R v Fraser-Adams [2001] NTSC 111

PARTIES:	THE QUEEN
	v
	SUSAN FRASER-ADAMS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	200004375
DELIVERED:	7 December 2001
HEARING DATES:	26 November 2001
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Crown:	M Grogan
Accused:	S Tilmouth QC and M Carter

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Thomas Berkley

Judgment category classification:	B
Judgment ID Number:	Mil01263
Number of pages:	10

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT Darwin
(20004375)

R v Fraser-Adams [2001] NTSC 111

BETWEEN:

THE QUEEN
Plaintiff

AND:

SUSAN FRASER-ADAMS
Defendant

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 7 December 2001)

[1] This is an application pursuant to ss 312 and 339 of the *Criminal Code (NT)* to quash the indictment or alternatively, pursuant to ss 309 and 341 of the Code, to order that there be a separate trial of count 1 on the indictment.

[2] The indictment charges the accused with 36 counts of obtaining property being part of the proceeds of a cheque by deception, by falsely representing in a report that certain sums of money were due and payable when to the accused's knowledge they were not, contrary to s 227(1) of the Code.

[3] At the hearing of the application, Mr Tilmouth QC for the accused, limited his submissions to an application for severance. There is in my opinion no basis for an order quashing the indictment.

[4] The first argument presented by Mr Tilmouth QC on behalf of the accused is that count 1 has been improperly joined with the other counts on the indictment. In order to understand this submission, it was submitted by Mr Tilmouth QC for the accused that it is necessary to consider the way the Crown intends to put its case to the jury and the way the defence proposes to put its case.

[5] The accused is a director of a company called Ochre Pty Ltd (Ochre) and for present purposes I assume that the Crown will be contending that she was Ochre's mind and will, such that whatever acts were done by Ochre were done by her personally or with her knowledge and approval. Ochre's business was that of a contract manager between building owners, whom Ochre represented as agent, and building contractors. Ochre engaged various building contractors from time to time on behalf of Ochre's clients for various building works to be done. The works were the subject of written quotations submitted by the building contractors to Ochre. When a particular job was satisfactorily completed, the building contractor concerned submitted an invoice to Ochre which provided a report to the client recommending payment of the invoice. The client would then pay Ochre which in turn would pay the builder's invoice. Ochre of course charged its clients for its work and I presume that when payment was made by the client, if the job was completed, the client's payment included an amount for Ochre's fees. Ochre operated a small office from the accused's home and employed one Russell Forbes to perform some (at least) of the contract managing work. It is not

clear to me if Mr Forbes was an employee for Ochre or a subcontractor to Ochre through a company of which he was a director called Ferrari Forbes Pty Ltd, but I will assume nothing turns on that. Mr Forbes' wife, Elaine Forbes, was also, for a time, employed by Ochre, apparently in some clerical capacity.

[6] As to count 1, it is alleged that in October 1996, Ochre engaged a firm called J A Contracting to perform concrete work for a Mr Don Brown. The original contract price for the work was $52,000. J A Contracting was a business owned and operated by a Mr John Alexopoulos. Some extras to the job for an amount of $1,000 were also carried out. The Crown case is that Alexopoulos was instructed by the accused to submit an account for $57,000 because the accused told him that she was acting as project manager and was entitled to a percentage of the job. Consequently, the account sent to Ochre was for $57,000. Ochre's subsequent report to Mr Brown, which the accused signed and sent to Brown on or about 4 November 1996, falsely represented that an additional $4,000 was payable to Mr Alexopoulos when it was not. It is contended that the $4,000 was kept by Ochre and that Alexopoulos received only $53,000.

[7] The accused denies any knowledge of the account being increased from $53,000 to $57,000, but it is not in issue as I understand it that Ochre kept part of the proceeds of Mr Brown's cheque for $57,000, viz $4,000. There is conflict in the evidence given at the committal as to who altered the invoice which was sent to Ochre, where the alteration was made and whether or not

the accused was present when this occurred. According to Mr Alexopoulos, the accused was present when the alteration was made by him at her request and this happened at the accused's office, although he later departed somewhat from this evidence. According to Mrs Alexopoulos, she physically altered the invoice at Mr Alexopoulos' office at his request and the accused was not then present. The accused's explanation for keeping the $4,000 was that this sum was owed to Ochre by Alexopoulos for repairs done in August and September 1996 to work performed by Alexopoulos for another client of Ochre's, a Mr Sarib. A number of documents have been provided to the Crown by the accused which she alleges supports her claim. Thus it is contended on her behalf that she had no knowledge of the overcharge to Mr Brown and that Ochre had an entitlement to the $4,000 which it kept. I should add two other matters. First it is contended that the original quote for $52,000 was never sent to Ochre and was at all times in Alexopoulos' possession. Second, it was put that the alteration to the invoice was obviously made to the sum of $52,000 before the total figure of $57,000 was written on the invoice as there is no sign that the total figure was altered. These matters were relied upon to show some of the difficulties inherent in Mr Alexopoulos' evidence.

[8] It was submitted that the Crown case against the accused in relation to the remaining counts rested upon a quite different factual background. It is alleged that invoices from tradespersons when received were altered by Mrs

Forbes, acting on the instructions of Mr Forbes and that the accused and Forbes agreed to share the profits of the scheme equally.

[9] Mr Tilmouth QC, submitted that the accused's position at trial will be that she knew nothing about the scheme until Forbes presented invoices to her on 21 April 1998 from Ferrari Forbes Pty Ltd totalling some $40,000 and a letter demanding payment within twenty-four hours. The accused went straight to the police alleging that Forbes was trying to intimidate or blackmail her. He submitted that, unlike count 1, there is no direct evidence that the accused was involved in the scheme. The case against her rests largely on the fact that she signed the reports containing the false invoices and the cheques for the lesser amounts and must have known what was going on.

Are the charges properly jointed?

[10] The general rule is that, unless expressly provided for otherwise by the Code, an indictment must charge only one offence against one person: s 303. The exception upon which the Crown relies as permitting the charging of more than one offence, is to be found in s 309(1) which provides:

> Charges for more than one offence may be joined in the same indictment against the same person … if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.

[11] In *R v Armstrong* (1990) 54 SASR 207, at 212, Cox J (with whom King CJ and Duggan J concurred) discussed the principles which have emerged as to the meaning to be given to this provision, although none of the authorities

referred to, or to which I have been referred by counsel, discuss the meaning of the words "a series of offences committed in the prosecution of a single purpose", except in-so-far as what is meant by a "series of offences" is concerned. The authorities suggest that there must be both a legal as well as a factual connection between the offences if they are to constitute a series. In the present case, each offence alleged is against the same provision of the Code and clearly these offences are legally of the same character. So far as the facts are concerned, the common ingredients are that each offence occurred at the same place within a twelve month period; each involved the obtaining of property being the proceeds of cheques; the victim in each case was a client of Ochre; each offence alleges the use of a false representation made in a report by Ochre signed by the accused; each involved a representation that a legitimate invoice had been received by a contractor in the amount claimed in the report; in each instance a cheque for a lesser amount than that received by Ochre was sent to the contractor and in each instance the accused signed the cheque.

[12] I consider that these facts are sufficient to establish that the indictment charges the accused with a series of offences of the same or a similar character. It was submitted by Mr Tilmouth QC that the offences could not be a series of the same or similar character having regard to the facts upon which the defence will be relying upon, but in my view it is the facts relied upon by the prosecution which must be considered in this context: see *De Jesus v The Queen* (1986) 61 ALJR 1 at 9 per Dawson J. It was also

submitted that unless the evidence on count 1 was admissible against the accused in reaction to the new counts, that count could not be joined under s 309(1). Whilst I accept that that is relevant to the question of my discretion as to whether or not to sever count 1 (see below) I do not accept that it is relevant to this question. In my opinion count 1 is properly joined with the other counts.

Should count 1 be severed?

[13] Section 341(1) of the Code provides:

> Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in his defence by reason of his being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any offence or offences charged in an indictment the court may order a separate trial of any count or counts in the indictment.

[14] It is to be noted that the court's discretion to order separate trials is not limited to circumstances where the accused may be prejudiced or embarrassed in his defence. The words in s 341(1), "or that for any other reason", clearly mean a reason other than such prejudice or embarrassment: see *Hofschuster* (1992) 65 A Crim R 167 at 175-177 where I ordered separate trials because of the complexities involved in having to decide more than one charge of murder and the risk of compromise verdicts.

[15] It was submitted by Mr Tilmouth QC that separate trials should be ordered because:

1. The evidence which the Crown relies upon in support of count 1 is not cross-admissible in relation to the others counts.

2. Different defences were being run in relation to count 1 as compared with the remaining counts; and therefore

3. the accused would be prejudiced or embarrassed in the prosecution of her defence which;

4. could not be adequately cured by a suitable direction to the jury; and

5. count 1, if tried separately, would not involve the Crown in having to call more than a few witnesses (whose evidence is not relevant to the other counts) and the trial on count 1 would last no more than two to three days.

[16] As to the first submission, as I understand the way the Crown intends to put its case, the Crown submission is that the evidence against the accused on count l goes further than mere propensity evidence and goes to prove a fact in issue in relation to each of the counts, viz., that the accused knew that the reports she sent out to Ochre's clients were false. In relation to count 1, the Crown relies on the evidence of Mr Alexopoulos that he was directed by the accused to increase his account from $53,000 to $57,000. The evidence against the accused in relation to the other counts is circumstantial. The inference of guilt which the jury will be invited to draw will rest on the fact that the accused signed the reports and the cheques to Ochre's clients and had copies of the original genuine invoices available to her in her files and that in

each case Ochre was the beneficiary of the excess payment. The force of the Crown case lies in the improbability of the accused having signed all the reports and the cheques over a period of twelve months innocently: see *R v Armstrong* supra at 214.215. In that case, the full Court concluded that evidence led for that purpose was admissible pursuant to the rules relating to similar fact evidence: cf. *R v Mayfield* (1995) 63 SASR 576 at 580.

[17] It is important to remember that the question of admissibility must be determined on the basis of the evidence which the Crown intends to lead. As Cox J said in *Armstrong*, supra, at 214, it is not to the point that the accused might have an answer to the Crown's allegations: see also *Pfennig v The Queen* (1994-95) 182 CLR 461 at 483, where Mason CJ, Deane J and Dawson J said (in the context of the trial judge asking himself whether there is a rational view of the evidence consistent with the accused's innocence) that "the trial judge must ask himself the question in *the context of the prosecution case*" (emphasis mine). Clearly proof that the accused specifically requested the account to be altered by Alexopoulos (assuming a finding of guilty in relation to count 1) would be highly relevant to the question of whether she had an innocent explanation for the remaining counts, given that in each of the other cases the accounts were altered (albeit by different means) and the same system was thereafter employed to deceive Ochre's customers, so as to obtain a benefit for Ochre in respect of which the accused was the person most likely to gain.

[18] Even without Alexopoulos' evidence, there is as much, if not more, similarity and unity between the facts alleged in relation to count 1 and the other counts as there existed in the facts alleged in *Pfennig* and I do not consider that on the facts alleged by the Crown there is a reasonable hypothesis consistent with the accused's innocence. I therefore reject the first of Mr Tilmouth QC's submission.

[19] As to the fact that different defences are being run, I accept that this is a relevant consideration: see *Sutton v The Queen* (1984) 152 CLR 528; *De Jesus v The Queen*, supra. In sexual cases, the fact that the defences are different is usually fatal in cases where the evidence in proof of one count is inadmissible in proof of another. However, this is not a sexual case; nor is the evidence so inadmissible. There is no particular difficulty in raising the specific defence relating to count 1. That defence is not inconsistent with the type of defence relied upon relating to the other counts and does not raise prejudice in the same way as the defences in *De Jesus v The Queen* raised. If the jury were minded to acquit on count 1, there is no difficulty in giving to the jury an appropriate instruction as to the use which may be put to the evidence of Mr & Mrs Alexopoulos so far as the other counts are concerned. It follows that I reject the remainder of Mr Tilmouth QC's submissions.

[20] The applications by the accused are therefore refused.

———————————————————