COURT: SUPREME COURT OF TASMANIA

CITATION: *Tasmania v Davey* [2018] TASSC 14

PARTIES: STATE OF TASMANIA
v
DAVEY, Matthew John
DAVEY, Dillon Anthony
DALE, Scott Raymond

FILE NO: 146/2015

DELIVERED ON: 28 March 2018

DELIVERED AT: Hobart

HEARING DATES: 13–16, 18-23, 26-28 March 2018

JUDGMENT OF: Blow CJ

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Criminal Law – Procedure – Adjournment, stay of proceedings or order restraining proceedings – Stay of proceedings – Abuse of process – In general – Whether power to restrict scope of Crown case instead of fully staying proceedings.

Maxwell v The Queen (1996) 184 CLR 501; *Magaming v The Queen* [2013] HCA 40, 252 CLR 381, referred to.

Aust Dig Criminal Law [3054]

REPRESENTATION:

***Counsel*:**

State: D G Coates SC, E Avery
Accused M Davey: F Cangelosi
Accused D Davey: J Sawyer
Accused S Dale K Baumeler

Solicitors:

State: Director of Public Prosecutions

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File No 146/2015

STATE OF TASMANIA v MATTHEW JOHN DAVEY, DILLON ANTHONY DAVEY and SCOTT RAYMOND DALE

REASONS FOR RULING **BLOW CJ**
28 March 2018

1 These are my reasons for a ruling that I gave on 13 March 2018, the first day of this trial. That ruling concerned a ruling given by Estcourt J on 18 September 2017. By count 1 on the current indictment, the three accused are jointly charged with committing an unlawful act intended to cause bodily harm, contrary to s 170 of the *Criminal Code*. I rejected a submission to the effect that, because of the ruling on 18 September 2017, I should not permit the Crown, in relation to count 1, to rely on any basis of criminal responsibility not based on one or more of the three accused men doing the physical act or acts that constituted the crime charged. The Crown wished to rely on physical acts performed by another assailant, Michelle Lee Arnott.

2 The background can be summarised as follows:

- The three accused, Matthew John Davey, Dillon Anthony Davey and Scott Raymond Dale, were jointly charged with Ms Arnott, on an indictment dated 8 September 2016 with one count of committing an unlawful act intended to cause bodily harm, contrary to s 170, and one count of assault. Both crimes were alleged to have been committed on 7 and 8 May 2015.
- A trial of the four accused was commenced by Estcourt J. On 4 September 2017, each accused pleaded not guilty to each charge. His Honour dealt with a number of preliminary matters. The trial did not reach the stage where a jury was empanelled.
- On 8 September 2017, his Honour ordered that Matthew Davey and Scott Dale each be tried separately.
- On 11 September 2017, at the request of Ms Arnott, the indictment was put to her again. On the s 170 charge, she pleaded not guilty to the crime charged, but guilty to assault. The Crown accepted that plea. She also pleaded guilty to the second count, the count of assault.
- I sentenced Ms Arnott on 14 September 2017.
- The Crown took the view that the disposal of the charges against Ms Arnott had brought an end to the circumstances that had led his Honour to make orders for separate trials, and that it had become appropriate for the other three accused to be tried together. A second indictment was filed on 14 September 2017, jointly charging the other three accused with the same crimes as those alleged in the first indictment.
- The three accused men then made applications to Estcourt J for an order refusing to permit the entry of a nolle prosequi in respect of the first indictment, and for an order quashing the second indictment. They contended that it was unfair for them to be brought to trial on the s 170 charge after the Crown had accepted Ms Arnott's plea of guilty to assault in satisfaction of the s 170 charge as it related to her.
- On 18 September 2017 Estcourt J refused those two applications and gave written reasons for doing so.

3 As at 18 September 2017, the Crown contended that the three accused men had committed the crimes charged as part of a joint criminal enterprise of themselves and Ms Arnott whereby they deprived the complainant of her liberty and physically attacked her. The Crown proposed to contend at trial that each of the three men was criminally responsible for every physical act of the other men

and Ms Arnott on a number of different bases, namely the existence of a joint criminal enterprise, common purpose liability in accordance with s 4 of the Code, aiding, abetting and instigating.

4 In his reasons of 18 September 2017, after deciding that he should refuse to make each of the orders sought by the three accused, Estcourt J went on to say the following, at [18]-[25]:

> "[18] … it seems to me to be fundamentally unfair that the State should be allowed to proceed on the basis of joint criminal responsibility with, or accessorial liability related to, not just each other of the accused men but Ms Arnott as well, when the State must be taken to accept that Ms Arnott's own criminal conduct is to be properly regarded as constituting the crime of assault contrary to s 184 of the Code and not the crime of committing an unlawful act intended to cause bodily harm contrary to s 170 of the Code.
>
> [19] The unfairness arises to my mind in the manifest inconsistency in the State presenting Ms Arnott as a witness who did certain things that properly viewed amount to the crime of assault upon the complainant, while at the same time contending that in 'joining with her' (to use a shorthand expression), the three accused men committed a more serious crime, and, unlike the crime of assault, a crime of specific intent (see *Tasmania v Oates* [2017] TASSC 39.)
>
> [20] The more fundamental question however is as to how it is legally possible for the three accused men to be part of a joint criminal enterprise *with* Ms Arnott to commit the crime of committing an unlawful act intended to cause bodily harm with one or more of them (including Ms Arnott), committing that crime, when Ms Arnott was convicted only of the crime of assault. If it is legally possible in the sense that as a matter of fact all four agreed with each other to commit the more serious crime and one or more of the men did commit that crime but Ms Arnott only committed the crime of assault, perhaps while the others were out of the room, or that she is somehow to be regarded as having withdrawn from the joint enterprise, then it adds absolutely nothing to the State's case to particularise the criminal responsibility of the three men in the way it has been done.
>
> [21] I am conscious of Mr Shapiro's submission [for the Crown] that 'the circumstances in which Ms Arnott pleaded guilty to assault did not involve a finding that she was innocent of the more serious charge', but I doubt that means that her criminal conduct once convicted could be used as a foundation for the criminal responsibility of her former co-accused by way of a joint criminal enterprise. As it is I am not required to decide that question as it would, as I have already observed, be both unnecessary and unfair to permit the jury to proceed on that basis.
>
> [22] The same may be said of aiding pursuant to s 3(1)(b) of the Code, abetting pursuant to s 3(1)(c) and instigating pursuant to s 3(1)(d) in so far as the further and better particulars assert that the three men aided and/or abetted and/or instigated *Ms Arnott* to commit the crime of committing an unlawful act intended to cause bodily harm. Patently they did not if the crime she committed was one of assault. If I am wrong as to that and such a position is permitted by means of a legal fiction turning on the proposition that Ms Arnott was not by her conviction of assault found innocent of the more serious crime against s 170 of the Code, then again the particulars present an unnecessary, confusing and unfair picture.
>
> [23] It would be unfair and unjust to expose the three accused men to the risk of a guilty verdict on the s 170 count by the jury reasoning that they somehow derived criminal responsibility for that crime by joining with Ms Arnott's acts for which she was convicted of a crime against s 184 of the Code. It would to my mind be difficult in the extreme to instruct a jury as to how as a matter of law joint criminal liability might be derived in part from joining in those acts, in part with the three men joining in acts with each other and in part perhaps from other, as yet unidentified conduct. In any event were it legally correct to do so any such direction would be far too sophisticated, as I apprehend it, to protect the accused from impermissible reasoning on the part of a jury whose members did not follow the nuanced reasoning process required.
>
> [24] The position is somewhat different in relation to the assertion in the further and better particulars of criminal responsibility based on common purpose pursuant to s 4

> of the Code. There the inclusion of Ms Arnott as a person with whom the three accused men formed a common intention to commit the crime of assault is merely historically contextual, so long as there is no suggestion by counsel for the State to the jury that it was Ms Arnott who committed the s 170 crime said to be the probable consequence of the prosecution of the unlawful purpose. If the State sought to suggest that then unfairness would again be manifest, based as it would be on entirely circular and artificial reasoning.
>
> [25] It will be apparent, as I have already said, that I am of the view that I should make no order pursuant to s 350 of the Code and that I should make no order preventing the entry of a nolle prosequi in respect of the original indictment. Further, I am of the view that the motion to quash the new indictment pursuant to s 352 of the Code fails. However, in the exercise of the Court's inherent jurisdiction to ensure a fair trial for the three accused men, I will not, except to the extent that I have set out in the course of these reasons, and save perhaps as relates to s 334A(1)(b) of the Code, permit the State to rely on bases of criminal responsibility other than that one or more of the three men and not Ms Arnott actually committed the act or acts which amounted to the crime of committing an unlawful act intended to cause bodily harm."

5 When his Honour delivered those reasons, it was expected that, if a nolle prosequi was entered in respect of the first indictment and the second indictment was not quashed, the trial of the three accused on the second indictment would proceed before his Honour with little or no delay. However none of the three accused had been called upon to plead to the second indictment. A trial is deemed to begin when the accused is called upon to plead: *Criminal Code*, s 351(6). A trial of the three accused upon the second indictment had therefore not begun.

6 Counsel for the accused submitted to me that, when Estcourt J said, at [25], that he would not permit the State to rely on certain bases of criminal responsibility, he made an order in the nature of a "partial stay" that applied to any subsequent trial upon the second indictment. I disagree. The language used in the sentence in question – the last sentence of [25] – was not the language of an order, but language describing an intended course of action. His Honour did not order that the State not be permitted to rely on particular bases of criminal responsibility. He said what he would not permit. The only reasonable inference is that his Honour assumed that he would be presiding in a forthcoming trial on the second indictment, and was informing counsel of a course that he had decided to take at that second trial. As things eventuated, the trial on the second indictment did not proceed before him last year, but commenced before me nearly six months after his ruling.

7 Counsel for one of the accused submitted to me that s 361A of the Code required me to limit the bases of criminal responsibility that the Crown could rely upon in accordance with the conclusion reached by Estcourt J. That submission was misconceived. That section applies when a determination is made at a trial before a jury is sworn, and there is subsequently a new trial on the same indictment. It is clear from the opening words of s 361A(1) that the section applies only to determinations made "After an accused person has been called upon to plead". The ruling of Estcourt J was given before any of the accused were called upon to plead to the second indictment. Section 361A was therefore irrelevant to the status of any determination made on 18 September 2017.

8 Counsel for the accused submitted that, if I concluded that no order had been made in the nature of a "partial stay", then I should restrict the bases of criminal responsibility that the Crown could rely upon, in the same way that Estcourt J had decided to restrict them, and for the same reasons that his Honour decided to restrict them. With great respect to his Honour, I believe that a trial judge does not have the power to take such a course.

9 It is well established that a judge has the power to stay all proceedings on an indictment in order to prevent an abuse of the process of the court: *R v Carroll* [2002] HCA 55, 213 CLR 635. However counsel did not refer me to any case in which a court has held that, for the purpose of preventing an abuse of process, a criminal court has a discretion to limit the bases of criminal

responsibility that may be relied upon by the Crown. I was unable to find any reported case that supported that proposition.

10 It is the role of the prosecutor, not the trial judge, to decide the basis or bases of the Crown case against any accused person. In *Maxwell v The Queen* (1996) 184 CLR 501 at 534, Gaudron and Gummow JJ said the following:

> "It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what." [Footnotes omitted.]

11 In *Magaming v The Queen* [2013] HCA 40, 252 CLR 381, French CJ, Hayne, Crennan, Kiefel and Bell JJ said at [20]:

> "[20] It is well established that it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences."

12 It is for the prosecuting authorities, not the courts, to decide on what bases the Crown will bring its case against accused persons. The integrity of the judicial process would be compromised if the courts were in any way to be concerned with decisions as to the bases upon which the Crown may seek to prove guilt.

13 If a prosecutor confines the Crown case when framing an indictment, when delivering particulars, or when making his or her opening speech, then the trial judge may prevent the prosecutor from later relying on an alternative basis of criminal liability if the accused would be prejudiced in his or her defence as a result: *King v The Queen* (1986) 161 CLR 423. However the situation in this case was different. The accused were contending that I, as the trial judge, should confine the Crown's case to certain bases of criminal liability.

14 Further, I came to the conclusion that the decision of the prosecutor not to confine the Crown's case in the way proposed by Estcourt J did not involve an abuse of process.

15 The acceptance by the Crown of Ms Arnott's plea of guilty to assault in satisfaction of the s 170 charge could not be regarded as an acceptance that she was innocent of the crime charged. The Crown may accept a plea of guilty to a less serious crime when it considers that the accused is guilty of the crime charged, but that the admissible evidence will be insufficient to prove guilt of that crime beyond reasonable doubt. It may also accept a plea of guilty to a lesser charge for practical reasons, including reasons relating to the availability of resources: *R v Brown* (1989) 17 NSWLR 472 at 480. The acceptance of the plea of guilty to the less serious crime of assault meant only that the Crown chose not to try to prove at trial that Ms Arnott was guilty of the more serious crime with which she had been charged.

16 In *R v Brown* (above), the New South Wales Court of Criminal Appeal (Gleeson CJ, Newman and Loveday JJ) said, at 479:

> "There may be circumstances in which it is appropriate to characterise a decision by the prosecuting authorities to charge a person with one offence, to which he is prepared to plead guilty, rather than another and more serious offence which he has apparently committed, as an abuse of the process of the court."

17 However there was nothing in the circumstances relating to Ms Arnott's pleas of guilty to suggest any impropriety or any unfairness to anyone, in my view.

18 The acceptance of Ms Arnott's plea of guilty to the crime of assault in satisfaction of the s 170 charge did not preclude the Crown from contending, in the proceedings on the second indictment, that she was guilty of the s 170 crime with which she had been charged.

19 In *Director of Public Prosecutions v Shannon* [1975] AC 717 at 772, Lord Salmon said:

> "The only effect of an acquittal, in law, is that the accused can never again be brought before a criminal court and tried for the same offence. … His acquittal cannot, however, affect anyone but himself and indeed would not be admissible in evidence on behalf of or against anyone else."

20 That passage was approved by Gibbs CJ, Aickin, Wilson and Brennan JJ in *R v Darby* (1982) 148 CLR 668 at 677.

21 Another decision relevant to this point is that of the New South Wales Court of Criminal Appeal in *Gilham v The Queen* [2012] NSWCCA 131, 224 A Crim R 22. In that case the applicant's parents and his brother were all killed at the same place within minutes of one another. The applicant was charged with the murder of his brother. He pleaded guilty to manslaughter on the basis of provocation. The Crown accepted that plea, on the basis that it could not disprove the proposition that the applicant had been provoked into killing his brother upon discovering that the brother had killed their parents. Subsequently, after further investigations, the applicant was charged with the murder of the parents. He was tried, was convicted of murdering both parents, and appealed. The court said, at [135]:

> "[135] There is no manifest inconsistency in the verdicts of guilty of the manslaughter of Christopher [the brother] and the murder of the parents. The fact that the applicant admitted that he was guilty of the manslaughter of Christopher is not inconsistent with his being accused of killing his parents. The issue in the applicant's trial was whether he had killed his parents. It was not in dispute that he had killed Christopher. It is of course true that the Crown accepted the plea to manslaughter in circumstances where the applicant asserted that it was his brother who killed their parents. However, there was no determination of that issue, the conviction for manslaughter evidencing only that the Crown accepted that it could not discharge the onus it carried to 'disprove' provocation. Furthermore, there was no finding that the applicant had not killed his parents, although it must be assumed that the Crown concluded that the evidence which was available could not prove that Christopher did not kill his parents."

22 In this case, there is no inconsistency between Ms Arnott's convictions for assaulting Ms Graham and the Crown's assertion that she and the three accused men committed against Ms Graham the crime called "committing an unlawful act intended to cause bodily harm". The fact that Ms Arnott admitted that she was guilty of assaulting Ms Graham is not inconsistent with the three men being accused of being parties to a s 170 crime against Ms Graham. There was no determination that Ms Arnott was innocent of that crime.

23 In *Police (SA) v Sherlock* [2009] SASC 64, 194 A Crim R 30, Kourakis J (as he then was) said the following at [103]-[104]:

> "[103] Although the concept of abuse of process cannot be restricted to 'defined and closed categories', it appears to me that there is some utility in the taxonomy that the English Courts have adopted. The first class is identified by reference to the concept of an unfair trial, in the sense that because of one or more features of the procedure adopted or the evidence proffered, the resulting judgment will necessarily be unsafe or unsatisfactory. …

> [104] The second class is identified by reference to the fairness in commencing and maintaining the prosecution itself. It can readily be accepted that it would be unfair to try a defendant where the prosecution has acted improperly. Prosecutions brought to harass, or for other extraneous reasons, are the most obvious examples. The deliberate destruction of evidence and the concealment of the names of material witnesses are other examples. Moreover, if a conviction is overturned because misconduct of this kind is only discovered after verdict, it may be, subject to a consideration of the wider public interest, an abuse to try the accused a second time, even if the relevant material would be available at the subsequent trial. Cf *R v Ulman-Naruniec* [2003] SASC 437; (2003) 143 A Crim R 531. The concept of impropriety in this context can only be elaborated over time and in the context of standards that I acknowledge may evolve. However, it would seem to me to necessarily involve conduct engaged in by the prosecution or persons closely associated with it, accompanied by an appreciation that that conduct was likely to materially compromise the operation of common law or statutory procedural rules designed to provide an accused with a fair trial."

24 It was not contended in this case that the quality of the evidence to be relied on by the Crown might make any resulting conviction unsafe or unsatisfactory. In my view it cannot be said that the acceptance of the plea of guilty to assault on the s 170 charge involved any impropriety, even if Ms Arnott was the principal offender.

25 For these reasons I concluded that I had no power to restrict the bases on which the Crown could put its case and that, if I did have such a power, it was inappropriate to exercise it.

26 It was also submitted to me that, if I concluded that there was no power to restrict the bases of criminal liability that could be relied upon by the Crown, and the only power was to make an order permanently staying proceedings on the second indictment, then I should make such an order. I decided not to do that because I considered that allowing the Crown to proceed with a trial on the second indictment would not involve any impropriety or abuse of process.