

Case Law update for prosecuting agencies

Joinder and severance of indictments

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Under Queensland's *Criminal Code* the general rule is that an indictment must only contain one offence.¹ Additional charges may be joined on the same indictment against the same person only if all charges are based on the same facts or form part of a series of offences of the same or similar character, or a series of offences committed in the prosecution of a single purpose.

It is the prosecution who initially decides how many charges are joined on an indictment. If the defendant objects to the joinder of any of those charges (i.e. objects to them being heard together) they can apply for separate trials (or to "sever the indictment").²

These principles were recently considered in some detail by the Queensland Court of Appeal in the case of *R -v- Smith* [2021] QCA105, delivered on 14 May this year.

Smith was charged with a series of sexual offences against a 12 year old girl, and the murder of her mother. He also faced two counts of stealing. All the charges were joined on the same indictment and were tried accordingly. All offences were said to have occurred within a short space of time within a house where the defendant was staying with the deceased and her daughters. It was alleged that during the night, the defendant woke up and raped the 12 year old daughter. When she threatened to tell her mother, the defendant replied "OK, you do that". The defendant then left the premises, stealing certain items as he went. The complainant did go to tell her mother, but found her dead, the victim of an apparent strangulation or drug overdose.³

¹ Section 567 *Criminal Code Act 1899*

² Section 597A *Criminal Code*

³ Those causes of death were the competing theories argued at trial

On the 11th day of the trial, after all the evidence had been heard, the defendant decided to plead guilty to all charges except the murder. He was convicted of that charge the following day.

On appeal, the defendant's (new) lawyers argued that the failure to sever the count of murder from the other counts on the indictment gave rise to a miscarriage of justice. The Court considered the application of the joinder and separate trial provisions of the Code in the context of this case. In doing so the Court noted:-

1. When counts are joined as being based "on the same facts", that phrase ought not be narrowly construed. The offences need not have arisen contemporaneously, nor involve precisely the same facts. All that is necessary is for them to be traceable, either in time place or circumstance, to common events;
2. When evidence on one count is inadmissible on another count, then even if the counts are properly joined, if the inadmissible evidence might improperly prejudice the accused, and thereby result in an unfair trial, there ought be separate trials. In such a case the accused can apply for separate trials under section 597A *Criminal Code*.
3. Even where the risk of prejudice exists, an application for separate trials can be refused if grounds exist to favour joinder, and the risk of prejudice can be alleviated by appropriate directions to the jury.
4. It is a general principle that, in a criminal trial, evidence of commission of offences other than the offence charged is inadmissible because such evidence has a tendency to erode the presumption of innocence. It may wrongly be regarded by a jury as being more probative of an accused's guilt than it deserves to be. The fundamental importance of ensuring the fairness of the trial for a particular offence requires that provisional paramountcy be given to the inherent tendency of such evidence to prejudice an accused person. For this reason, the admission of such evidence is the exception rather than the rule.
5. The application of the principle requires a balancing of the probative force of the evidence to prove an issue against the potential prejudicial effect of its admission. The prosecution must, as the first step in this process, identify the issue to which the evidence is directed and then, as the second step, identify with precision the fact sought to be proved directly by the contested evidence. It must then demonstrate how proof of that fact is said to lead to proof of a fact in issue.
6. Because the admission of prejudicial evidence is exceptional, evidence must not be merely relevant, it must possess a strong degree of probative force. It must have "a really material bearing on the actual issues to be decided".

In *Smith's* case, the court concluded that evidence of the stealing offences was directly relevant to the murder count (to prove the appellant's presence in the house), and the risk arising from that evidence was not so great that it could not be removed by an adequate direction. The risk of prejudice from the evidence about the sexual offences however was very high. The evidence concerning the sexual offences could have been excluded without rendering the narrative of the night's events concerning the murder unintelligible. Consequently, the court held that the sexual offence counts should have been tried separately from the murder and stealing counts.

Smith's case represents a helpful consideration of the essential principles that apply to the joinder and severance of indictable charges.

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