COURT: SUPREME COURT OF TASMANIA

CITATION: *Tasmania v Jones* [2022] TASSC 24

PARTIES: STATE OF TASMANIA
v
JONES, Scott Andrew Francis
A
JONES, Brendan Lee

FILE NOS: 425/2013, 354/2014, 71/2017

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CATCHWORDS:

Criminal Law – Procedure – Information, indictment or presentment – Joinder – Joint or separate trial – Embarrassment or prejudice – *Giretti* charges of drug trafficking – Application for separate trials.
Criminal Code (Tas), s 363.
Aust Dig Criminal Law [3079]

Criminal Law – Evidence – Judicial discretion to admit or exclude evidence – Prejudicial evidence – Generally – *Giretti* charges of drug trafficking – Probative value of evidence against one co-accused is not outweighed by the danger of unfair prejudice to the other co-accused and presentation of that evidence does not create a significant risk of injustice or an unfair trial.
Evidence Act 2001 (Tas), s 137.
R v Lao and Nguyen [2002] VSCA 157, 5 VR 129, *R v Holden* [2001] VSCA 63, 120 A Crim R 240, applied.
Aust Dig Criminal Law [2680]

REPRESENTATION:

***Counsel*:**

Crown: A Shand
Accused A: G Richardson
Accused Brendan Jones: F Cangelosi
Accused Scott Jones: C Rainbird

Solicitors:

Crown: Director of Public Prosecutions
Accused A: G A Richardson
Accused Scott Jones: Craig Rainbird Barrister & Solicitors

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File Nos 425/2013
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71/2017

STATE OF TASMANIA v SCOTT ANDREW FRANCIS JONES, A and BRENDAN LEE JONES

REASONS FOR RULING **BRETT J**
6 June 2019

1 The indictment charges the accused as follows:

Count 1 A and Scott Jones (Scott) are charged with trafficking in morphine between 9 September 2009 and 9 September 2013.

Count 2 Scott is charged with trafficking in oxycodone between 9 September 2009 and 4 December 2013.

Count 3 Scott and Brendan Jones (Brendan) are jointly charged with trafficking in cannabis between 1 June 2013 and 9 September 2013.

2 Brendan is Scott's son.

3 A applies for an order that the trial against her in respect of count 1 be conducted separately from the trial against the other accused on the indictment, which would include the trial against Scott in respect of that count. The power to make that order arises pursuant to s 363 of the *Criminal Code*. Brendan has applied for a similar order in respect of count 3.

The law

4 The jurisdiction under s 363 arises "during the trial". Each accused has been called upon to plead to the indictment, and each has entered a plea of not guilty to the relevant count or counts. Accordingly, the trial has commenced: s 351 of the Code. I am authorised to determine the applications by A and Brendan before a jury is sworn, by virtue of the provisions of s 361A of the Code.

5 The legal principles applicable to an application for separate trials are well established. The question of whether there should be a separate trial is a matter of discretion for the trial judge. The principles applicable to the exercise of this discretion have been stated and accepted in numerous cases, including a number of Tasmanian decisions. See *Leaman v The Queen* [1987] TASSC 21 (CCA Tas) (1987) 28 A Crim R 104; *R v Courtney, Lomas and Duggan* [1998] TASSC 127; *R v Stocks and Thorley* [1999] TASSC 44; *Tasmania v Smart* [2014] TASSC 52. Those principles can be summarised as follows:

- The prima facie position is that where it is alleged that accused persons were engaged in a joint or common enterprise, there should be a joint trial.
- However, the prima facie position is subject to the principle that no accused person should be deprived of a fair trial. Accordingly if, in the circumstances of the case, a joint trial would cause injustice to the point of denial of a fair trial to an accused, then the trial should be held separately.
- There is no limit on the circumstances which might constitute injustice. However, some typical examples are:
    - Where evidence will be admitted against one accused which is not admissible against and/or will cause unfair prejudice to other accused.

- Where there is a risk of guilt by association, or a risk of some other improper reasoning on the part of the jury, which might result in unfair prejudice, which is not reasonably capable of being obviated by appropriate direction.
- Where there are practical difficulties arising as a result of a joint trial, which would render the trial unfair to one or more accused.

The evidence

6 The parties agree that I should determine these applications on the basis of the material contained in the Crown papers. The prosecution case is that for the whole period encompassed in the indictment, 9 September 2009 to 4 December 2013, Scott carried on the business of trafficking in illicit drugs in the sense described in *R v Giretti* (1986) 24 A Crim R 112. It is alleged that he continuously sold various drugs, including morphine (count 1) and oxycodone (count 2) throughout the entire period, and cannabis during the period specified in count 3. The drugs were obtained by him from a number of sources, including the regular supply by A of MS Contin (morphine) tablets. The evidence available to prove these allegations against Scott can be summarised as follows:

(a) The evidence of Damian Pratt. Mr Pratt's evidence will be that he sold drugs on behalf of Scott during the relevant four year period. The drugs sold by him were opioid drugs in tablet form, including both morphine and oxycodone. The detail of his evidence is consistent with Scott conducting a business in trafficking such drugs during that period. His evidence also relates to the involvement of the other accused in Scott's drug selling business.

(b) A number of witnesses attest to purchasing illicit drugs from Scott on a repetitive basis over part or all of the relevant period. The witnesses variously identify the drugs as OxyContin (oxycodone), morphine and kapanol.

(c) There is a considerable volume of telephone intercept evidence, which was acquired under warrant. Despite its volume, it only relates to a relatively short period of time. That evidence is to the following effect:

(i) Volume 2 of the Crown papers contains transcripts of telephone conversations intercepted and recorded between 6 July 2013 and 3 August 2013. The majority of the conversations are between Brendan and his then girlfriend, recorded while Brendan was incarcerated in the Ashley Youth Detention Centre. There are also conversations which involve Scott and A. The prosecution asserts that the probative value of this material relates to count 3, the trafficking of cannabis by Scott and Brendan. There is one conversation on 24 July 2013 between Scott and A which may have some probative value in respect of A's involvement in Scott's drug trafficking business.

(ii) Volume 3 contains transcripts of telephone conversations intercepted by police between 20 June and 14 August 2013. There are numerous conversations between Scott and unidentified callers, discussing the purchase of illicit drugs of various varieties. Some of the drugs identified during the course of these conversations include "MS Contin", "Kapanol" and "greys". Evidence from a police officer with experience in the sale and use of illicit drugs permits the conclusion that these are references to morphine in tablet form.

A

7 The prosecution case in respect of count 1 is that over the four year period alleged in the indictment, Scott and A were engaged jointly in the business of selling morphine. A's specific involvement was the continuous supply to Scott of morphine in tablet form, in particular MS Contin. The drugs were obtained by her on prescription. The prosecution contention is that she supplied the drugs to Scott knowing that he would sell or arrange for the sale of the drugs in the course of the ongoing drug selling business.

8 The specific evidence relevant to A's involvement in this business, according to the Crown papers, appears to be as follows:

(a) The prosecution case against A is heavily dependent on the evidence of Mr Pratt. His evidence in relation to A is that on a number of occasions over the four year period, he was present when A handed to Scott an envelope containing 30 milligram morphine tablets. The envelope typically had writing on the front, which was her name and what appeared to be "doctor's details". Mr Pratt was then given the tablets to sell. The arrangement was that he would keep A's tablets separate from other tablets being sold on behalf of Scott and his brother Gary, so that the proceeds of sale could be separately identified. He would then give the proceeds of sale of these tablets to Scott, who would give them to A. Mr Pratt asserts that he was present "nearly every time" that Scott handed the money to A. He suggests that this happened at least once per week, if not more, over the entire four year period. Mr Pratt gives some other general evidence concerning the relationship between Scott and A, including A's knowledge of Scott's acquisition of stolen property and her purchase of some of that property from Scott. According to Mr Pratt, this property had been obtained by Scott in exchange for illicit drugs, and was part of the overall drug trafficking business.

(b) According to the prosecution, a telephone conversation between Scott and A intercepted on 19 July 2013 is capable of interpretation as a conversation between them concerning action which Scott intended to take as a result of police being in the vicinity of his premises. He believed that the police were conducting surveillance of him. The prosecution asserts that he and A discussed the temporary cessation of drug selling activities because of the surveillance by police. This evidence is said by the prosecution to be probative of A's knowledge of, and involvement in, Scott's drug selling activities.

(c) The specific reference to MS Contin during some of the telephone conversations between Scott and potential buyers is also asserted to be directly relevant to the case against A. It provides some evidence which is consistent with the sale of the tablets supplied by A to Scott.

9 Mr Richardson, on behalf of A, submits that A should be tried separately from Scott for the following reasons:

(a) He objects to the admissibility of any evidence on A's trial which does not directly relate to her involvement in drug selling activities. Mr Richardson submits that the only admissible evidence against A is the testimony of Damian Pratt, the single telephone conversation of 19 July 2013 referred to above, and any telephone conversations between Scott and potential buyers which expressly or by clear implication refer to the sale of morphine. He submits that the balance of the evidence relevant to Scott's drug trafficking activities is not admissible on the case against A because count 1 relates only to the trafficking in morphine, whereas the other counts relate to the trafficking of other drugs. This is not a case where the allegation is framed on the basis that there was one drug trafficking crime which involved several drugs. Further, Mr Richardson submits that even if the evidence is technically admissible against A, its probative value is so limited, and the risk of prejudice so high, that the evidence ought be excluded pursuant to s 137 of the *Evidence Act* 2001.

(b) It is submitted that there is a real risk that the jury will be overwhelmed by the evidence of drug trafficking on the part of Scott, that this will unfairly prejudice A, and she will thereby be deprived of a fair trial. This risk is heightened by the relationship between A and Scott. All of this leads to a risk that the jury will find guilt by association, rather than conducting the necessary intellectual exercise of discriminating between the evidence admissible against each accused.

(c) Finally, Mr Richardson submits that the volume of material, in particular the telephone intercept material, will result in a joint trial, which will take some weeks. A separate trial against A would, in his submission, be expected to last only a couple of days. Mr Richardson

submits that it is unfair to expect A to meet the expense of a lengthy trial in circumstances where the evidence against her is extremely limited.

10 The force of Mr Richardson's submissions depends heavily, in my view, on the admissibility and probative value, in respect of the case against A, of the telephone intercept evidence, the majority of which does not directly involve A or expressly relate to the sale of morphine. The prosecution contends that this evidence is admissible against A because it establishes and demonstrates the nature of the business of which the prosecution contends she is a part. It adds a crucial element to the direct evidence concerning her provision of the tablets to Scott, that is, that she provided those tablets to him, not just once or twice, but on a continuous basis and with an understanding of the manner in which the tablets would be sold. In particular, the prosecution contends that it would be open to the jury to accept that A understood the nature and extent of Scott's overall drug trafficking business and was supplying the morphine tablets as part of her role in that business. This is relevant to the jury's assessment of whether the supply by her to Scott of morphine tablets amounts to trafficking, and, further, would be relevant to the determination by the trial judge of the factual basis of sentencing in the event of a guilty verdict.

11 In *R v Lao and Nguyn* [2002] VSCA 157, 5 VR 129, the Court of Appeal of Victoria considered the admissibility of evidence of the wider drug trafficking business in the case of two accused, each of whom had completely separate and relatively small roles in respect of that business. A single count charged them jointly with the crime of trafficking. There was no suggestion that there was joint responsibility for particular acts performed by each of them. The allegation which underpinned the charge was that they were each involved in a joint enterprise with each other, and with others who were not the subject of the charge, in respect of the business. An issue on the appeal concerned the admissibility of evidence of acts and declarations of other alleged participants in the drug trafficking business, as incriminatory of each appellant. At least two members of the Court were satisfied that, notwithstanding the separate roles of each appellant in the business, their association with it provided "a sufficient basis for a finding of guilt of a *Giretti* type trafficking against either or both on the same count": Vincent JA, at [52]. In relation to the admissibility of evidence of the acts and declarations made by others, Eames JA, who was in the majority on this question, said at [108]:

> "[108] The question of the use which might have been made by the jury of the statements and acts of the other parties to the trafficking raises the same issues as those raised on a count of conspiracy. The evidence of acts and words in furtherance of the common purpose which constitutes the crime may be used for all purposes where the judge is satisfied that there was reasonable independent evidence of the participation of the accused in the offence, that is, of the combination or pre-concert for the purpose of the offence. Therefore, if the acts and declarations of the co-accused assert the participation of the accused in the offence the jury may have regard to them for that purpose. On the other hand, if the judge was to conclude that there was no reasonable independent evidence of the accused's participation, amounting to a prima facie casehttp://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2002/157.html - fn87, apart from that contained in the disputed declarations of the co-accused or other offenders, the declarations of those persons could not be used for that purpose, but they may, however, still be relevant and admissible for the purpose of providing circumstantial evidence on which the jury might draw the inference that there was indeed a trafficking enterprise being undertaken. The jury would be obliged to be directed, however, that in those circumstances they could not use the declarations as proof of the participation of the accused (insofar as they constituted an assertion of the participation of the accused in the offence). That restriction would be removed once the judge ruled that there was sufficient evidence of pre-concert to allow the evidence to be used for the further purpose of proving that the accused persons were participants in the joint enterprise/common purpose." [Footnotes omitted.]

12 These comments emphasise the close analogy between a charge of conspiracy and a claim of *Giretti* style trafficking, particularly in respect of the admissibility of evidence of acts or words of

others performed in the furtherance of the conspiracy or business. It is asserted in these comments, consistently with other authority, that there are two bases upon which the acts and declarations of another in respect of a drug trafficking business can be relevant to, and hence admissible on, the case against a person alleged to be a participant in the business. They are:

(a) as circumstantial evidence of the existence of the drug trafficking business;

(b) as evidence of the fact and existence of the accused's participation in that business.

13 The proof of the existence and nature of the drug trafficking business is relevant to an essential element of the charge against A. The prosecution case is not just that she supplied morphine tablets to Scott; it is that she did so with knowledge of, and as a participant in, his wider drug selling activities which included, in particular, the trafficking of morphine. It is this joint activity that is alleged to constitute the trafficking of which she is guilty. It is necessary for the prosecution to prove that she provided the tablets to Scott, at the very least in the knowledge that they would be sold by him. The prosecution case is that she had this knowledge in the context of her participation in the wider business. The prosecution is entitled to prove this if it can. The extent of A's participation in the drug trafficking business would, of course, also be relevant to the factual basis of sentencing in the event of a finding of guilt.

14 A's knowledge of Scott's wider drug trafficking activities is proved in part by some of the telephone conversations referred to above. It would be open to the jury, in my view, to conclude that A was aware of Scott's wider activities, and the existence of this knowledge is directly relevant to her intention at the time that she supplied the drugs to him. This is not a case where the evidence of her involvement consists of express declarations made by others out of her presence. It is a circumstantial case which relies on "strands of the cable" reasoning. That circumstantial evidence includes the true nature and extent of the overall business. Evidence which establishes such is therefore admissible in the case against A, notwithstanding that it relates to activity or statements with respect to which she was not directly involved, or which do not expressly refer to her.

15 One of Mr Richardson's points is that there is a risk that the jury will assume that the many conversations between Scott and potential buyers concerning illicit drugs, relates to morphine, when there is no satisfactory basis in the evidence to support an inference to that effect. This is a significant component of his submission that there is a risk of prejudice to A arising from the overwhelming nature of the case against Scott.

16 In *R v Holden* [2001] VSCA 63, 120 A Crim R 240, the Court of Appeal considered a similar question in similar circumstances. However, in that case, it was the principal operator of the business who argued that evidence of taped conversations relating to his sale of drugs, ought to have been excluded because they either referred to drugs other than the one relevant to the charge against him, or the identity of the drug was uncertain and, at the very least, could not be identified as the drug relevant to the charge. It was submitted that the evidence was irrelevant and hence inadmissible, and in any event ought to have been excluded on the basis that its probative value did not outweigh its prejudicial effect. Both contentions were rejected by the Court. It was held that the evidence was relevant to establish the relationship between the appellant and the person who supplied him with the specific drug relevant to the charge, and, further, to establish the nature and extent of the trafficking activity. The Court found that the probative value of this evidence outweighed any risk of unfair prejudice, and any such risk was in any event significantly obviated by careful directions about the proper use to be made of the evidence.

17 In my view, a similar conclusion is warranted in this case. In fact, I consider that the danger of unfair prejudice to A arising from conversations which do not refer to the sale of morphine, is significantly less than that which arose in *Holden*. In *Holden,* the prejudice was asserted to arise from the fact that the jury heard evidence that the accused was trafficking in illicit drugs which were not the

subject of the charge against him. That feature is not applicable in A's case. In discussion during the course of submissions, I raised the suggestion that it may well have been fairer and easier to simply charge all three accused with trafficking in all of the drugs being sold by Scott. However, Ms Shand submitted that it was, in fact, fairer to A, and Brendan, to charge them only with trafficking in the drugs to which their particular involvement in the overall business related. I accept this submission. A single charge would increase the danger of finding guilt by association. I do not regard it as a difficult intellectual exercise for the jury to focus, in the case against A, on the extent of her involvement in Scott's overall business, limited by the charge, to the question of morphine. In my view, the contrast between the evidence of her particular involvement and Scott's wider activities will assist the jury in identification of the precise extent of her involvement in the joint activity. However, the existence of the nature of the overall business remains relevant to the jury's assessment of A's conduct because, on the prosecution case, she was aware of that wider business and aware that it was through that medium that the drugs being supplied by her to Scott would be sold to others.

18 It follows that the evidence of Scott's wider drug selling activities, which will be adduced by the telephone intercept evidence, is admissible on the case against A. I consider that it has considerable probative value, and that probative value is not outweighed by the danger of unfair prejudice to A. I am also satisfied that the presentation of that evidence against A in a joint trial with Scott on count 1, and in a trial which includes the other counts against him on the indictment, does not create a significant risk of injustice or an unfair trial for A. In my view, the prima facie position should apply. The application by A for a separate trial is refused.

Brendan

19 The conduct alleged against Brendan is significantly more confined, and different in nature, to that alleged against A. Brendan is alleged to have trafficked jointly with Scott in respect of cannabis only, and for a period slightly in excess of three months. There is a practical difference between the nature of cannabis and the drugs relevant to counts 1 and 2. The latter are drugs sold in pill form, whereas cannabis is typically sold as the dried plant according to weight. Further, Brendan's role was as the seller of the drug, not the supplier. The prosecution case suggests this was a specific enterprise which Scott conducted with his son Brendan for the relatively short period alleged in the indictment. It has the nature of a discrete enterprise, separate to the wider drug trafficking business operated by Scott over the full four year period relevant to counts 1 and 2.

20 The discrete nature of the allegations relating to count 3 is consistent with concessions made by Ms Shand during the course of argument. In particular, Ms Shand suggested that the entirety of the intercept evidence contained in volume 2 would be relevant to count 3, but would probably not be adduced in respect of counts 1 and 2 if count 3 was severed from the indictment. In that event, Ms Shand also said it would be unlikely that the prosecution would adduce much, if any, evidence concerning Scott's wider drug trafficking activities on the trial of count 3, notwithstanding that that evidence may have some relevance to that charge.

21 These concessions and practical consequences are significant to the question of how the trial of count 3 is best dealt with, in my view. Mr Cangelosi's application was for Brendan to receive a separate trial from Scott in respect of count 3. I am not prepared to accede to that application. The application of principle discussed already in respect of A's application leads to the conclusion that the evidence against Scott in respect of count 3 will also be admissible against Brendan. The prima facie position should apply. Scott and Brendan will be tried jointly in respect of count 3.

22 However, I think that there is a strong argument to support the severance of count 3 from counts 1 and 2. As already noted, while some evidence relating to Scott's wider activities may be duplicated on the respective trials, severance would have the practical consequence that the majority of the telephone intercept evidence contained in volume 2 would not be led on the trial relating to

counts 1 and 2, and an amount of evidence relevant to Scott's earlier and wider drug trafficking activity would not be led on the trial relevant to count 3. Of course, the prosecutor could not be held to excluding that material completely as some of it may be relevant to establish the nature of the drug trafficking activity which is the subject of count 3, for the same reason as that explained above in relation to the case against A. However, most of the material relating to Scott's wider drug trafficking activities would be of only marginal relevance to the charge in count 3. The question of the admissibility of any particular piece of evidence can be determined at a later time. The practical effect, however, is likely to be that the length of each trial will be significantly reduced.

23 Further, a reduction in the length of the trial against A obviates to some extent the practical concerns raised by Mr Richardson. I do not regard this as a decisive consideration in respect of the application by A, but it does provide some support for the severance of count 3. However, as things presently stand, no party has made an application for the severance of this count. Accordingly, before making such order, I will discuss the matter further with counsel.