S V THE QUEEN

RICHARD HOOKER*

Difficulties commonly arise for the Crown in the prosecution of assault cases, particularly of a sexual nature, where the complainant is unable to specify particular acts of the alleged assault. Such difficulties are inherent initially in the drafting of the indictment, and subsequently in conducting the case at trial. In *S v The Queen*[1] ("*S*"), a majority of the High Court identified these problems and ruled that they cannot justify unfairness to an accused or uncertainty in the criminal trial process.

The applicant had been charged with three counts of incest with his daughter. Each count alleged one act of carnal knowledge on a date unknown within a specified twelve month period. These periods were between 1 January 1980 and 31 December 1980, 1 January 1981 and 31 December 1981, and 8 November 1981 and 8 November 1982. Thus the periods specified in the second and third counts gave rise to an overlap of nearly two months.[2] The trial judge refused an application by defence counsel for particulars of each of the three counts, and did not require the prosecution to nominate specific acts as the subjects of the counts.

Evidence of a general nature was given by the complainant. Apart from evidence as to two specific acts of sexual intercourse, neither of which was linked to any one of the stipulated periods, it was claimed that intercourse took place over the two years prior to the complainant leaving home at age 17. It was on 8 November 1982 that the complainant turned 17. The applicant was convicted on all three counts; an appeal to the Court of Criminal Appeal of Western Australia (Justices Brinsden and Smith; Justice Kennedy dissenting) was dismissed.[3]

* B Juris (Hons)(UWA).

1. (1989) 168 CLR 266.
2. Only Dawson J made mention of this overlap creating embarrassment to the applicant ibid, 274-275. Gaudron and McHugh JJ specifically left the problem aside ibid, 287.
3. (1988) 39 A Crim R 288.

The four judges comprising the majority in the High Court, Justices Dawson, Toohey, Gaudron and McHugh, the latter two in a joint judgment, were in substantial agreement in their reasons for granting special leave to appeal, allowing the appeal and quashing the convictions. Their Honours found that whilst the indictment in itself was not objectionable, the manner in which the trial was conducted and the evidence led gave rise to ambiguity (a "latent ambiguity"[4] or "latent duplicity"[5]), prejudice to the accused and, consequently, a miscarriage of justice. Central to these findings were notions of fairness to an accused person, "the orderly administration of criminal justice"[6] and the reception and use of evidence as to the relationship between the parties.

Justice Brennan, dissenting, held that any suggestion of prejudice was artificial, having regard to the limited utility that the giving of particulars would have provided. For his Honour, the real choice the jury had to make was as to whether or not the alleged series of incestuous acts had occurred. Since nothing in the evidence could have caused the jurors to distinguish between one act of the series and another, Justice Brennan found that the conduct of the trial had given rise to no substantial miscarriage of justice and would have dismissed the appeal.[7]

However Justice Brennan agreed that special leave to appeal should have been granted for the reason that the scope of the rule in *Johnson v Miller*[8] was a question of some importance. Indeed, the rulings of the majority judges rested in no small part on an application of that earlier High Court decision. *Johnson v Miller* concerned a situation where the prosecution charged the applicant with just one offence, but intended to call evidence of some thirty possible offences. The High Court held that the prosecution's failure to cure a latent ambiguity by identifying the one transaction out of the number upon which it relied meant that the complaint must fail. Although a summary offence was involved, the principles enunciated by, in particular, Justice Dixon[9] "are of general application".[10] The complaint (and, in *S*, the indictment) was "equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the

4. Supra n 1 Brennan J (dissenting), 269; Dawson J, 274.
5. Ibid Gaudron and McHugh JJ, 284.
6. Ibid.
7. Ibid, 271-272. Compare with Toohey J, 282.
8. (1937) 59 CLR 467.
9. Ibid, 489.
10. Supra n 1 Dawson J, 277.

complaint".[11] Such a difficulty does not require the prosecution to be specific as to the date of each occasion on which it relies. The prosecution should, however, identify each occasion which it alleges gives rise to the offences charged. This should be done as soon as the situation described by Justice Dixon in *Johnson v Miller* (in the quotation cited above) becomes apparent.[12]

Not only did this situation occur in *S*, but the trial judge failed to adequately inform the jury of the problems inherent in the evidence. The situation, as it emerged, caused prejudice and embarrassment to the applicant for several reasons.

Firstly, the applicant did not know with any certainty the case he had to meet. Justices Toohey,[13] Gaudron and McHugh[14] referred to a number of cases in support of this proposition.[15] Because of the uncertainty facing the applicant, he was reduced to a general denial in pleading his defence. Thus not only was he precluded from raising a specific defence, such as one of alibi,[16] he was also effectively required to defend himself in respect of each occasion where an offence might have been committed. Given the general nature of the complainant's evidence, such occasions were practically impossible to identify.

Justices Gaudron and McHugh identified a further source of prejudice: the applicant was denied an opportunity to test the credit of the complainant by reference to such surrounding circumstances as would be apparent if the offences were particularised.[17] For their Honours, the avoidance of prejudice

11. Supra n 8, 489.
12. Supra n 1 Toohey J, 282.
13. Ibid, 281.
14. Ibid, 285.
15. Including *R v Robe* (1735) 2 Str 999; 93 ER 993; *Davy v Baker* (1769) 4 Burr 2471; 98 ER 295; *Young v The King* (1789) 3 TR 98; 100 ER 475; *R v Hollond* (1794) 5 TR 607; 101 ER 340; *Cotterill v Lempriere* (1890) 24 QBD 634.
16. In the Court of Criminal Appeal of Western Australia, Brinsden J, with whom Smith J agreed, held that the applicant was not prejudiced in his defence because he was not deprived of a real opportunity to call alibi evidence: supra n 3, 291-292. However Gaudron and McHugh JJ stated that: "The question of prejudice goes somewhat deeper than the question whether there was an effective denial of an opportunity to call alibi evidence.": supra n 1, 286.
17. Supra n 1, 286. A good example of a situation where the offences were sufficiently particularised arose in *Butun v The Queen* (unreported) Supreme Court of Western Australia 15 February 1991 no 191 of 1990. In that case the credit of the complainant was tested at trial by reference to the sort of "surrounding circumstances" envisaged by Gaudron and McHugh JJ, which included the precise location of the alleged offences (eg in the shower, in bed); what the parties had been doing at the time (eg returning from the beach, reading a story); a certain song on the radio; the fact that it was raining. The appeal in *Butun v The Queen* was allowed on other grounds.

is the main factor to be borne in mind in seeking to eliminate uncertainty as to precisely what is charged.

Other important considerations, coming under the broad rubric of "the orderly administration of criminal justice", were also identified. The Court must be aware of precisely which charges are being entertained so as to ensure that evidence is properly admitted, to correctly instruct the jury as to the law to be applied and, in the event of a conviction, to order an appropriate punishment. In addition, the record must reflect each offence for which there has been a conviction or acquittal for the purposes of the rule of double jeopardy.[18]

All five members of the High Court rejected the argument that, on the facts of this case, the prejudice accruing to the applicant extended to the difficulty of pleading a defence of autrefois convict or autrefois acquit pursuant to section 17 of the Western Australian Criminal Code should he be later charged with an offence concerning an act of intercourse occurring within one of the relevant periods. Section 17 covers the possibility of alternative verdicts and not the facts of *S*.[19] The existing ambiguity would have remained for any subsequent proceedings unless appropriately corrected by particularisation.

A distinct problem arose in the way the evidence of the charges was left to the jury. Because the complainant testified as to frequent acts of sexual intercourse, the jury may have concluded, with no specific act in mind, that one act of intercourse "must have" been committed in each of the three periods. Theoretically, different jury members may have contemplated different acts as constituting the offences. But as Justice Dawson pointed out, there were no means to identify any specific occasion. To reach a verdict with no particular acts in mind was tantamount to convicting the applicant upon the basis of a general disposition or propensity to commit offences of the kind charged.[20] For Justice Dawson, this point provided a link with the issue of similar fact, or relationship evidence.

A string of High Court cases in the last 13 years has dealt with similar fact evidence in a variety of scenarios. Judgments in *Harriman v The Queen*[21] have reinforced the view that evidence which bears on the relationship between two parties (most commonly an accused person and a complainant) may have a particularly high degree of relevance and should best be viewed

18. Ibid, 284.
19. Ibid Dawson J, 276-277. See generally *O'Halloran v O'Byrne* [1974] WAR 45.
20. Supra n 1, 276.
21. (1989) 167 CLR 590 Dawson J, 597-601; McHugh J, 630-631.

as a sub-category of similar fact evidence, perhaps to be termed "relationship evidence". However the true nature of the relationship can only be discerned in the context of identified occasions on which offences are alleged to have taken place. Thus the failure of the prosecution in *S* to isolate the acts charged rendered the testimony of the complainant of no greater relevance than mere propensity evidence.[22]

Ultimately, Justices Dawson[23] and Toohey[24] regarded the proceedings at trial as "fundamentally flawed", applying *Wilde v The Queen*.[25] Justices Gaudron and McHugh were unpersuaded that there was no substantial miscarriage of justice for the reason that, even if the acts charged had been properly identified, it was impossible to say that the verdicts of guilty "would plainly have been the same".[26] The fact that the Crown may have experienced difficulties in particularising or identifying the offences charged was of little moment. "An accused is not to be prejudiced in his defence by the inability of the prosecution to observe the rules of procedural fairness."[27]

22. Supra n 1 Dawson J, 275-276; Toohey J, 279-280. Gaudron and McHugh JJ found it unnecessary to deal conclusively with this point, 287.
23. Ibid, 278.
24. Ibid, 282-283.
25. (1988) 164 CLR 365.
26. Supra n 1, 288.
27. Ibid Dawson J, 275. For a straightforward application of *S v The Queen* by the Court of Criminal Appeal of Queensland to a case involving assault occasioning bodily harm, see *Morrow and Flynn v The Queen* (1990) 48 A Crim R 232. The insertion of s 229B (no 17 of 1989) into the Criminal Code 1899-1990 (Qld) was a legislative response to difficulties perceived by the Crown.