Knight & Anor v R [1999] NTSC 139

PARTIES:	JAMES SCOTT PARNELL KNIGHT and SCOTT ANTHONY EATON v THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9712774, 9712979
DELIVERED:	10 December 1999
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JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Applicant:	P Cantrill
Respondent:	R. Noble

Solicitors:

Applicant:	Withnall Maley & Co.
Respondent:	Office of the Director of Public Prosecution

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Knight & Anor v R [1999] NTSC 139
No. 9712774, 9712979

BETWEEN:

JAMES SCOTT PARNELL KNIGHT
and SCOTT ANTHONY EATON
Applicants

AND:

THE QUEEN
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 10 December 1999)

[1] Gary William Watt, James Scott Parnell Knight and Scott Anthony Eaton have been charged on the one indictment with various offences all of which are alleged to have occurred on 31 May 1997 at Howard Springs and Palmerston.

[2] Watt is charged that on that date at Howard Springs he: had sexual intercourse, namely digital penetration of the vagina, with H without her consent (count 1); had sexual intercourse, namely fellatio, with H without her consent (count 2); did counsel or procure Eaton to have sexual intercourse, namely fellatio, with H without her consent (count 3); and finally that he did unlawfully enter a building at Moulden with intent to

commit an offence namely depriving H of her liberty, the building being a dwelling house which was occupied at the time of entry and the entry occurring at night (count 4).

[3] Eaton is charged that on the same date and at the same place at Howard Springs he: had sexual intercourse, namely fellatio, with H without her consent (count 5); and had sexual intercourse, namely penile penetration of the vagina with her without her consent (count 6).

[4] Knight stands charged that on the same date and at the same place at Howard Springs he: had sexual intercourse namely penile penetration of the vagina with H without her consent (count 7); and further that he entered the premises at Moulden with intent to commit an offence namely deprive H of her liberty, the building being a dwelling house which was occupied at the time of entry and the entry occurring at night (count 8).

[5] Both Eaton and Knight make application for separate trials. Watt did not wish to be heard in relation to these applications and took no part in the hearing of them.

[6] The Crown case is that on the night of 30 May 1997 H had, for a time, been at the clubhouse of the Hell's Angels Club at Howard Springs. She had then, at her request, been taken home by her girlfriend to her accommodation in Moulden, a suburb of Palmerston, and gone to bed. It is alleged that later that night Watt and Knight, along with the girlfriend, went to the premises in Moulden and there Watt and Knight committed an

unlawful entry of the home of H with intent to deprive H of her liberty. Although she was conveyed by Watt and Knight from her home to the premises in Howard Springs it is not the Crown case that either of the accused did so with intent to have unlawful sexual intercourse with her. However there was evidence that she did not wish to accompany Watt and Knight and that she told them so. It is alleged that Watt, in the presence of Knight, informed her that she had the choice of going back with them "or we'll kidnap you".

[7] H was conveyed to the premises at Howard Springs where she remained for some hours. During the time that she was there the Crown case is that each of the accused committed the acts of unlawful sexual intercourse upon her. The alleged acts were said to have occurred in succession and within a short time of each other. They all occurred in a bedroom at the Howard Springs premises. Otherwise they were separate and distinct offences. The only charges in which two of the accused are in any way connected arise from the alleged unlawful entry and from the allegation in count 3 that Watt procured Eaton to have sexual intercourse with H and that he did so.

[8] It was the observation of counsel appearing on behalf of each of the applicants that neither of the applicants is charged jointly with any other person in respect of any of the offences. They are each charged as principals in the commission of the individual offences alleged against them. Except for the unlawful entry charges against Watt and Knight and the

procurement charge concerning Watt and Eaton no joint enterprise is alleged. The Crown did not contend otherwise.

[9] In s 303 the *Criminal Code* provides that an indictment must charge one offence against one person. It then goes on to provide for circumstances in which more than one person may be charged in the same indictment. Such joinder is permitted under s 308(2) of the *Criminal Code* and it is pursuant to that provision that the present indictment has been preferred. The section provides that:

> "Any number of persons charged with committing different or separate offences arising substantially out of the same facts or out of closely related facts so that a substantial part of the facts is relevant to all the charges may be charged in the same indictment and tried together."

[10] The court has the power under s 350 of the *Criminal Code* to order separate trials where two or more persons are charged in the same indictment whether they are charged with the same or different offences. The court may on the application of any of the accused persons direct that the trial of the accused persons or any of them shall be had separately from the trial of the other or others of them.

[11] Section 309 of the *Criminal Code* provides the circumstances in which more than one charge may be joined in the one indictment against the one person. That is where the charges are founded on the same facts or form part of a series of offences of similar character or are committed in the prosecution of a single purpose.

[12] Section 341 of the *Criminal Code* permits a court, if it 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."

The Application of Scott Anthony Eaton

[13] It is the application of Eaton that there be a separate trial (jointly with Watt) of the counts presented against him pursuant to s 192 of the *Criminal Code*.

[14] I understand that the defences of Eaton and his fellow accused will, at least in part, centre upon the issue of lack of consent. Mr Cantrill, who appeared for the applicants, submitted that the evidence available to the jury on the issue of consent and any belief that Eaton may have had in that regard is limited.

[15] Eaton is not charged with the unlawful entry at Moulden and there would appear to be no claim made by the Crown that he had any knowledge that Watt and Knight attended at that location or that they were responsible for H returning to the Howard Springs premises.

[16] In identifying the involvement of Eaton in the events Mr Noble for the Crown took me to passages from the transcript of H's evidence on an earlier occasion. In that evidence Eaton was said to have been present at the clubhouse when H took a white tablet which she understood to be the drug

ecstasy. She had been sitting with her girlfriend and Knight when Knight offered her the tablet. She declined the invitation. She then said another person "came down from the other end of the bar" and so did Eaton. It is not suggested that either Eaton or the other person said anything but only that they came from the other end of the bar and stood alongside or near to her. She said she was scared and "so I took it". The tablet had no effect upon her.

[17] The evidence then was that, at a later time, Watt took her on a tour of the premises which ended in her being in a bedroom where she alleges Watt undressed her and digitally penetrated her vagina. After a time he left the room. H remained there in a state which, for present purposes, I will describe as semi-conscious. When she regained her senses she found Knight was upon her and had his penis in her vagina. He then left. Watt returned and at his request she performed fellatio upon him. When that was complete Eaton entered the room and her evidence was then as follows:

> "[Watt] said to him that 'she'd' – that 'she likes it' and [Eaton] just went 'oh yeah' and unzipped his fly and told me to suck – [Watt] told me to suck [Eaton] off as well."

[18] She did as she was requested apparently without voicing any objection.

[19] Watt then left the room and then Eaton had sexual intercourse with her. She described this in the following terms:

> "He got my jeans down to my knees and my pants and he inserted his penis into my vagina. I'm not sure what happened after that. … he seemed really, really drunk and he stank."

[20] There was no suggestion of H expressing either verbally or physically any objection or lack of consent in the presence of Eaton on that or any other occasion.

[21] At present the evidence establishes that Eaton saw H on three occasions on that night. The first was when he asked the question of a group of people, that included H, "anyone for sex?". That was early in the evening. The second was when he stood near to her when she took what she says was an ecstasy tablet. The third was when he entered the bedroom and the sexual conduct described above took place between them. It was submitted that there was nothing in any of these events which indicated that Eaton should have been aware that H may not be consenting to the sexual conduct which occurred.

[22] The concern was then expressed that evidence that informed the jury that Eaton was a member of the Hell's Angels Club and that "two of the people who were at the Hell's Angels clubhouse this night went and dragged this girl back, they frightened her, therefore she remained frightened", would be highly prejudicial to the interests of Eaton. That evidence would not be admissible against Eaton on the issue of whether or not there was a lack of consent because there was no suggestion that he was even aware of what had occurred.

[23] It was submitted that there was no direction which could be provided by a trial judge which would overcome the potential for real and impermissible prejudice.

[24] In addition it was submitted that the jury in this case is not to consider one incident but rather "eight separate counts, individually, without any common purpose being alleged". It followed, it was said, that the cases were discrete and should be heard separately.

[25] Whilst it is true that the accused are not jointly charged, that there is no common purpose alleged relevant to these applications and that each count is to be considered individually, it remains the fact that the allegations of sexual misconduct arise out of the same set of circumstances. The allegations are such that those circumstances are narrowly confined as to time and location. Each of the accused is alleged to have had sexual relations with H in circumstances which were so linked and intertwined that they may properly be regarded as being, for present purposes, part of the same overall incident. Whilst it may be said that the charges reflect a series of incidents those incidents arise substantially out of the same facts, or closely related facts, so that a substantial part of the facts is relevant to all charges.

[26] In *R v Glover* (1987) 46 SASR 310 King CJ (with whom Jacobs and Millhouse JJ agreed) said at 312:

> "I take the view that where two accused persons are charged with offences arising out of an incident in which they have both participated, it is, generally speaking, highly desirable in the interests of justice that they should be tried together. It is, generally speaking, very unsatisfactory for jurors to have to attempt to arrive at the truth of the matter when only one of the persons alleged to have participated in the criminal conduct is before them. In order to arrive at the truth of the matter it is generally highly desirable that the jury should have before it the respective accounts and explanations which are given by all the alleged criminal participants in the incident. There are cases, of course, in which that important consideration has to give way to other considerations. There may be circumstances surrounding the case for the prosecution which would be so prejudicial to a particular accused that a separate trial is imperative but, generally speaking, participants in the same incident alleged to have been of a criminal nature, or to have resulted in or have included the commission of criminal offences, ought to be tried together."

[27] As was observed in *R v Demirok* (1976) VR 244 the convenience of witnesses (including a witness such as H) must be considered. The Court observed (at 254):

> "The lot of a witness in a criminal trial is not a happy one, and unless for good reason witnesses should not be required to give evidence of the same events at a succession of trials."

[28] I have given careful consideration to the potential for impermissible prejudice to Eaton arising out of the evidence directed to the conduct of Watt and Knight at the premises in Moulden and have concluded that an appropriate direction can be provided to the jury to effectively deal with that potential. Such a direction will include an explanation to the jury that the case against each accused must be considered separately and an identification of the evidence available in the case against Eaton.

The Application of James Scott Parnell Knight

[29] It is the application of Knight that:

(1) there be a separate trial (jointly with Watt) on that count in the indictment in which he is charged with entering a building with intent to commit an offence contrary to s 213 of the *Criminal Code* (count 8); and

(2) that there be a separate trial on that count in the indictment in which he is charged with unlawful sexual intercourse contrary to s192 of the *Criminal Code* (count 7).

[30] Knight sought to have the counts pursuant to s 213 of the *Criminal Code* heard separately from the counts against him under s 192 of the *Criminal Code*. It was his submission that the aggravated unlawful entry of the dwelling house at Moulden was an offence quite separate from, and quite different from, those offences arising out of the allegations of sexual intercourse at the premises at Howard Springs.

[31] As I have previously indicated an important aspect of these matters is centred upon the issue of consent. It seems to me that in so far as the proceedings against Knight are concerned the events at Moulden are relevant to this issue. The Crown case, as I understand it, is that H was coerced into returning to the clubhouse and remaining there. Knight was aware that this was the case. He was also aware that she was coerced into taking what she thought was ecstasy. The Crown says those matters taken with the

circumstances in which it is alleged that he found H in the bedroom and had sexual intercourse with her, and further continued to have sexual intercourse with her subsequent to her request that he desist, are relevant to the question whether Knight could be in any reasonable doubt as to her lack of consent. In my view the evidence relating to the alleged offences occurring at Moulden is admissible in relation to the charge under s 192 of the *Criminal Code*. The facts relating to the unlawful entry are also relied upon for the remaining count alleged against Knight. I do not see that these charges should be dealt with separately.

[32] It seems to me that the interests of justice are best served by all of these matters being tried together. Appropriate directions to the jury should address any potential for prejudice. Such directions should provide a sufficient guard against the risk of impermissible prejudice.

[33] In all of the circumstances I am not persuaded that the applications should be granted and they are refused.

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