CITATION:	*The King v Swan (No 2)* [2024] NTSC 94
PARTIES:	THE KING v SWAN, Rebecca
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22037672
DELIVERED:	9 October 2024
HEARING DATE:	9 October 2024
JUDGMENT OF:	Grant CJ

REPRESENTATION:

Counsel:

Crown:	A Lonergan
Accused:	C Voumard with D Gorry

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

Judgment category classification:	C
Judgment ID Number:	Gra2415
Number of pages:	4

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The King v Swan (No 2) [2024] NTSC 94
No. 22037672

BETWEEN:

THE KING

AND:

REBECCA SWAN

CORAM: GRANT CJ

EDITED REASONS FOR DECISION
(Delivered *ex tempore* on 9 October 2024)

[1] The defence asserts that the offences charged in counts 2 and 3 of the indictment breach the rule against duplicity. The defence has made application to stay those counts on the indictment until the prosecution elects the precise formulation of the charges. That is, in effect, an application for the stay of the prosecution generally.

[2] Neither count in the indictment patently alleges the commission of two or more offences. The duplicity asserted in this case is latent in nature in that it is said to arise because the evidence in respect of a single charge reveals the possible commission of two or more offences. So far as the serious harm charge is concerned, the two possible offences are the infliction of serious harm by smashing the glass and causing

damage to the soft tissue of the complainant's eyeball by the entry of shards and/or the infliction of serious harm by striking the complainant directly to the face causing facial fractures. So far as the reckless endangerment charge in the alternative is concerned, the two possible offences are constituted, again, by smashing the glass and/or striking the complainant directly with the bat.

[3] There is an exception to the rule against duplicity where the alleged conduct has occurred so close in space and time that it may be viewed as a single composite activity, or an activity of a continuing nature. That is no doubt the case which presents here, but the prosecution has clearly put its case on the basis that there are two possible formulations of the offences charged. Those two possibilities arise both in terms of the conduct said to have caused the harm or the reckless endangerment in question, and the nature of the harm involved. The Crown has not made any election which would cure that duplicity in formulation. In the absence of that election, the question becomes whether a fair trial is possible in the circumstances.

[4] This is not a case where the evidence reveals a single offence for which the jury may be able to convict on several alternate legal bases, such as in a homicide case where there are a number of alternative legal pathways to guilt. As stated, this is a case in which the evidence reveals two possible offences. Although the assessment will always be one of fact and degree, it would not be appropriate in this particular

case to characterise the conduct charged as a continuing act and thereby an exception to the rule against duplicity. That is because there is a realistic possibility that the jury may not agree unanimously in its verdict concerning the act said to constitute the offence in question. That possibility arises due to variations in the strength of the evidence in relation to each of the possible acts and consequential forms of serious harm. However, the particulars of the two available offences are obvious in the circumstances and the defence is not prejudiced, and has not at any stage been prejudiced, in the evidentiary sense. That is to say, the defence is not embarrassed by not knowing the factual case which it must meet.

[5] In the absence of that form of evidentiary prejudice, the duplicity in this case may be cured by directions that the jury must make unanimous findings in relation to the facts constituting the offence before a guilty verdict may be entered. Directions of that nature are adequate to address the risk that the jury might reach a compromised verdict on either of the charges: see, for example, *R v Heaney* (2009) 22 VR 164; *R v Holmes* [2006] VSCA 73; *R v Khouzame* [1999] NSWCCA 173; *R v Trotter* (1982) 7 A Crim R 8; and *R v S* (1989) 168 CLR 266.

[6] To the extent that the jury's verdict may be inscrutable as to the form of the serious harm involved in the event of a finding of guilt on the charge of unlawfully causing serious harm, given the nature of the

complainant's evidence in this particular case I do not apprehend any difficulty in finding facts for the purpose of sentencing. There will also be no such difficulty in the event of a finding of guilt on the alternative charge of recklessly endangering serious harm. Moreover, on the alternative charge the distinction between the relevant acts, and the distinction between the potential forms of the serious harm, is not of great materiality to the penalty which would properly be imposed.

[7] Accordingly, I intend to direct the jurors that in respect of each count they must agree unanimously on whether the accused committed one or other (or both) of the alleged acts before going on to consider the other elements of the offence in respect of that act unanimously found; and that they must further agree unanimously on the form of the actual or potential serious harm involved in order to convict on the offence in question.

[8] The application for the stay of the prosecution is dismissed.

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