The Queen v Whittington [2006] NTCCA 04

PARTIES:	THE QUEEN
	v
	WHITTINGTON, Robert Gregory
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	RESERVATION OF A POINT OF LAW PURSUANT TO S 408 OF THE CRIMINAL CODE
FILE NO:	20304540
DELIVERED:	1 March 2006
HEARING DATES:	8 November 2005
JUDGMENT OF:	MILDREN, RILEY & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW – practice and procedure – charges of manslaughter and dangerous act – four shots fired in quick succession – one bullet caused death – Crown unable to identify which shot caused the death – whether one act or four separate acts – whether charge bad for latent duplicity – defendant intends to raise authorisation – whether Crown obliged to provide particulars of why act not authorised

Criminal Code, Part 1, s 2, s 23, s 24, s 26, s 26(1)(b), s 27, s 28, s 29, s 31, s 31(2), s 33, s 154, s 163, s 305, s 305(1), s 305(3), s 311, s 313, s 408

Archbold, *Criminal Pleading, Evidence and Practice*, 44th edition, Sweet & Maxwell, London, 1995

Director of Public Prosecutions v Merriman [1973] AC 584; *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508; *R v Chapman* (2001) 214 LSJS 319; applied

Hoessinger v R (1992) 62 A Crim R 146; *Johnson v Miller* (1937) 59 CLR 467; *Walsh v Tattersall* (1996) 188 CLR 77; distinguished

Greenfield (1973) 57 Cr App R 849; *Johnson v Miller* (1937) 59 CLR 467; *Pearce v The Queen* (1998) 194 CLR 610; *R v Buckett* (1995) 79 A Crim R 302; *R v Haslet & Anor* (1987) 50 NTR 17; *R v Morton* (2001) 11 NTLR 97; *R v S* [2000] 1 Qd R 445; *Saffron (No 1)* (1988) 36 A Crim R 262; *Stanton v Abernathy* (1990) 48 A Crim R 16; *The King v Weaver* (1931) 45 CLR 321; *The Queen v Juraszko* (1967) Qd.R 128; referred to

REPRESENTATION:

Counsel:

Crown:	J. Tippett QC/D. Lewis
Accused:	M. Abbott QC/I. Rowbottom

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Withnalls

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Whittington [2006] NTCCA 04
No. 20304540

IN THE MATTER of Criminal Code s 405
and

IN THE MATTER of a reservation of point of law stated by the Supreme Court of the Northern Territory in an application by the accused to quash or stay the indictment for the opinion of the Court of Criminal Appeal

BETWEEN:

THE QUEEN
Crown

AND:

ROBERT GREGORY WHITTINGTON
Accused

CORAM: MILDREN, RILEY & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 1 March 2006)

Mildren J:

[1] This is a reservation of a point of law formulated for the opinion of the Court of Criminal Appeal in pursuance of s 408 of the Criminal Code.

[2] The accused stands charged with one count of manslaughter and with an alternative count of dangerous act causing death.

[3] The charges arise from an incident which occurred on 23 October 2002 at Wadeye in the Northern Territory. It is alleged by the Crown that at approximately 2:00 pm that day the accused discharged his police issued Glock pistol by firing four shots in quick succession over a distance of approximately 40 to 50 metres in a public place in which members of the public including men, women and children were present in the direction of Tobias Worumbu and Robert Jongmin, both of whom were in close proximity to one another and in the direction of domestic housing in circumstances which caused actual danger to Robert Jongmin who was shot dead. The accused is a serving member of the Northern Territory Police Force and was the relieving officer in charge of the Wadeye (Port Keats) Police Station.

[4] The prosecution cannot say which of the four shots struck Robert Jongmin or struck Tobias Worumbu, who was also wounded by a bullet.

[5] The Crown proposes to amend the indictment to plead two counts, one of manslaughter contrary to the provisions of s 163 of the Criminal Code and a second count of doing a dangerous act contrary to s 154 with two circumstances of aggravation namely that the accused caused grievous harm to Tobias Worumbu and also that the accused caused the death of Robert Jongmin.

[6] The questions for the opinion of the Court are: (1) does the inability of the Crown to identify which bullet caused the death of Robert Jongmin: (a) offend s 305 of the Criminal Code and/or the common law relating to the particulars, and (b) absent the particulars sought does the indictment disclose an offence known to the law; and (2) is the Crown obliged by law to provide particulars the basis of which it alleges that the act of the accused was unlawful taking into account the accused's claim that the act was authorised, justified or excused.

Question 1

[7] Mr Tippett QC for the Crown submitted that their position was that all four of the shots were fired in circumstances where the discharge of the weapon was unlawful. In his submission there was but one act namely the discharge of the firearm by pulling the trigger four times in quick succession. Accordingly, it was submitted that it does not matter that the Crown is unable to prove which of the four bullets struck the deceased or which of the four bullets caused grievous harm to Tobias Worumbu.

[8] It was the submission of Mr Abbott QC, counsel for the accused, that the indictment was bad for duplicity because if the Crown is entitled to lead evidence of four discharges of the pistol and invite the jury to select which therefore resulted in the death of the deceased, each of the counts in the indictment contains four separate offences because each of the four acts may have resulted in the event, i.e. the death of Mr Jongmin; but which cannot be

ascertained or identified. Therefore, so it was submitted, the indictment offended s 305 of the Code in that it contained a latent ambiguity. Alternatively it was submitted that the indictment charged no offence known to the law because only one act caused the relevant event, but each count of the indictment contained four separate charges predicated on four separate acts producing but one event.

[9] In my opinion the indictment is not bad for duplicity. There is certainly nothing in the indictment on its face to indicate that more than one offence is charged. Furthermore there is nothing in the particulars to indicate that more than one offence is charged. In a case such as this where the prosecution is unable to identify which bullet caused the death of the deceased, two circumstances may emerge. The weapon may be fired so rapidly as to effectively constitute one act: see *Director of Public Prosecutions v Merriman* [1973] AC 584 at p 593 per Lord Morris of Borth-y-Gest; at p 607 per Lord Diplock (with whom Lord Reid agreed); *R v Chapman* (2001) 214 LSJS 319 at 324 per Debelle J; and at 326 per Bleby J with whom Wicks J agreed. Alternatively there may be four separate acts only one of which constitutes the offence with which the accused is charged.

[10] However, in my opinion there are not four offences charged in the one count. This is so irrespective of whether or not the Crown alleges that all four acts were "unlawful" in the sense in which that word is used in the Criminal Code, i.e. not authorised, justified or excused. An act may be "unlawful" in that sense without it constituting an offence. The only act with

which the indictment is concerned is the firing of the bullet which caused the death of the deceased. Because the Crown is unable to show which of the four bullets caused the death, it of course is necessary for the Crown to prove that all four shots were "unlawful". The jury will have to be told that if there is a reasonable doubt as to whether any one of those shots was unlawful, the accused will be entitled to be acquitted.

[11] The situation in this case is therefore quite different from that discussed in cases such as *Johnson v Miller* (1937) 59 CLR 467 and *Hoessinger v R* (1992) 62 A Crim R 146. The point of difference is that in each of those cases the circumstances alleged the commission of more than one offence. In *Johnson v Miller*, supra, there was a single complaint alleging that Johnson was the licensee of the specified premises out of which a person unknown was seen coming out of the premises during prohibited hours. The defendant sought particulars as to which of the 30 men who had been seen emerging from the hotel was the subject of the complaint. This the complainant refused to do. A special magistrate held that the complaint was defective and made an order of dismissal. On appeal, it was held that the failure to give the further particulars did not render the complaint defective. The High Court allowed the appeal and restored the order of the magistrate. That is a clear case where the prosecution proposed to lead evidence of 30 distinct offences each of which satisfied the description contained in the complaint. The same applied in the case of *Hoessinger*. In that case Hoessinger was charged with a single offence against s 154 of the Criminal Code. The

Crown case was that Hoessinger and one Rankin were standing near the edge of a rooftop. An argument ensued. The Crown case was that Hoessinger assaulted Rankin causing him to fall to the ground. The act of assault was said to be either a blow, or swinging his fist without actually connecting or behaving in a manner so as to threaten Rankin. The trial was conducted on the basis that the jury could convict if they were satisfied that he had assaulted Rankin in any one of those three ways. Each one of those alternatives amounted to a separate offence. Moreover, in that particular case, the indictment alleged an assault as an ingredient of the charge without specifying the conduct said to constitute the dangerous act or omission found in the charge. This was calculated to introduce an irrelevancy resulting in confusion, embarrassment and prejudice.

[12] Reliance is also placed by Mr Abbott QC on the decision of the High Court in *Walsh v Tattersall* (1996) 188 CLR 77, but I am unable to see how that case is of assistance. Mr Abbott QC relied upon it for the proposition that more than one offence was joined in the one count in the indictment and therefore the indictment was duplicitous.

[13] However that may be, in my opinion there is only one count charged in the indictment and the facts upon which the Crown seek to rely do not amount to more than one charge. It is the bullet which struck the deceased and not any other bullet with which the charge is concerned. The fact that the Crown is unable to identify which bullet struck the deceased does not mean that there is any latent ambiguity in the indictment.

[14] The situation is very much the same as discussed by Lord Morris of Borth-y-Gest in *Director of Public Prosecutions v Merriman*, supra, at 593 where his Lordship said:

> "If A attacks B and, in doing so, stabs B five times with a knife, has A committed one offence or five? If A in the dwelling house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery CJ in a case where it was being considered whether an information was bad for duplicity: see *Jemmison v Priddle* [1972] 1 QB 489, 495. I agree respectfully with Lord Widgery CJ that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must, of course, depend upon the circumstances. In the present case it was not at any time suggested, and in my view could not reasonably have been suggested, that count 1 was open to objection because evidence was to be tendered that the respondent stabbed Mr Parry more than once."

[15] It is my experience that there are many similar cases that have arisen in this Court over the years. Stabbing cases provide a good example. The Crown often leads evidence of a victim having been stabbed many times by a knife. Often only one of the stab wounds amounts to the fatal wound. The Crown has no knowledge of the order in which the stab wounds occurred. Nevertheless, it is ridiculous to suggest that the Crown, because it is unable to identify which of a number of stab wounds was the fatal wound by reference to whether it was the first, second or third, etc, cannot bring a charge of murder or manslaughter.

[16] The proposed amended indictment in relation to the proposed charge of dangerous act, however, raises another difficulty. The present indictment charges the accused with a dangerous act in the alternative to the charge of manslaughter. The proposal is to amend the second count to plead a single charge of dangerous act with two circumstances of aggravation. The difficulty is that this count is no longer in the alternative to the charge of manslaughter. Does this count therefore give rise to duplicity? If it is the one act, i.e. the firing of the weapon four times in close succession which caused the death of the deceased, it would appear to me that the indictment as proposed to be amended would become defective because the same act is being relied upon to prove two offences which are no longer expressed to be in the alternative. In *Pearce v The Queen* (1998) 194 CLR 610 at 616-618 McHugh, Hayne and Callinan JJ considered the circumstances under which an accused is placed in double jeopardy when charged with two offences out of the same set of facts. The conclusion that was reached was that a person could not be charged again with an offence in respect of which the elements charged are identical to or wholly included in another offence: see at 618 [para 24]. In my opinion, the proposed indictment would breach that rule because the elements of dangerous act are wholly contained in the manslaughter count, the principal difference between the two counts being that in the case of manslaughter the Crown must prove actual foresight on the part of the accused, whereas that is not required in the case of dangerous act. However, the questions which this Court has been asked to answer do

not strictly speaking raise any question about the proposed amended indictment. I therefore confine my answers to the questions to the indictment as it presently stands.

[17] I would therefore answer question 1(a) no and question 1(b) yes.

Question 2

[18] Section 305(1) of the Criminal Code provides that "an indictment shall contain a statement of the offence charged together with such particulars as may be necessary to give reasonable information as to the nature of the charge".

[19] Section 305(3) provides that "the statement of the offence shall describe the offence shortly in ordinary language in which the use of technical terms is unnecessary and it need not state all the elements of the offence, but it shall contain a reference to the section and the enactment defining the offence".

[20] Section 311 of the Code provides:

> "311. Formal defect
>
> Without in any way limiting the power of the court to order an indictment to be amended, an indictment shall not be quashed by reason of formal defect if it is shown that such formal defect would not cause surprise or uncertainty to the accused person as to the true nature of the charge or charges brought against him."

[21] Section 313 provides:

> "313. Particulars
>
> The court may in any case direct particulars to be delivered to the accused person of any matter alleged in the indictment and unless they are delivered he is entitled to be discharged."

[22] It is to be noted that s 313 refers to "any matter alleged in the indictment". In my opinion, the word "matter" refers to facts which the Crown asserts gives rise to the commission of the offence, but does not include particulars as to any question of law which may arise out of the facts so asserted. None of the numerous authorities dealing with particulars to which we were referred suggested otherwise. In *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 520, Mason CJ, Deane and Dawson JJ identified the matter in which the information in that case failed to provide adequate particulars in this way:

> "… the information in the present case failed to identify *an essential factual ingredient* (italics mine) of the actual offence, namely, the "material particular" in which the statement, which the appellant was alleged to have caused to be published, was false or misleading."

[23] At p 521 their Honours went on to say:

> "In other words, the information failed to specify the "manner of the [appellant's] acts or omissions" (*cf.* per Dixon J, *Johnson v Miller*) or to provide "fair information and reasonable particularity as to the nature of the offence charged" (per McTiernan J)."

[24] In the same case, Brennan J at 529 identified the problem as "the absence of circumstances which made the advertisement false or misleading to the knowledge of the appellant".

[25] It is true that s 23 of the Code provides that "a person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorised, justified or excused". However, unlike s 2 which applies only to Part 1 of the Code there is no provision to the effect that an offence is committed when a person who possesses any mental element… does, makes or causes the act, omission or event, or the series or combination of the same, constituting the offence in circumstances where the act, omission or event, or each of them, if there is more than one, is not authorised or justified". Whatever else may be said about manslaughter and dangerous act, strictly speaking those provisions of the Code which relate to authorisation, justification or excuse are not elements of the offence of dangerous act. It is different with the offence of manslaughter because that offence requires as one of its elements that the accused "unlawfully" killed the deceased under such circumstances as not to constitute murder and requires proof that the accused foresaw the possibility that his act or conduct might cause death: see s 31(2) of the Code.

[26] Nevertheless as s 305(3) of the Code specifically recognises it is not necessary to state all of the elements of the offence in the indictment.

[27] What else the Crown must prove depends upon what is raised. For example, if self-defence is raised, either by evidence called by the Crown or by evidence called by the defendant, the Crown must prove that the accused was not acting in self-defence. But that does not, strictly speaking, make the absence of self-defence an element of the offence.

[28] In *R v Morton* (2001) 11 NTLR 97 at 98-99, I said:

> "Manslaughter may be divided into two broad categories often referred to as voluntary and involuntary manslaughter. The significant difference between these two categories is that in the former case there is nearly always an intention to kill or cause grievous harm, whereas in the latter there is not. Murder, which is reduced to manslaughter because of provocation, is an example of voluntary manslaughter. In provocation manslaughter cases, the intent to kill or cause grievous harm is an aggravating factor which often, although not inevitably, places it in a more serious category than cases of involuntary manslaughter. In the Northern Territory, because of the effect of s 31 of the Criminal Code 1983 (NT), in cases of involuntary manslaughter there must always be proved actual foresight that the accused's acts could result in the deceased's death. In this respect, Territory law relating to manslaughter differs from the common law which also includes manslaughter by criminal negligence where no foresight is required. Such a case is dealt with by the Code as an aggravated dangerous act contrary to s 154(1) and (3) of the Code, to which s 31 does not apply. … the essential difference in the Northern Territory between voluntary and involuntary manslaughter is the nature of the mental element required."

[29] In the case of manslaughter it is open to the Crown to allege manslaughter on more than one basis. For example, manslaughter may be left to the jury either on the basis that there was no intent to kill or cause grievous harm or on the basis that there was intent to kill or cause grievous harm but the Crown is unable to rebut the so-called defence of provocation. It is open to the jury to find a verdict of guilty of manslaughter even though some members of the jury are satisfied that the Crown has proven voluntary manslaughter whilst other members of the jury are satisfied that the Crown has established that the manslaughter was involuntary. The only thing that is essential is that all members of the jury must conclude that the Crown has established the offence of manslaughter however it has been made out.

[30] Section 305(1) of the Code requires the giving of such particulars as may be necessary to give reasonable information as to the nature of the charge. The Crown must therefore assert what facts it relies upon to make out a case of manslaughter. It is not required to set out the arguments that it may be advancing to the jury as to what inferences are to drawn from those facts. Nor is it required to give particulars of matters which may be raised by the accused in order to show that the particular act was authorised, justified or excused. Although s 23 provides that a person is not guilty of an offence if an act if authorised (and see also s 24 in relation to an event resulting from an authorised act), the Crown is not required to prove that an act was not authorised unless the question of authority is raised by the defence in some way. It is not raised merely by his counsel asserting that it is raised in a letter to the prosecutor.

[31] A number of submissions were directed to a question which does not arise on this reference. It was submitted by Mr Abbott QC that even if the prosecution could prove that the application of force was unnecessary force for the purposes of s 28 of the Code, the prosecution nevertheless had to prove that the act of the accused was not otherwise authorised, justified or excused under the Code and must therefore provide particulars relating to those other sections. The submission was in effect that the Crown had to provide particulars of matters not only going to authorisation under s 26 of the Code, but justification under s 27 and s 28 of the Code, of defensive conduct under s 29 of the Code, actual foresight under s 31 of the Code and

why sudden and extraordinary emergency under s 33 of the Code did not apply.

[32] In my opinion the Crown is not required to provide particulars of this kind. Whether any of those sections will be engaged (except for s 31 which is always a matter which the Crown must prove) will depend on the evidence given at the trial. It is not a matter for particulars. Similarly although s 31 is a matter which the Crown will have to prove at trial, it is not usually capable of being the subject of particulars as the facts upon which actual intent or knowledge or foresight by an accused person of the consequences of his acts, is usually a matter of inference to be drawn from other facts in the case.

[33] As it happens in this case, the Crown has particularised the circumstances under which it claims that the shooting of the deceased was unlawful. The circumstances relied upon are as follows:

> "The prosecution further alleges that in the circumstances the force used by Robert Whittington was unnecessary in that an ordinary person similarly circumstanced to the accused using such force would have regarded its use as unnecessary for and disproportionate to the occasion, involving as it did two persons moving in close proximity to one another and where the weapon was discharged at a distance, with a chance of effectively hitting a select target, without causing serious actual danger an injury to any innocent parties, was unlikely."

[34] The prosecution also says that an ordinary police officer similarly circumstanced using a Glock pistol would not have acted in the same or

similar way to Robert Whittington. It is apparent that the particulars refer to s 27 and s 28 of the Criminal Code.

[35] Mr Abbott QC submits, notwithstanding this, that the Crown is obliged to provide particulars of why the actions of the police officer were not authorised. The short answer is that if the acts were not justified by either s 27 or s 28 of the Criminal Code, then the act is not done "in the execution of the law or in obedience to, or in conformity with the law" and therefore is not authorised: see s 26(1)(b). Be that as it may, this is a question of law not a matter for particulars.

[36] It is not in every case that the Court will order particulars. Whether or not particulars are required depends on the circumstances. For example, in *The Queen v Juraszko* (1967) Qd.R 128, the Queensland Court of Appeal held that in circumstances where there had been a committal hearing in relation to a charge of dangerous driving, where the conduct complained of was essentially a course and manner of travel over a short distance, it was not appropriate to order particulars. On the other hand, there are other cases where it is essential that particulars should be given notwithstanding that there has been a full committal. The most obvious example is a conspiracy charge. In *The King v Weaver* (1931) 45 CLR 321 at 351 Evatt J said that in conspiracy cases proper particulars of the overt acts relied on should be given and that a mere reference to depositions taken upon the preliminary magisterial enquiry will seldom be sufficient: see also in the joint judgment of Gavan Duffy CJ, Starke J and McTiernan J at p 333. Another common

example is where the charge is one of perjury: see for example *Stanton v Abernathy* (1990) 48 A Crim R 16; *R v Haslett & Anor* (1987) 50 NTR 17. In *Saffron (No 1)* (1988) 36 A Crim R 262, Hunt AJA said at pp 311-312:

> "Where the relevant particulars are not stated in the indictment (because the necessity to do so has been dispensed with by statute), an accused is entitled to have identified the specific transaction upon which the Crown relies and to be apprised not only of the legal nature of the offence with which he is charged but also the particular act, matter or thing alleged as the foundation of the charge: *Johnson v Miller* at 489, 495, 501-502. Only in that way can the trial judge rule upon the relevance of the evidence led by the Crown: *Johnson v Miller* at 497-498. So far as a conspiracy charge is concerned, the accused is entitled to particulars of the persons with whom it is alleged that he conspired and as to the specific scope of the conspiracy alleged, in addition to particulars of the overt acts upon which the Crown relies: *Mok* (1987) 27 A Crim R 438 at 441-442."

[37] There is therefore no correct answer to the question in the absolute terms it has been formulated in this case. It all depends on the circumstances as to whether or not further particulars will be ordered. Nevertheless, having regard to the particulars already supplied by the Crown in this case, I would answer question 2, "No, not in the circumstances of this case".

Riley J:

[38] I agree with Mildren J.

Southwood J:

Introduction

[1] Three questions of law have been formulated by the learned trial judge under s 408 of the Criminal Code for the opinion of the Court of Criminal

Appeal. First, does the inability of the Crown to identify which bullet caused the death of Robert Jongmin offend s 305 of the Criminal Code and/or the common law relating to particulars? Second, absent the particulars sought, does the indictment disclose an offence known to the law? Third, is the Crown obliged by law to provide particulars of the basis on which it alleges that the act of the accused was unlawful taking into account the accused's claim that the act was authorised, justified or excused?

Background

[39] The accused stands charged on indictment in the following form:

> "Count 1
>
> On 23 October 2002 at Wadeye in the Northern Territory of Australia, (the accused) unlawfully killed Robert Jongmin in such circumstances as to constitute manslaughter.
>
> Section 163 of the Criminal Code
>
> Count 2
>
> In the alternative to count 1
>
> On 23 October 2002 at Wadeye in the Northern Territory of Australia, (the accused) did an act, namely discharged a firearm that caused serious actual danger to the life of Robert Jongmin, in circumstances where an ordinary person similarly circumstanced would clearly have foreseen such danger and not have done that act.
>
> AND THAT the dangerous act involved the following circumstances of aggravation, namely,

(i) that Robert Gregory Whittington thereby caused the death of Robert Jongmin

Section 154(1) and s 154(3) of the Criminal Code"

[40] The charges pleaded in the indictment arise from an incident during which the Crown alleges the accused, a police officer, fired four bullets from a police issue pistol, one of which caused the death of Robert Jongmin.

[41] The accused has given notice to the Crown that at the trial it will seek to rely upon authorisations (s 26), justification (s 27, s 28 and s 29) and excuse (s 31, s 32 and s 33). Section 31 does not apply to the crime defined by s 154 of the Criminal Code. Neither the accused's intention nor foresight is an element of the offence of dangerous act.

[42] On 10 October 2005 the accused sought the following particulars:

"Introduction

We understand that the Case against our client is that on 23 October 2002, at Wadeye, at the time when our client was:

1. a serving member of the Northern Territory Police Force pursuant to the Police Administration Act, registered number 1813; and

2. the relieving Officer-in-Charge of the Wadeye (Port Keats) Police Station.

The DPP acknowledges that he discharged his firearm, namely his Glock Police issue pistol issued to him in his capacity as a Police officer, on four occasions and fired four rounds of bullets.

If our understanding of the above is incorrect in any detail above please let us know.

We further understand that it is the DPP's case that one of those bullets struck Robert Jongmin and killed him and that you allege in Count 1 that our client thereby unlawfully killed him in such circumstances as to constitute manslaughter (s 161 and s 163 of the Criminal Code).

You also allege in Count 3 that at the same place and at the same time our client discharged his Police issue pistol and that a bullet struck Tobias Worumbu and that the firing of the round in those circumstances amounted to another unlawful and dangerous act pursuant to s 154 of the Criminal Code.

Again, if our understanding is incorrect, please let us know immediately.

Particulars

Please particularise whether or not you allege that it was the same bullet or a different bullet that struck Robert Jongmin and Tobias Worumbu, i.e. are the acts relied on in Count 1 and 2 on the one hand, and Count 3 on the other, different acts, or the same act?

In any event, please specify whether it was the first, second, third, or fourth bullet which struck Robert Jongmin and which of those bullets struck Tobias Worumbu, i.e. was it the act of firing the first, second, third, or fourth bullets and if so, upon which one do you rely?

Conclusion

You will appreciate that until our client knows exactly which act you allege resulted in the event which forms that basis of each Count in the indictment and the basis upon which you claim that each act was unlawful, he cannot adequately prepare his defence, let alone plead to the Counts.

In addition, a failure to supply the particulars sought would, in our view, result in the type of "latent ambiguity" in the indictment

referred to by His Honour the Chief Justice in *McKinnon v R* (2004) NTCCA 8."

[43] On 17 October 2005 the Crown replied as follows:

"We refer to your letter of 10 October 2005 and advise:

1. Robert Whittington was a serving member of the Northern Territory Police Force pursuant to the provisions of the Police Administration Act Registered Number 1813.

2. Robert Whittington was the relieving Officer-in-Charge of the Wadeye Police Station at the time of the alleged offences.

3. It is alleged that Robert Whittington discharged his firearm, namely his Glock police issue pistol.

4. It is alleged that Robert Whittington discharged his Glock pistol on four occasions and that four rounds were fired.

Particulars of the Crown case

5. At approximately 2.00pm at Wadeye in the Northern Territory the accused discharged his police issue Glock pistol by firing four shots in quick succession over a distance of approximately 40 to 50 metres in a public place in which members of the public including men, women and children were present, in the direction of Tobias Worumbu and Robert Jongmin, both of whom were in close proximity to one another, and in the direction of domestic housing in circumstances that caused actual danger to Tobias Worumbu and Robert Jongmin and other members of the public.

6. As a result of the discharge of the firearm by Robert Whittington, Robert Jongmin was shot dead and Tobias Worumbu suffered grievous harm.

7. It is further alleged by the prosecution that the discharge of the Glock pistol took place in circumstances where an ordinary police officer would clearly have foreseen the danger to Robert

Jongmin, Tobias Worumbu and other members of the public, and would not have discharged the firearm.

8. The prosecution alleges the act was unlawful as it amounted to the crime of manslaughter or in the alternative, dangerous act.

9. The act relied upon by the prosecution in Counts one and two of the indictment is the firing of the Glock pistol in quick succession at or in the direction of Tobias Worumbu and Robert Jongmin.

10. The prosecution further alleges that in the circumstances the force used by Robert Whittington was unnecessary in that an ordinary person similarly circumstanced to the accused using such force would have regarded its use as unnecessary for and disproportionate to the occasion, involving as it did two persons moving in close proximity to one another and where the weapon was discharged at a distance, where the chance of effectively hitting a selected target, without causing serious actual danger and injury to innocent parties, was unlikely.

11. The prosecution also says that an ordinary police officer similarly circumstanced using a Glock pistol would not have acted in the same or similar way to Robert Whittington.

12. The prosecution cannot say with precision which of the bullets, one, two, three, or four struck Robert Jongmin and Tobias Worumbu.

13. As presently intended, the prosecution will serve an Amended Indictment upon the accused which pleads two counts, one of manslaughter contrary to the provision of s 163 of the Criminal Code and in the same terms as pleaded in the present indictment, and a second single count of doing a dangerous act contrary to the provision of s 154 of the Criminal code with two circumstances of aggravation, namely that the accused caused grievous harm to Tobias Worumbu and secondly that the accused caused the death of Robert Jongmin. Otherwise the pleading of dangerous act will be in the same terms as in the present indictment."

Does the indictment offend s 305 of the Criminal Code?

[44] Section 305 of the Criminal Code provides as follows:

> "(1) An indictment shall contain a statement of the offence charged together with such particulars as may be necessary to give reasonable information as to the nature of the charge.
>
> (2) If more than one offence is charged each offence shall be set out in a separate paragraph called a count and numbered consecutively.
>
> (3) The statement of the offence shall describe the offence shortly in ordinary language in which the use of technical terms is unnecessary and it need not state all the elements of the offence, but it shall contain a reference to the section and the enactment defining the offence.
>
> (4) If any circumstance of aggravation is intended to be relied upon it shall be charged in the indictment."

[45] For there to be compliance with s 305 of the Criminal Code, each count in an indictment must be pleaded in such a manner that there is, in ordinary language, a short description of the offence charged providing such particulars as are necessary to give the accused reasonable information as to the nature of the charge made against him. The description of the offence need not state all the elements of the offence, but it shall contain a reference to the section and the enactment defining the offence. Further, only one offence may be pleaded in each count of the indictment.

[46] Section 305 of the Criminal Code requires that each count in an indictment must be pleaded in such a manner as to give the accused sufficient information as to be able to understand the essence of the accusation against

him. The information pleaded must be sufficient to enable the accused to answer the charge against him. The pleading should include at least the following information: a statement of the alleged criminal act, the date on which the act was committed, the place where the act was committed, the name of the person or persons against whom the act was committed, a statement of any event said to be caused by the act of the accused and a reference to the section and the enactment defining the offence. It is not necessary to state all of the elements of the offence. Likewise it is not necessary to specifically traverse or avoid all possible authorisations, justifications or excuses for the offence. Not all excuses are applicable to every offence in the Criminal Code. Depending upon the nature of the offence it may be a sufficient pleading if the act and event that is the subject of the offence are described by the word unlawfully. The word "unlawfully" that appears in the Criminal Code means without authorisation, justification or excuse.

[47] The pleading of count 1 and count 2 in the indictment complies with s 305 of the Criminal Code. The pleading provides reasonable information to the accused about the nature of the charges. The essence of the accusation against the accused that is pleaded in count 1 is that he unlawfully killed Robert Jongmin by firing a shot from his police issue pistol in such circumstances as to constitute manslaughter. The essence of the offence pleaded in count 2 is that the accused committed a dangerous act, namely, discharged a firearm that caused serious actual danger to the life of Robert

Jongmin. The accused has been provided with sufficient information to be in a position to answer the charges against him. The facts that at the time he killed the deceased the accused fired four shots and that the Crown is unable to specify which shot killed the deceased does not offend against s 305 of the Criminal Code. It does not mean that the accused has not been provided with such particulars that are necessary to give the accused reasonable information about the nature of the charges against him. The essence of the charges remains that the accused unlawfully killed the accused by firing a shot from his police issue pistol. That the accused fired three other shots (at the time he fired the shot that killed the deceased) that missed the accused is irrelevant to the form of pleading of the indictment. There is only one act and event that is the subject of each count.

[48] The pleading is not duplicitous. Duplicity occurs where more than one offence is joined in one count in an indictment: *Walsh v Tattersall* (1996) 188 CLR 77; Archbold, *Criminal Pleading, Evidence and Practice* (44th ed, 1992), Vol 1, p 75. No one count of the indictment charges the accused with having committed two or more separate offences. The only act and event that is the subject of each count of the indictment is the accused firing the bullet that killed the deceased from his police issue pistol. It matters not that the Crown cannot specify which of the four shots that were fired by the accused from his police issue pistol killed the deceased. The fact that the Crown cannot identify which of the four shots killed the deceased is a matter of evidence. It does not mean that as a matter of form each count in the

indictment charges the defendant with having committed two or more separate offences. Count 1 charges the accused with only one offence namely, unlawfully killing the deceased by firing the shot that killed the deceased. Likewise, count 2 of the indictment only charges the accused with one offence, namely he did an act, discharged a firearm, that caused serious actual danger to the life of Robert Jongmin. Duplicity in a count is a matter of form not evidence: *Greenfield* (1973) 57 Cr App R 849 at 855-856. The Crown case is that one of the four shots that were fired by the accused killed the deceased. Ultimately, the rule against duplicity must be applied in a practical, rather than a strictly analytical, way for the purpose of determining what constitutes one offence: *DPP v Merriman* [1973] AC 584 at 593.

[49] There is no latent ambiguity in this case. Latent ambiguity is different from duplicity, as it refers to the evidence which is led on the charge: *Johnson v Miller* (1937) 59 CLR 467. In this case the evidence that the accused fired four shots, not one, is not evidence of more than one criminal act in either count 1 or count 2. The evidence reveals that only one of the four shots that were fired by the accused from his police issue pistol killed the deceased and that the accused fired all four shots. The fact that four shots were fired by the accused is not evidence of two or more possible offences. Nonetheless because the Crown is unable to show which of the four bullets that were fired by the accused from his police issue pistol killed the deceased it will be necessary for the Crown to prove that all four shots were

unlawful. The jury will need to be directed that, if there is a reasonable doubt that any of the four shots fired by the accused were unlawful, the accused should be acquitted.

Particulars

[50] The provision of particulars under the Criminal Code is governed by s 313 of the Criminal Code. The section provides as follows:

> "The court may in any case direct particulars to be delivered to the accused person of any matter alleged in the indictment and unless they are delivered he is entitled to be discharged."

[51] An indictment is not invalid because it fails to give all the particulars as may be required to enable the accused to know the case which he must meet. However, the defendant is entitled to have particulars of the precise case against him before he is required to plead: *Johnson v Miller* (supra) at 489, 495, 501 - 502; *R v Buckett* (1995) 79 A Crim R 302. There are two aspects of the need for particularity. One is the need to eliminate the risk of duplicity. The occasion on which the offence is alleged to have occurred must be sufficiently identified so that it may be differentiated by the jury as a specific event upon which they must focus. The second purpose of particulars is to give the accused person a sufficient indication of what is alleged against him on the occasion when he is said to have committed the offence: *R v S* [2000] 1 Qd R 445 at 452.

[52] In this instance the accused has been given precise particulars of the act and event alleged as the foundation of each count charged in the indictment.

The fact that the shot that killed the deceased is said to be one of four shots that were fired by the accused from his police issue pistol does not mean that the accused does not know the case he must meet nor does it mean that the relevant shot has not been sufficiently identified so that it may be differentiated by the jury as the specific event on which they must focus. The inability of the Crown to identify which bullet caused the death of Robert Jongmin does not offend the common law relating to particulars.

Offence Known to the law

[53] It follows from what I have stated above that each count charged in the indictment does disclose an offence known to the law.

Particulars in Reply

[54] Generally speaking a party is not required to provide particulars of a negative. By pleading in count 1 of the indictment (the charge of manslaughter) that the accused acted unlawfully the Crown puts in issue all bases of authorisation, justification and excuse. However, the Crown is only required to plead or particularise the facts that it relies on to make out the case of manslaughter. It has done so in the indictment and in the further particulars that it has provided. The Crown is not required to give particulars of its response traversing or avoiding matters of authorisation, justification or excuse that are raised and put in issue by the accused. The fact that the accused asserts that what he did was authorised, justified or excused is not a basis for requiring further particulars from the Crown.

[55] I agree with Mildren J that strictly speaking the provisions of the Criminal Code which relate to authorisation, justification or excuse are not elements of the offence of dangerous act. Consequently, it is not necessary for the Crown to provide particulars traversing or avoiding such matters if they are raised by the defence.

[56] What ultimately will be in issue at the trial will depend on the evidence that emerges during the course of the trial. The accused has already had the benefit of discovery and of a committal. He knows what evidence the Crown is going to tender. If there are any deficiencies in this regard then all that is required, if they cannot be resolved between the parties, is for the accused to make the appropriate application. The Crown is not required to give particulars of how it proposes to meet the accused's assertions that his conduct was authorised, justified or excused. The Crown is not required to, in effect, plead a reply traversing or avoiding the assertions of the accused. The Crown is not obliged by law to provide particulars of the basis on which it alleges that the act of the accused was unlawful taking into account the accused's assertions that his acts were authorised, justified or excused. None of the cases to which the Court was referred is authority for such a proposition. By virtue of the pleading of the charges contained in the indictment and the provision of the further particulars the accused knows the precise case against him.

Answers

[57] In my opinion the questions of law formulated for the opinion of the Court of Criminal Appeal should be answered as follows:

1 (a) No

1 (b) Yes

2 No
