

CITATION:	<i>Flynn & Anor v Thompson</i> [2024] NTSC 3
PARTIES:	IN THE MATTER of the <i>Local Court</i> (<i>Criminal Procedure</i>) Act, section 162 AND IN THE MATTER of a Special Case stated by the Local Court for the opinion of the Supreme Court FLYNN, Steven and NICHOLAS, Sally v THOMPSON, Fabian
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	139 of 2018 (21804899) 140 of 2018 (21801973)
DELIVERED:	23 January 2024
HEARING DATE:	7 August 2018
JUDGMENT OF:	Southwood J

CATCHWORDS:

CRIMINAL PROCEDURE—Domestic violence—related charges on information and complaint—multiplicity of hearings—prosecution desire to avoid multiplicity of hearings.

CRIMINAL PROCEDURE—Indictable offences— *Local Court (Criminal Procedure) Act 1928* s 131A—Dealing with indictable offences summarily—Local Court may deal with particular indictable offences summarily.

CRIMINAL PROCEDURE—Local Court—Special Case stated—Joinder—Joinder of charges on information—Summary proceedings— *Local Court (Criminal Procedure) Act 1928* s 101A—Whether section 101A continues to govern joining of charges on information once a matter is to proceed summarily in the Local Court—s 101A continues to have application.

CRIMINAL PROCEDURE—Local Court— Special Case stated —Joinder—Joinder of charges on information—Summary proceedings— *Local Court (Criminal Procedure) Act 1928* s 51—Whether s 51 applies instead of s 101A to joinder of charges on information once a matter is to proceed summarily in the Local Court—s 51 has no application.

CRIMINAL PROCEDURE—Local Court— Special Case stated —Joinder—Joinder of charges on information and complaint—Summary proceedings— *Local Court (Criminal Procedure) Act 1928* s101A—Whether subsequent filing of an information or complaint numbered consecutively amounts to joinder of the charges under s 101A—no valid joinder found.

CRIMINAL PROCEDURE—Local Court— Special Case stated —Joinder—Joinder of charges on complaint and information—Summary proceedings— *Local Court (Criminal Procedure) Act 1928* s 183A—Whether s 183A permits the joining of charges on complaint and information—s 183 does not provide for joinder.

Criminal Code Act (NT) s 3(3), s 188(2)

Domestic and Family Violence Act 2007 (NT) s 120(1)

Local Court (Criminal Procedure) Act 1928 (NT) s 49, 51, s 101A, s 121A, s 131A, s 183A

Pearce v The Queen [1988] HCA 57, referred to.

REPRESENTATION:

Counsel:

Applicants:	D Dalrymple
Respondent:	T Jackson

Solicitors:

Applicants:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

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

Flynn & Anor v Thompson [2024] NTSC 3
No. 139 of 2018 (21804899) and No. 140 of 2018 (21801973)

IN THE MATTER of the *Local Court*
(*Criminal Procedure*) Act,
section 162

AND

IN THE MATTER of a Special Case
stated by the Local Court for the
opinion of the Supreme Court

BETWEEN:

STEVEN FLYNN
First Applicant

AND:

SALLY NICHOLAS
Second Applicant

AND:

FABIAN THOMPSON
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 23 January 2024)

Introduction

- [1] On 29 January 2018, Senior Constable First Class Steven Flynn filed an information for an indictable offence in the Local Court at Darwin. The information charged a single count that on 29 January 2018 the accused at Darwin unlawfully assaulted the complainant contrary to s 188(2) of the *Criminal Code Act 1983*. On the same day, the senior constable also filed a complaint charging the accused with breaching a domestic violence order. The count on the information was numbered 1 and the count on complaint was numbered 2. Both documents were filed on file No 21804899. It is noted on the information that it was filed under s 101 of the *Local Court (Criminal Procedure) Act 1928* (the Act). The complaint records on its face that it was filed under s 49 of the Act, which provides that a complaint may be made when a person is suspected of having committed a summary offence. An offence contrary to s 120(1) of the *Domestic and Family Violence Act 2007* is a summary offence.
- [2] Section 101 is in Part V Division 1 of the Act, which is headed ‘Procedure to committal’. Section 49 of the Act is in Part IV Division 2 of the Act, which deals with complaints and the proceedings thereon.
- [3] On 7 February 2018, Senior Constable First Class Steven Flynn filed a complaint in the Local Court charging that on 9 January 2018 at Darwin the accused engaged in conduct that resulted in a contravention

of a domestic violence order. That count was numbered 1. On the same date, Senior Constable First Class Steven Flynn also filed an information that charged the accused with committing another aggravated assault contrary to s 188(2) of the *Criminal Code*. That count was numbered 2. Both documents were filed on file No 21801973. Once again, the charges were laid under s 49 and s 101 of the Act respectively. The complainant was the same person in all four counts.

- [4] The filing of an information and a related complaint on the same file is facilitated by s 183A of the Act which provides:

Notwithstanding any other provision of this Act, where the Court has jurisdiction to deal with both:

- (a) a charge specified in a complaint; and
- (b) a charge specified in an information,

relating to the same defendant and arising from the same associated circumstances, the Court may deal with both the complaint and information together.

- [5] Section 183A of the Act enabled the two charges to be heard together at a single hearing. The section does not facilitate the joinder of a charge on complaint and a charge on information in a single document. The charges are heard together and there remains a proceeding on complaint and a proceeding on information.
- [6] On 17 April 2018, the complaint and information filed in proceeding No 21801973 were renumbered and filed in proceeding No 21804899.

The count on complaint was renumbered 3 and the count on information was renumbered 4. The purpose of the prosecution doing so was to try and have all four counts heard together at a single hearing. The Crown contended that the evidence in respect of each count was not only evidence of the actual counts but also propensity evidence of the other counts.

[7] On 18 June 2018, under s 162 of the Act, her Honour Armitage LCJ reserved the following questions of law for the determination of the Supreme Court:

- (1) Does s 101A of the Act permit the joining of charges on information where the charges are to be heard summarily in the Local Court?
- (2) If the answer to question 1 is yes, do s 101A and s 183A of the Act in combination, also permit the joining of related charges on complaint?
- (3) If the answer to question 1 is no, does s 51 permit the joining of charges on information where the charges are to be heard summarily in the Local Court?
- (4) If the answer to question 2 is no, does s 51 apply to joining any and all charges laid on complaint?

[8] On 7 August 2018, with the parties consent, I determined that, as no duly amended information jointly charging both counts of aggravated assault had been filed in the Local Court, the following question be substituted for the above questions:

Once a matter on information is to proceed to a summary hearing in the Local Court does s 101A of the *Local Court (Criminal Procedure) Act* continue to apply, or does s 51 of the Act then apply?

[9] I answered the substituted question:

Yes. Section 101A continues to have application.

[10] The substituted question arose because I held that the prosecution had failed to file in the Local Court a duly amended information charging both counts of aggravated assault in accordance with s 101A of the Act, the consequence being that there was no joinder of the two counts of aggravated assault and that the questions as originally stated in the Local Court were either irrelevant or sought an advisory opinion.

[11] Section 101A of the Act states:

1. Charges for any offences may be joined in the same information if the charges are founded on the same facts or form or are part of a series of offences of the same or similar character.
2. The Court may, if it thinks just, deal with any other charge so joined separately.

[12] The prosecution did not file over an amended information pleading the two counts of aggravated assault. Consequently, there was no joinder of the two counts of aggravated assault. Instead, the charges from the Second File had simply been re-laid on the First File and numbered (3) and (4). While the purported joinder of additional charges by way of a subsequent filing of an information or complaint that are numbered consecutively is a common practice in the Local Court, the practice does not constitute compliance with, or joinder of the charges, under s 101A of the Act.

[13] Because of my ruling that no joinder of the two aggravated assault counts had occurred, the question of law that the parties needed answered differed from the questions posed by the Local Court Judge. Consequently, I determined that the question the parties needed answered was that set out at [8] above.

[14] Following are my reasons for my answer to the amended question.

The Special Case Stated

[15] Her Honour Armitage LCJ stated the following case.

1. On 29 January 2018 Steven Flynn laid an information, and complaint against Fabian Thomson on file 21804899 (the “First File”). The criminal charges against Mr Thompson were that on 29 January 2018, at Darwin, in the Northern Territory of Australia:
 - a) Being a person against whom a Domestic Violence Order was in force, engaged in conduct that resulted in a

contravention of that Domestic Violence Order (laid on complaint under s 120(1) of the *Domestic and Family Violence Act*);

- b) Unlawfully assaulted the complainant in circumstances of aggravation, namely the complainant was a female and the respondent was a male, and that she suffered harm (laid on information under s 188 (1) & (2)(a) 7 (b) of the *Criminal Code*).

2. On 2 February 2018, Steven Flynn laid an information and complaint against Mr Thompson in respect of criminal offending alleged to have taken place on a date earlier than the offending charged on the First File. The further charges laid by Steven Flynn were on a new file 21801973 (the “Second File”). The criminal charges against Mr Thompson were that on 9 January 2018, at Darwin, in the Northern Territory of Australia:

- a) Being a person against whom a Domestic Violence Order was in force, engaged in conduct that resulted in a contravention of that Domestic Violence Order (laid on complaint under s 120(1) of the *Domestic and Family Violence Act*);
- b) Unlawfully assaulted the complainant in circumstances of aggravation, namely that the complainant was a female and Mr Thompson was a male, and that she suffered harm (laid on information under s 188(1) & (2)(a) & (b) of the *Criminal Code*).

3. At a directions hearing on 23 February 2018 the charges on the First File were listed for trial on 16 April 2018. At a directions hearing on 6 March 2018 the charges on the Second File were also listed for trial on 16 April 2018.

4. On 16 April 2018 both files came before Relieving Local Court Judge Wallace. The prosecution sought to proceed with a single trial of all the charges together. The defence did not consent to the two trials running together. Judge Wallace ruled that a joint trial could only proceed where the charges across the two files had been joined. In those circumstances Judge Wallace dismissed the prosecution application for a joint trial. Both parties asked for the proceeding to be adjourned to 20 April 2018 for further directions.

5. On 17 April 2018, Sally Nicholas relayed the charges from the Second File onto the First File. The First File now contains all four charges concerning the alleged offending on both 9 January and 29 January 2018. However, charges on the

Second File were not sought to be withdrawn, pending a decision as to whether all charges could be heard in the one trial.

6. On 21 May 2018, this Court heard submissions on the issue of joinder of the charges and whether or not the matters could and should proceed as a joint trial.
7. The prosecution submitted that when read together with sections 121A and 131A of the Act, section 101A of the Act permitted joinder of the charges on information for a summary hearing once it was established that the charges were founded on the same facts or formed or were part of a series of offences of the same or similar character. The prosecution submitted that joinder should be permitted because the alleged offending on 9 January 2018 and on 29 January 2018, considered in combination, comprised a series of offences of the same or similar character. The prosecution further submitted that, where the charges sought to be joined involve both charges on information and charges on complaint, section 183A of the Act permitted the joining of all charges.
8. The defence submitted that any joinder of charges permitted under section 101A was restricted to charges on information in the context of committal proceedings; and that joinder of charges to be tried summarily, be they laid on information or complaint, was only permitted by reference to section 51 of the Act. The defence submitted the charges across the two files could not be joined because they concerned events that had taken place on separate days and the charges did not arise out of the same set of circumstances.
9. The Court reserved the decision and adjourned the proceedings to 23 May 2018.
10. On the morning of 23 May 2018, the prosecution requested that the questions of law in respect of the issue of joinder of charges and joint trials in the Local Court be reserved for the opinion of the Supreme Court. I agreed to this course and further proceedings in the Local Court on the First and Second files were deferred.

The procedural issue – a multiplicity of hearings

[16] The Supreme Court was informed that the reason for the Special Case

Stated above was that frequently in cases of domestic violence in the

Local Court, there is a series of incidents of domestic violence, or course of conduct, as occurred in this case, giving rise to an inconvenient multiplicity of hearings.

[17] The prosecution wish to avoid such a multiplicity of hearings and have all of the four charges heard together at a single sitting of the Local Court. As stated above, one of the prosecution's reasons for doing so is that frequently the evidence about the two incidents of domestic violence is cross-admissible as tendency evidence. The prosecution submitted that a single summary hearing could occur if a single information charging two counts of aggravated assault was filed over the two existing information under s 101A of the Act, and then in accordance with s 183A of the Act the prosecution asked the Local Court to hear the charges on the two complaints at the same time.

[18] The main contention raised by the defence was that s 101A of the Act ceased to be applicable once the parties elected, or the Local Court ordered them, to proceed to a summary hearing of the indictable offences in the Local Court.

[19] The defence submitted that, while under s 101A of the Act the charges of aggravated assault may be joined in the same information, that joinder was for the purposes of a preliminary hearing only and did not apply at a summary hearing. Once the charges were to proceed by way of summary hearing, any joinder of the charges was subject to the

provisions of s 51 of the Act not s 101A. Joinder under s 51 of the Act only applies to charges that arise out of *the same set of circumstances*, which is a narrower test than that specified in s 101A. The defence submitted that the charges in this proceeding did not arise out of the same set of circumstances.

Consideration

[20] The defence submissions cannot be sustained.

[21] The Act essentially deals with two categories of charges. Charges for summary offences and charges for indictable offences. Subsection 3(3) of the *Criminal Code* defines summary offences as follows:

An offence is a summary offence if:

- (a) an Act states that:
 - (i) the offence is a summary offence; or
 - (ii) the offence is not an indictable offence; or
 - (iii) a charge of the offence must be heard and determined summarily; or
- (b) the offence is not an indictable offence.

[22] An aggravated assault contrary to s 188(2) of the *Criminal Code* is an indictable offence.

[23] Serious indictable offences are tried before a jury in the Supreme Court. However, Part V Division 2 of the Act enables the Local Court to deal with certain indictable offences summarily subject to certain conditions. In particular, s 131A of the Act provides as follows:

- (1) Subject to subsection (3)(a), the Court may hear and determine the charge of an indictable offence summarily if the offence is an offence against section 186, 188(2), 188A or 189A(1) or (2)(a) of the Criminal Code.
- (2) The prosecutor or the defendant may apply to the Court, before the Court exercises its jurisdiction under subsection (1), for the charge to be heard and determined by the Supreme Court.
- (3) The Court may exercise the jurisdiction under subsection (1):
 - (a) only if the Court is of the opinion that the charge should be heard and determined summarily; and
 - (b) whether or not the defendant consents to its exercise.

[24] The prosecution should have filed over a fresh information on file No. 21804899 pleading both charges of aggravated assault in the one document and then withdrawn the two original information. Subject to the rules of pleading, joinder, fairness, and abuse of process, it is for the prosecution alone to determine what charges are to be joined in an information.

[25] In *Pearce v The Queen*¹ the plurality of the High Court stated:

The decision about what charges should be laid and prosecuted is for the prosecution. Ordinarily, prosecuting authorities will seek to ensure that all offences that are to be charged as arising out of the one event or series of events are preferred and dealt with at the one time. Nothing we say should be understood as detracting from that practice or the equally important proposition that prosecuting authorities should not multiply charges unnecessarily.

¹ *Pearce v The Queen* [1988] HCA 57 at [30] per McHugh, Gummow, Kirby, Hayne and Callinan JJ.

[26] If an amended information is filed, the defence can apply to sever the counts on the information, on the basis that the joinder was unfair, embarrassing or prejudicial.

[27] After an amended information is filed, the prosecution may apply under s 183A of the Act, to the Local Court to have the two counts on complaint heard at the same time as the charges on information.

The defendant's argument about s 51 and s 101A of the Act

[28] The defendant's submissions that s 101A of the Act did not apply to the aggravated assaults in this case, and that s 51 of the Act governed the proceedings in the Local Court because the charges were to be tried summarily were misconceived. They ignored Part V Division 2 of the Act, which is headed, 'Certain offences may be dealt with summarily' and provides for the prosecution and trial of certain indictable offences in the Local Court.

[29] Section 51 of the Act is in Part IV Division 2 of the Act, which deals with the prosecution of summary offences on complaint. Section 51 is headed 'Joinder of charges' and states:

- (1) Charges for any number of offences may be joined in the same complaint, if the charges arise out of the same set of circumstances.
- (2) Where a provision constituting an offence states the offence to be the doing of or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative,

the acts, omissions, capacities, or intentions, or other matters stated in the alternative in the provision, may be stated in the alternative in the complaint.

- (3) The Court may, if it thinks just, deal with any charge so joined separately.
- (4) This section shall apply notwithstanding anything inconsistent therewith contained in any other Act.

[30] The charges referred to in s 51(1) are charges of summary offences, not charges of indictable offences. The charges being referred to in the subsection are charges on complaint and s 49 of the Act states that:

A complaint may be made to the Court in any case when a person is suspected to have committed a summary offence.

[31] All of the provisions in the Act dealing with indictable offences, including provisions about information on indictable offences and joinder of such charges (save specific supplementary provisions), are contained in Part V of the Act. Those provisions include s 101, s 101A, and Division 2, which contain the sections of the Act that enable the summary trial of certain indictable offences. There is nothing in Part V Division 2 that precludes the operation of s 101 and s 101A when indictable offences are tried summarily in the Local Court.

[32] Contrary to the defendant's submissions, the fact that s 101 and s 101A are in Division 1 of Part V and s 131A is in Division 2 of Part V does not mean that s 101 and s 101A cease to have operation and effect if such indictable offences are tried summarily. Part V contains the main provisions that are applicable to proceedings for indictable offences.

- [33] When Division 1, is considered in the context of the whole of Part V, and the whole of the Act, the following significant matters become apparent.
- [34] Parts IV and V of the Act contain the major substantive provisions of the Act. Part IV deals with the prosecution of summary offences and Part V deals with the prosecution of indictable offences. Proceedings for summary offences are commenced by complaint. Part V recognises that the Supreme Court has general criminal jurisdiction to try offences charged on indictment, and a person charged with an indictable offence is, subject to Part V Division 2 of the Act, entitled to a preliminary or committal hearing in the Local Court during which the prosecution must make discovery of the case against the accused.
- [35] A Local Court Judge then determines whether the defendant should be committed to stand trial in the Supreme Court. Consequently, Division 1 of Part V of the Act contains the procedure to committal or summary trial of an indictable offence. Largely for matters of convenience, efficiency and economy, Part V Division 2 of the Act provides that in certain circumstances, certain indictable offences may be dealt with summarily in the Local Court.
- [36] Proceedings for indictable offences in the Local Court are commenced by information. Division 2 of Part V does not contain any provision for the laying of an information. Nor does Division 2 contain any

provisions that exclude the operation of any relevant provisions of Division 1. The only provision of the Act that provides for the laying of an information is s 101 in Division 1 of Part V, and s 101A facilitates the joinder of charges in an information.

- [37] The presence of s 101A in a Division of the Act headed ‘Procedure to committal’ does not mean that s 101A ceases to apply if the counts on information are dealt with summarily in the Local Court. There being no other provisions in the Act dealing with indictable offences, it follows that those provisions continue to apply. Section 101A continues to have application once a proceeding becomes a summary proceeding and s 51 has no application in relation to an information for indictable offences. Indeed, subject to s 131A(3), the presence of s 131A in Division 2 of Part V of the Act means that the prosecution may elect to proceed summarily with a charge contrary to s 188(2) of the *Criminal Code* without a committal proceeding.

Section 183A of the Act.

- [38] The prosecution submitted that s 183A of the Act authorises the joinder of ‘associated’ charges on information and on complaint together in a summary proceeding. The relevant test for a joint hearing under s 183A is that the charges relate to the same defendant and arise from the same or associated circumstances. In those circumstances, the prosecution

submitted that the two counts of aggravated assault and the two counts of breaching a domestic violence order may be heard together.

[39] The prosecution further submitted that the requirements of s 183A of the Act were also met in this case if the two counts of aggravated assault were joined in the same information. The prosecution submitted that where there has been a joinder of charges under s 101A, it is likely that the circumstances that gave rise to the s 101A joinder would also permit the charges on complaint to be dealt with together under s 183A. In the present case, the same defendant is alleged to have breached a domestic violence order by committing an aggravated assault on two occasions in what are alleged to be the same or associated circumstances.

[40] The defendant submitted that s 183A of the Act was not enlivened in this case. Section 183A is only enlivened when the charge on information and the charge on complaint arose in the same course of conduct. The charges in this case did not arise out of the same course of conduct.

[41] While the heading to s 183A of the Act states that, “Complaint and information may be joined in certain circumstances”, the section does not provide for the joinder of a charge on complaint and a charge on information in a single document. The section merely enables the Local

Court to hear both the charge on complaint and the charge on information together.

[42] As the prosecution submitted, s 183A of the Act enables charges on complaint and information to be dealt with together if the charges relate to the same defendant and arise from “the same or associated circumstances”. Section 183A does not diminish or restrict the operation of s 101A of the Act. “Associated circumstances,” means related or connected circumstances. There is nothing in the text of s 183A that requires the charges to have arisen out of the same set of facts. Section 183A enables a charge on complaint and a charge on information to be tried together when the offences have arisen from associated circumstances. It is arguable that all of the four counts in this case have arisen in associated circumstances.
