Tasmania v Davey (No 3) - [2018] TASSC 16

[2018] TASSC 16

COURT: SUPREME COURT OF TASMANIA

CITATION: *Tasmania v Davey (No 3)* [2018] TASSC 16

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

FILE NO: 146/2015
DELIVERED ON: 18 September 2017
DELIVERED AT: Hobart
HEARING DATES: 15 September 2017
JUDGMENT OF: Estcourt J

CATCHWORDS:

> Criminal Law – Procedure – Adjournment, stay of proceedings or order restraining proceedings – Abuse of process – In general – Where co-offender in joint criminal enterprise pleaded guilty to assault – Whether an abuse of process to indict remaining co-accused on a charge of committing an unlawful act intended to cause bodily harm acting in a joint criminal enterprise with offender convicted only of assault – State not permitted to rely on co-offender committing grievous bodily harm within indictment of remaining co-accused

Criminal Code Act (Tas), ss 3(1)(b)-(d), 184, 172 .
Aust Dig Criminal Law [3054]

REPRESENTATION:

Counsel :

State: J Shapiro
Accused M Davey: F Cangelosi
Accused M Arnott R Mainwaring
Accused D Davey: J Sawyer
Accused S Dale K Baumeler

Solicitors:

State: Director of Public Prosecutions

Judgment Number: [2018] TASSC 16
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Serial No 16/2018
File No 146/2015

STATE OF TASMANIA v MATTHEW JOHN DAVEY, MICHELLE LEE ARNOTT, DILLON ANTHONY DAVEY and SCOTT RAYMOND DALE (No 3)

REASONS FOR RULING ESTCOURT J

18 September 2017

1. Matthew John Davey, Michelle Lee Arnott, Dillon Anthony Davey and Scott Raymond Dale are jointly charged on an indictment dated 8 September 2016 with one count of committing an unlawful act intended to cause grievous bodily harm contrary to s 170 of the *Criminal Code* , and one count of assault by deprivation of liberty contrary to s 184 of the Code. The crimes are alleged to have occurred between 7 and 8 May 2015. Each accused pleaded not guilty to both counts, and the trial commenced on 4 September 2017. The accused, Arnott,

subsequently pleaded guilty to assault on both counts. Her pleas were accepted by the State and she was convicted and sentenced by Blow CJ on 14 September 2017. A jury has not as yet been sworn.

2. Before Ms Arnott pleaded guilty, the accused Matthew Davey, Dillon Davey and Scott Dale had each made applications for a separate trial.

3. For reasons related to the proposed use of the evidence of the video recorded records of interview by police of those accused, in combination with audio and visual recordings of the alleged attack upon the complainant, said to be recorded on the mobile telephone of the accused Dillon Davey, I granted those applications on 8 September 2017. I directed that the accused, Matthew Davey, be tried separately from any of his co-accused, other than the accused Arnott, and that the accused, Scott Dale, be tried separately from any of his co-accused, other than the accused Arnott. In doing so I observed that I saw no impediment to the accused, Dillon Davey, and the accused, Arnott, being jointly tried with each other.

4. It was after I made those directions pursuant to s 363 of the Code that, on 11 September 2017, the accused, Arnott, requested that the indictment be put to her again, and she thereupon pleaded guilty, as already noted.

5. On 15 September 2017 counsel for the State, Mr Shapiro, informed me that pursuant to s 350 of the Code the Crown would not proceed further on the indictment dated 8 September 2016. I was also informed that another indictment had been filed on 14 September 2017 jointly charging the accused Matthew Davey, Dillon Davey and Scott Dale with the same crimes as set out in the original indictment (with some minor omissions to the particulars of count 1 which are irrelevant for present purposes).

6. Whilst counsel for the State does not accept that the sole purpose of the new indictment and the nolle prosequi is to avoid my directions for separate trials, that, to my mind, is the only reasonable characterisation of the situation. It is true that Ms Arnott will now be called as a witness by the State to give evidence which, had it been available at the time of the applications for separate trials, would probably have resulted in those applications being refused, but the fact remains that on the original indictment separate trials have been directed and the new indictment is intended to avoid those directions.

7. I presently have before me, in effect, two applications made on behalf of the accused Matthew Davey by his counsel, Mr Cangelosi, and joined in by the two other accused men with their counsel adopting Mr Cangelosi's submissions. The first is an oral application to invoke the inherent jurisdiction of the Court to refuse to permit the entry of the nolle prosequi. The second is a written motion made pursuant to s 352 of the Code to quash the new indictment on the ground that it is calculated to prejudice or embarrass the accused Matthew Davey in his defence.

8. I do not doubt that the three accused men could be jointly indicted with the two counts in the new indictment. The conviction of Ms Arnott for assault on count 1 of the original indictment does not prevent the State from alleging that the three men committed the more serious crime of committing an unlawful act intended to cause bodily harm. It is a question of whether there is evidence to prove those charges, and I do not know of course, what evidence the complainant will give. Nor would it be safe to speculate as to that, even had the State not already given a notice pursuant to s 38 of the *Evidence Act* 2001 in respect of the

complainant's evidence (and that of Ms Arnott). What is to my mind problematic, however, is the basis upon which the State proposes to proceed upon a joint trial of count 1 of the new indictment with respect to the criminal responsibility of the accused, linked to that of Ms Arnott.

9. In this regard the State has delivered the following further and better particulars of the new indictment:

Criminal responsibility

10. Each of the accused is criminally responsible as they struck the complainant to her head and body, kicked her to the body, struck her to the head and body with a baseball bat, threatened to strike her with a baseball bat, threatened to strike her with a glass, threatened her with a hand held "blow torch," threatened to cut her with a knife and strangled her, at that time having the intention to either disable, maim, disfigure and/or do grievous bodily harm to the complainant. In addition:

> "1 Joint Criminal Enterprise / Acting in Concert – the Code, s 3(1)(a)
>
> Each accused was part of a joint criminal enterprise with one or more of each other and/or Michelle Arnott and/or persons unknown to commit the crime charged and the act or acts of one or more parties to the joint criminal enterprise amounted to the crime of committing an unlawful act intended to cause bodily harm.
>
> *Clarke v Tasmania* [2013] TASCCA 11
>
> 2 Aiding – the Code, s 3(1)(b)
>
> Each accused aided one or more of each other and/or Michelle Arnott and/or other persons unknown to commit the act or acts which amounted to the crime of committing an unlawful act intended to cause bodily harm.
>
> 3 Abetting – the Code, s 3(1)(c)
>
> Each accused abetted one or more of each other and/or Michelle Arnott and/or other persons unknown to commit the act or acts which amounted to the crime of committing an unlawful act intended to cause bodily harm.
>
> 4 Common Purpose – the Code s 4
>
> Each accused formed a common intention with one or more of each other and/or Michelle Arnott and/or persons unknown to commit the crime of assault.

In the prosecution of that unlawful common purpose the crime of committing an unlawful act intended to cause bodily harm was committed and the commission of that crime was a probable consequence of the prosecution of the unlawful common purpose.

5 Instigating – the Code, s 3(d)

The accused Matthew Davey instigated one or more of the other accused and/or Michelle Arnott to commit the act or acts which amounted to the crime of committing an unlawful act intended to cause bodily harm."

11. Whilst proceeding jointly against the three accused men purely on the basis that their criminal responsibility for the crime of committing an unlawful act intended to cause bodily harm contrary to s 170 of the Code, individually as a principal, or as a result of acting in concert with each other, would not, in my view, result in relevant unfairness. The same cannot be said when Ms Arnott's criminal conduct is relied upon, as is proposed by the further and better particulars, to establish a joint criminal enterprise between the accused men *and* Ms Arnott to commit the crime of committing an unlawful act intended to cause bodily harm, or to establish criminal responsibility in the three men for that crime on the basis that they aided, and/or abetted and/or instigated Ms Arnott to commit that crime

12. Counsel for the State in written submissions contended:

"2 An accused is not entitled to the benefit of another person's acquittal. In *R v Darby* (1982) 148 CLR 668 per the majority quoting Lord Shannon in *Prosecutions v Shannon* [1975] AC 717 said:

'… The only effect of the acquittal, in law, is that the accused can never again be brought before a criminal court and tried for the same offence. So far as the Crown is concerned, the accused is deemed, in law, to be innocent. His acquittal cannot, however, affect anyone but himself and indeed would not be admissible in evidence on behalf of or against anyone else.'

3 The circumstances in which Ms Arnott pleaded guilty to assault did not involve a finding that she was innocent of the more serious charge. (*Gilham v The Queen* (2012) 224 A Crim R 22 per the Court at [149] .)

4 The doctrine of issue estoppel is not applicable to criminal proceedings. (*Rogers v The Queen* (1994) 181 CLR 251 per Mason CJ, Deane and Gaudron JJ at 278). Even if it were to apply there has been no finding that Michelle Arnott is innocent of the more serious charge, which would be required for the crown to be estopped from proving her guilt on a subsequent trial under the doctrine. (*Rogers* ibi d per Deane and Gaudron JJ at 274; *Gilham* ibid.)

> 5 If based on the evidence admissible against an accused person a jury acting reasonably could convict the accused then there is no abuse of process.
>
> 6 There are many examples of situations where, due to the evidence admissible against a secondary party but not available on the trial of the principal, the secondary party has been convicted but the principal has been acquitted. This is '… readily explained in terms of the obligation of the jury to consider separately the guilt of the two accused on the basis only of the evidence admissible against each'. (*R v Darby* ibid per the majority at 677 .)
>
> 7 The acquittal of one party to a joint criminal enterprise (the Code, s 3) is not a bar to the prosecution of another party to the joint criminal enterprise. (*Osland v The Queen* (1998) 197 CLR 316 per McHugh J at [93] .)
>
> 8 The acquittal of one party to an unlawful common purpose [the Code, s 4] is not a bar to the prosecution of another party to the unlawful common purpose. (*R v Barlow* (1997) 188 CLR 1 per Brennan CJ Dawson and Toohey JJ at 14)."

13. I accept as trite the submission made on behalf of the State that if a jury, acting reasonably, could convict the accused on admissible evidence then there is no abuse of process. However, Mr Cangelosi contends in his written submissions that "the assertion" in the fresh indictment that each accused is directly liable for the crime of committing an unlawful act intended to cause bodily harm, or is "derivatively liable" via the commission of a physical act by another accused or another person, in circumstances where the State *does not intend to adduce evidence at trial that any of the accused physically performed the unlawful acts, or that any other person physically performed the unlawful acts*, is calculated to prejudice or embarrass each accused in his defence to the charge. But I do not know that that is the case. As I have already said, I do not know what the evidence will be. Counsel for the State has not informed me that such is its intention, and I cannot discern that from the position taken by the State on Ms Arnott's sentencing hearing as to the physical acts for which she was responsible. Indeed, as I understand it, the State will in fact allege that one or more of the accused committed physical acts with the requisite intention sufficient to prove the crime charged in count 1 (or, I bear in mind, an alternative crime pursuant to s 334A of the Code).

14. Mr Cangelosi further submits as follows:

> "5.6 Assuming that the Crown case develops *in accordance with the material disclosed to the applicant*, the applicant anticipates asking the Court at the close of the Crown case not to leave count 1 to the jury on the basis of liability otherwise than derivatively of the physical acts of Michelle Lee Arnott.
>
> 5.7 Nonetheless, it is not beyond possibility that either the complainant or Michelle Lee Arnott will, when called, give evidence capable of suggesting that

either the accused, the other defendants, or an unknown person, committed one of the physical acts relied upon as constituting the unlawful act intended to cause bodily harm.

5.8 It is also not beyond possibility that counsel for any of the other defendants may cross-examine a witness called by the Crown, or will give evidence that a physical act relied upon as constituting the unlawful act intended to cause bodily harm was committed by the application, by another defendant, or by an unknown person.

5.9 If this were to happen, then, no matter whether the evidence is subsequently recanted, there will be inconsistent evidence before the jury, one version of which, taken at its highest, may be capable of being accepted by a reasonable jury properly instructed as proving guilty beyond reasonable doubt. In such a case, a no-case submission would be most likely to fail.

5.10 It is prejudicial and embarrassing for the indictment to survive on the basis that there may be *an unexpected departure in the evidence that witnesses called by the Crown might give*, or on the basis that the other defendants may adduce evidence that establishes liability on the Crown case where the Crown case failed to do so." [My emphasis.]

15. Once again I cannot know, and I have not been told, that the evidence available to the State, at its highest, is as described by Mr Cangelosi. In fact, as I have already observed, it is my understanding that the State intends to endeavour to lead evidence beyond that anticipated by Mr Cangelosi, albeit perhaps by means of cross-examination of the complainant or Ms Arnott, assuming that leave to do so is given pursuant to s 38 of the *Evidence Act* .

16. It follows that I see no basis upon which, assuming it is not in any event too late to do so, to exercise the Court's undoubted inherent jurisdiction to refuse to permit the entry of a nolle prosequi pursuant to s 350 of the Code (see *R v YL* [2004] ACTSC 115 at [62]-[76]).

17. It also follows that I see no basis for quashing the new indictment for the reasons advanced on behalf of the accused. That, however, is not to say that Mr Cangelosi has not identified a significant problem with the manner in which the State proposes to approach the question of criminal responsibility on the trial of count 1 on the new indictment.

18. Leaving aside for one moment the legal basis for the State's approach to this question as reflected in the further and better particulars, 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 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) insofar 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 it 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.