ONE ACCUSED'S EVIDENCE OF ANOTHER'S CRIMINAL DISPOSITION

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[*This article examines the introduction of evidence by one accused of the criminal disposition of another in a joint trial. Often such evidence is used by an accused to say that he did not commit the offence, the other accused did. The evidence is also introduced to show duress.*

The article examines the relevance of such evidence and its justification. Then it shows how the evidence is used in practice and what the appeal courts say about it. The next part examines the different modes of such evidence and their different effects. The last part examines the judge's discretion to exclude such evidence in the setting of the need to conduct a fair trial and direct a jury properly.]

I INTRODUCTION

In a trial of more than one accused the rule is that there are as many trials being conducted as there are accused. In a trial of say two accused the prosecution will typically lead evidence implicating both, and other evidence which implicates each. The defences of each are separate. So generally where one accused introduces evidence showing the criminal disposition of the other, that evidence is relevant only to the case of the first accused. It does not bear on the prosecution case for or against the other.

One of the most frequent ways in which the criminal disposition of an accused will be introduced in evidence will occur when each accused denies being involved in any criminal activity but says the other was. The other way in which such disposition is used is to show duress, that is that one accused forced the other to perform the act with which they are both charged.

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II RELEVANCE

General principles of relevance never depend on some form of mathematical calculation. The test for relevance is 'logic and experience'.[1] That is the logic and experience of the judge. In *Matthews*, Schreiner JA said:

> Relevancy is based on a blend of logic and experience lying outside the law. The law starts with this practical or commonsense relevancy and then adds material to it or, more commonly, excludes material from it, the resultant being what is legally relevant and therefore admissible.[2]

Evidence of an accused's propensity for wrongdoing is often excluded when the prosecution seeks its introduction. That is not because the evidence lacks relevance. Dawson J summed up the position in his opening remarks in *Harriman*:

> When a person is charged with a criminal offence, evidence is ordinarily inadmissible that he has on other occasions been guilty of behaviour indicating a criminal disposition. This is not because the evidence is irrelevant. On the contrary, it is excluded because a jury is likely to regard it as proving too much and is for that reason likely to proceed on prejudice rather than proof.[3]

III JUSTIFICATION FOR SUCH EVIDENCE OF BAD CHARACTER

The justification for one accused adducing evidence of the bad character or criminal propensity of another is that no accused can be stopped from leading evidence relevant to a defence. So it was that Mr McKenzie sought to introduce such evidence to show that he was coerced to play a small part in the crime because he was afraid of Mr Gibb who was a violent man.[4]

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[1] *Director of Public Prosecutions v Kilbourne* [1973] AC 729, 756 (Lord Simon); *Hoch v The Queen* (1988) 165 CLR 292, 297 (Mason CJ, Wilson and Gaudron JJ).

[2] *R v Matthews* [1960] 1 SA 752, 758 (Appellate Division). Approved (but wrongly cited): *R v Harmer* (1985) 28 A Crim R 35, 41; *R v Fraser* (1995) 65 SASR 260, 267.

[3] *Harriman v The Queen* (1989) 167 CLR 590, 597.

[4] *R v Gibb and McKenzie* [1983] 2 VR 155.

The entitlement of an accused to lead such evidence against a co-accused is well entrenched as relevant. As the court said in *Lowery and King*:

> It is one thing to say that it is unjust or unfair for the Crown to put a person in danger of conviction by leading such evidence against him. It is, however, a very different thing to say that he is to be restricted in defending himself by excluding such evidence when it tends to rebut his guilt or to prove his innocence.[5]

Hence the common law position is that evidence by one accused of the wrong behaviour of the other accused is prima facie relevant. The *Uniform Evidence Acts* section 101(2) bear only on tendency evidence 'adduced by the prosecution'. Further, by section 111(1) the tendency rule does not apply to evidence 'of an opinion about the defendant adduced by another defendant'.[6] Thus because such evidence is relevant it is admissible,[7] or more correctly, not inadmissible. [8]

The leading of such evidence includes the cross-examination of prosecution witnesses.[9] A judge should not prevent the leading of such evidence other than in the rarest of cases,[10] nor confine or prevent cross-examination designed for the same purpose.[11]

A judge may exclude prosecution evidence against one accused because it is too prejudicial. But the other accused can compel its admission because it advances that other accused's defence.[12]

IV THE CUT THROAT DEFENCE

Where there are two accused and each has a defence at odds with the other, one accused can lead evidence of the prior convictions of the other to show that the first accused's version of events is the likely one.[13]

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[5] *R v Lowery and King (No 3*) [1972] VR 939, 947 (CCA) approved *Lowery v The Queen* [1974] AC 85, 102 (PC).
[6] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas).
[7] *Uniform Evidence Acts* s 56(1).
[8] *Papaskomas v The Queen* (1999) 196 CLR 297, 306 [21]; *Smith v The Queen* (2001) 206 CLR 650, 653 [6].
[9] *R v Miller* (1952) 36 Cr App R 169 (ruling of Devlin J).
[10] *R v Darrington and McGauley* [1980] VR 353 (CCA).
[11] *R v Gibb and McKenzie* [1983] 2 VR 155, 170-171 (CCA); *R v O'Boyle* (1991) 92 Cr App R 202; *R v Douglass* (1989) 89 Cr App R 264.
[12] *Question of Law Reserved* (1998) 70 SASR 555.

It often happens in a joint trial that each accused says: 'I am not the offender, the co-accused is.' That form of defence has been called cut throat. The expression may come from *Turner*.[14] It was also used in *Varley*: '…this was a case where two experienced criminals metaphorically cut each other's throats in the course of their respective defences.'[15] It is certainly still in use in England.[16] Whatever its origins, courts in Australia have taken to the expression.[17] A good example of each accused blaming the other was *Bannon*.[18] Two accused were convicted of the stabbing murder of two victims. The prosecution was unable to say which was the principal but alleged that the other acted in concert or aided and abetted the principal. The defence of each accused was that the other committed the crime, acting alone.[19]

The recent decision of the House of Lords in *Randall*[20] is a good example of the cut throat defence. Mr Randall and Mr Glean were jointly charged with murder. The prosecution case was that each of them acting independently or jointly inflicted fatal head injuries on the deceased. Each had a motive. Both accused gave evidence, each denying the fatal attack and blaming the other. Mr Randall introduced the propensity for violence of the other including the admission in evidence that at the time of the killing he was on the run from the police for a vicious and potentially brutal armed robbery. But Mr Randall admitted having hit the deceased. He was convicted and Mr Glean acquitted, rather undermining the observations of Dawson J in *Harriman*.

Not always has such evidence been held admissible. In *Darrington and McGauley*[21] the accused were jointly charged with murder. Mr McGauley's defence was that he had agreed to the killing and had played no part in it. Mr McGauley was prevented at trial from adducing evidence that Kaye Darrington had earlier killed someone else. Jenkinson J, who gave the leading judgment, said that the trial judge did have a discretion to exclude such

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[13] *R v Douglass* (1989) 89 Cr App R 264.
[14] *R v Turner & ors*. (1979) 70 Cr App R 256, 264.
[15] *R v Varley* (1982) 75 Cr App R 242, 246.
[16] *R v Douglass* (1989) 89 Cr App R 264.
[17] Kirby J uses the term extensively in *R v Patsalis & Spathis* (1999) 107 A Crim R 432.
[18] *Bannon v The Queen* (1995) 185 CLR 1.
[19] In *Question of Law Reserved (No 3 of 1997)* (1998) 70 SASR 555 Perry J described the *Bannon* defences as cut throat. Some other description might have been in better taste for in *Bannon* that was the cause of death.
[20] *R v Randall* [2004] 1 WLR 56; 1 All ER 467; 1 Cr App R 375.
[21] *R v Darrington and McGauley* [1980] VR 353 (CCA).

evidence and had properly exercised it. He pointed out that the evidence was no part of the prosecution case against Ms Darrington and that the jury would be distracted by prejudice and complexity of issues from proper consideration of the case against her.[22] His Honour went on to say that there were three reasons for a judge's discretion to exclude such evidence. First, to relieve the jury of 'intellectual and emotional burdens'. Second, to reduce the need for a separate trial. Third, where the weight of the proposed evidence is too slight.[23]

These propositions call for some analysis. True it is that two or more accused are tried together largely for procedural convenience. But they are still considered separate trials. On that basis his Honour's point is sound. So is the last point where a matter is so remote and difficult of proof that it is excluded. The reference to the intellectual and emotional burdens on the jury seems like a voice from another age. Since that decision we have often seen trials lasting more than six months, a scale expected by all participants. As to the reduction of the need for a separate trial there is a paradox. Trials are required to be as fair as possible.

An accused cannot be shut out from a defence. According to the House of Lords in *Murdoch v Taylor*, such rights are considered to be a fundamental interpretation of the statute and there is no room for a judge's discretion.[24] That proposition has been applied and approved on too many occasions to cite.

McBride[25] was another case out of kilter with accepted principle. Two brothers were jointly tried and convicted of murder. They carried out an armed robbery on a post office in the course of which the postmistress was shot. The applicant said there was no plan to use the firearm. He also sought to introduce in evidence a letter later written by his brother showing that the brother was aggressive and sadistic and would kill for no reason. The trial judge had rejected the evidence and the Court of Criminal Appeal agreed. They held that evidence of this sort cannot descend to the particular and must be confined to reputation and Lowery's case must be limited by its own particular facts.[26] These propositions have not since been referred to as far as I am aware.

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[22] *R v Darrington and McGauley*, 384.
[23] *R v Darrington and McGauley*, 385.
[24] *Murdoch v Taylor* [1965] AC 574 (HL).
[25] *R v McBride* (1983) 34 SASR 433 (CCA).
[26] *R v McBride* , 443.

V THE NATURE OF THE EVIDENCE

Most of the cases deal with whether there has been a miscarriage most particularly because the applications for separate trials were refused by the trial judge. Nevertheless, through it all one can discern the sort of evidence that is led to show the criminal disposition of the other accused.

In *Miller*[27] the charge was conspiracy to import nylon stockings without paying customs duty. The other accused were Messrs Harris and Mercado. Mr Mercado's defence was that he was not connected with the crime, and that Mr Harris, his employee, had posed as him and used his office for the purpose of the importation. During the currency of what the prosecution said was the period of the conspiracy, Mr Harris had spent some time in prison. No importations had occurred while he was there. As part of his case, counsel for Mr Mercado cross-examined a prosecution witness on the fact of Mr Harris's imprisonment. The trial judge, Devlin J, ruled the evidence relevant (of course) and refused Mr Harris's application for separate trial.

In *Holden* the co-accused told the police of the fear he and others had of the accused because of what he had seen of Mr Holden's violence and because of his reputation. The evidence was held properly admitted. The co-accused was acquitted of murder and manslaughter and Mr Holden convicted of murder. His appeal was dismissed.[28]

In *Randall* each accused gave sworn evidence. Mr Glean admitted in cross-examination by counsel for Mr Randall that he had committed offences of dishonesty and violence. The trial judge had warned the jury not to use the evidence of Mr Glean's convictions as showing his likelihood of committing the offence. The House of Lords examined many authorities including *Darrington and McGauley* and *Gibb and McKenzie*. They unanimously agreed that the judge had misdirected the jury, dismissed the prosecution appeal and agreed with the Court of Appeal that Mr Glean have his conviction set aside and be granted a new trial.

It is not unusual for one accused to tell the police about the violent propensity and reputation of another accused. Mr Jones told the police about Mr Waghorn's earlier criminal doings and provided a motive for Mr Waghorn's commission of the murder. At trial Mr Jones made an unsworn statement

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[27] *R v Miller* (1952) 36 C App R 169 (ruling of Devlin J).

[28] *R v Holden* (1990) 52 A Crim R 32 (SA CCA). Reference to Mr Holden's propensity to violence is at 42-45.

reinforcing what he had told the police implicating Mr Waghorn.[29] None of that evidence was admissible against Mr Waghorn. Both were convicted of murder. Mr Waghorn's appeal succeeded and Mr Jones's failed.

VI DURESS

In *Gibb and McKenzie*,[30] JH Phillips QC appeared at trial for Mr Gibb. The charge was murder. Phillips QC did not appear on the appeal,[31] but years later, as Phillips CJ, he described it and the evidential perplexities:

> There had been a joint trial of the two abovementioned accused (who were presented with one 'C') which had resulted in both Gibb and McKenzie being convicted. 'C' was acquitted. An application for separate trial for Gibb had been refused. Gibb's defence had been to raise an alibi but McKenzie and 'C', in unsworn statements, confirmed their and his presence at the death scene but pleaded that they acted under duress from Gibb. This followed similar statements to the police, which were put in evidence. In addition, the unsworn statements and cross-examination of Crown witnesses produced a volume of damaging and prejudicial material against Gibb, which the Crown could not have led.[32]

Note that the right of an accused to make an unsworn statement has now been abrogated by statute.[33]

Collie, Kranz and Lovegrove[34] were tried for murder along with a man named Meyer and a woman named Joanne Carter. Joined in the same information but charged with misprision of felony was David Carter. Mr Meyer and Ms Carter were acquitted but the rest were convicted. Relevantly David Carter in conversations with police had implicated the convicted accused in the crime.

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[29] *R v Jones and Waghorn* (1991) 55 A Crim R 159 (Vic CCA). Smith J sets out that evidence at 181-183.
[30] *R v Gibb and McKenzie* [1983] 2 VR 155 (CCA).
[31] I did.
[32] JH Phillips CJ, "Practical Advocacy" (1998) 72 *Australian Law Journal* 340.
[33] Cth: *Evidence Act 1995* s 25; Qld *Criminal Code* s 618; WA: *Evidence Act 1906* s 97(2); Tas: Criminal Code s 371(c); NT: *Criminal Code* s 360; NSW: *Criminal Procedure Act 1986* s 31; Vic: *Evidence Act 1958* s 25; SA: *Evidence Act 1929* s 18A; ACT *Evidence Act 1971* s 68A.
[34] *R v Collie, Kranz and Lovegrove* (1991) 56 SASR 302 (CCA).

He did not give evidence. Mr Lovegrove's statement to police implicated the others. He gave evidence that because of delusions he could not recall his statements to police. He was cross-examined and attributed his knowledge of what had happened by rumours implicating Messrs Collie and Kranz. Each was convicted of murder. The appeals were allowed.

Mr Mathers was convicted of two counts of culpable driving causing death. His co-accused at trial was Mr Kavenagh. The two deceased had been in Mr Kavenagh's car which he said was chased by Mr Mathers who had put him in fear. By cross-examination of police, counsel for Mr Kavenagh elicited prior and subsequent convictions of Mr Mathers. In an unsworn statement Mr Kavenagh told of his conversations with naval ratings like himself of violence visited on them. Mr Mathers fitted their description of their assailant. Mr Kavenagh was acquitted on both counts. Tadgell J delivering the leading judgment said on the question of relevance:

> Evidence of the applicant's bad character, and in particular of his disposition to violence, was capable of being logically probative of the issue between Kavanagh and the Crown whether Kavenagh had driven his car as he had because he had been put in fear by what the applicant had said or done…The fact that the evidence was sought to be led against Kavenagh's co-accused, to whom it would or might be prejudicial, was not a reason for excluding it.[35]

VII THE JUDGE'S DIRECTIONS

Sentiments similar to *Mathers* have been expressed again by the Privy Council in *Lobban*.[36] In *Bannon*, [37] Dawson, Toohey and Gummow JJ characterised the judgment in *Lobban* in the following way:

> Their Lordships said that where the admission of evidence which was admissible against one defendant but not against his co-defendant resulted in a real risk of prejudice to the co-defendant, the judge should ensure that the interests of the co-defendant were protected by specific directions to the jury to the effect that the statement of one co-defendant was not evidence against the other or, in the last resort, by ordering separate trials.[38]

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[35] *R v Mathers* (1988) 38 A Crim R 423, 425-426.
[36] *Lobban v The Queen* [1995] 1 WLR 877.
[37] *Bannon v The Queen* (1995) 185 CLR 1.
[38] *Bannon v The Queen* at 23.

VIII GIVING EVIDENCE AGAINST ANOTHER

The discussion so far has been concerned with the position which obtains when for a variety of reasons the evidence of criminal disposition is admissible only for or against the accused who puts that evidence before a jury. Typically that occurs in what an accused has said out of court or at trial in an unsworn statement in the times when such statements were allowed. In these circumstances that evidence was no part of the evidence against the accused whose disposition has been disparaged.

There are other circumstances, however, when such evidence is admissible against the impugned accused. The primary way in which that happens is where one accused gives sworn evidence part at least of which refers to the criminal disposition of the co-accused. Where that position prevails there are a number of consequences. One is that the accused giving evidence can be cross-examined on behalf of the co-accused about the accused's own criminal disposition. That entitlement derives from statute.[39] In Victoria, South Australia and Northern Territory the accused giving evidence has to be 'charged with the same offence'. In Queensland it suffices if the accused is 'charged in the same proceedings'. Under the *Uniform Evidence Acts* leave is not to be given for cross-examination of one 'defendant' by another unless that evidence includes evidence adverse to that other and the evidence has been admitted.

In *Varley* Kilner Brown J, showing a marked dislike of a comma, summarised in six propositions the principles on what is meant by the expression 'has given evidence against':

1. If it is established that a person jointly charged has given evidence against the co- defendant that defendant has the right to cross-examine the other as to prior convictions and the trial judge has no discretion to refuse an application.
2. Such evidence may be given either in chief or during cross-examination.

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[39] Qld: *Evidence Act* 1977 s 15(2); WA: *Evidence Act* 1906 s 8(1)(c)(iii); NT: *Evidence Act* s 9(7)(c); Vic: *Crimes Act* 1958 s 399(5)(c); SA: *Evidence Act* 1929 s 18(1)VI(c). Much the same position obtains under the *Uniform Evidence Acts* 1995: Cth, and NSW s 104(6) and Tas *Evidence Act* 2001 s 104(5).

3. It has to be objectively decided whether the evidence either supports the prosecution case in a material respect or undermines the defence of the co-accused. A hostile intent is irrelevant.
4. If consideration has to be given to the undermining of the other's defence care must be taken to see that that the evidence clearly undermines the defence. Inconvenience to or inconsistency with the other's defence is not of itself sufficient.
5. Mere denial of participation in a joint venture is not of itself sufficient to rank as evidence against the co-defendant. For the proviso…to apply, such denial must lead to the conclusion that if the witness did not participate then it must have been the other who did.
6. Where the one defendant asserts or in due course would assert one view of the joint venture which is directly contradicted by the other such contradiction may be evidence against a co-defendant.[40]

Later cases have added a gloss. On the fifth of Kilner Brown J's six propositions in *Varley* the court said in *Crawford*[41] that such denial *may* (not *must*) lead to the conclusion that if the witness did not participate then is must have been the other who did. In South Australia the Court of Criminal Appeal held in *Congressi*[42] that there were two types of evidence by one accused which could constitute the giving of evidence against the other. The first was direct evidence and the second was evidence which undermined the defence of the other.

'Charged with the same offence' is in the legislation of Victoria, South Australia and Northern Territory as we have seen, and with the exception of federal offences and the provisions in New South Wales and Tasmania, the other jurisdictions use 'charged in the same proceedings'. The phrase 'charged with the same offence' does not seem to have been dealt with in Australia since 1918.[43] In England in 1979 legislative amendments resulted in a change from 'charged with the same offence' to 'charged in the same proceedings'.[44] In the result some jurisdictions in Australia can key into decisions in England before the 1979 amendment, and some others into the post 1979 cases.

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[40] *R v Varley* (1982) 75 Cr App R 242, 246.
[41] *R v Crawford* [1997] 1 WLR 1329, 1335.
[42] *R v Congressi* (1974) 9 SASR 257, 267.
[43] *R v Malouf* (1918) 18 SR (NSW) 142.
[44] *Criminal Evidence Act* 1898 s 1(f)(iii) amended by *Criminal Evidence Act* 1979 s 1(1).

As to 'the same offence' the House of Lords reluctantly concluded that the words meant

> the same in all material respects including the time at which the offence is alleged to have been committed, and a distinct and separate offence similar in all respects to an offence committed later, no matter how short the interval between the two, cannot properly be regarded as 'the same offence'.[45]

The decision was in the following setting. A van made a right turn to enter a factory. Another car whose lane was crossed collided with the van and bounced off killing a pedestrian. There was a joint trial with each driver on a count of causing death by dangerous driving. The car driver gave evidence that the van turned in front of him giving neither time nor space to manoeuvre around it. The trial judge allowed the car driver to be cross-examined by the van defendant to the fact that he had no licence, was unqualified to drive and had earlier similar convictions. The Lords found that leave was wrongly given because the drivers had not been charged with 'the same offence' and struck down the conviction. Earlier cases such as *Lovett*[46] were called in aid of the cry for legislative change.

IX JOINT OR SEPARATE TRIAL

Courts have often said that where more than one accused are charged with committing a crime jointly, the presumption is that there should be a joint trial. Where one accused intends to introduce evidence blaming the other there should still ordinarily be a joint trial. In *Middis* Hunt J identified the circumstances when it was appropriate to order a separate trial. His Honour said:

> Briefly the relevant principles are that:
> 1. where the evidence against an applicant for a separate trial is significantly weaker than and different to that admissible against the other accused to be jointly tried with him, and
> 2. where the evidence against those other accused contains material highly prejudicial to the applicant though not admissible against him, and

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[45] *Commissioner of Police for the Metropolis v Hills* [1980] AC 26 at 34. In fact the decision was handed down in mid-1978 and included a strong recommendation for the legislative amendment that was made the following year.

[46] *R v Lovett* [1973] 1 WLR 241.

3. where there is a real risk that the weaker Crown case against the applicant will be made immeasurably stronger by reason of the prejudicial material.[47]

Other courts have approved these principles.[48] A good example of failure to order a separate trial is *O'Boyle*.[49] Two men were charged over the importation and supply of cocaine in England. When Mr O'Boyle had been in USA he had been promised immunity if he told the police and other what had gone on. He was promised that what he said would never be used. The prosecutor at trial wanted to lead that evidence and the trial judge excluded it. Mr O'Boyle gave evidence. The co-accused's counsel cross-examined Mr O'Boyle and introduced that USA confession. It went to the co-accused's defence. The Court allowed the appeal. There should have been separate trials, they said.

X DIRECTIONS TO THE JURY

When a judge is summing up to a jury in any trial he must direct them on how to use the evidence. In a joint trial the summing up must also include directions on what evidence is admissible and what is not admissible in the case against each accused. If one accused introduces evidence of the criminal disposition of another careful directions must be given.

Corak and Palmer was a joint trial on a charge of possession of indian hemp for trading. The accused Mr Palmer gave evidence. He was cross-examined on behalf of another accused that she acted as she did because of his duress. To that end he was taken to various other wrongdoings. King CJ referred to Mr Palmer's evidence and said:

> The evidence could properly be used by the jury as tending to support the evidence of duress and also in their assessment of the credibility of Palmer as a witness. It could not properly be used as supporting the truth of the charge by way of its tendency to show a propensity on the part of Palmer to commit crime in general or to commit crime involving unlawful drugs in particular. The admission of the evidence placed an obligation on the trial judge to give a direction to

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[47] *R v Middis* (unreported, NSW Supreme Court, No 70412 of 1990, 27 March 1991).
[48] *R v McDonald & Ors* (2002) 168 FLR 232, [56] (ACT, Gray J); *R v Chami & Sheikh* (2002) 128 A Crim R 428, [12] (NSW CCA).
[49] *R v O'Boyle* (1991) 92 Cr App R 202.

> the jury as to the uses to which it could properly be put and as to the use which is impermissible.[50]

Whether one accused who gives evidence of the criminal disposition of the other should be the subject of a warning to the jury has been a matter of some debate, particularly on whether an accomplice direction must be given.[51] So it was that King CJ said:

> I consider that in the generality of cases in which an accused person gives evidence implicating a co-accused, it would be necessary, or at least desirable, to advise the jury to exercise caution in relying on that evidence alone to convict a co-accused because of the interests of his own which the implicating accused has to serve.[52]

One obvious difficulty in the above proposition is that a jury should not be told of the interest of the accused in the outcome of the case. To direct a jury in that way is to undermine the presumption of innocence.[53]

Lord Taylor of Gosforth CJ in *Cheema* pointed to the difficulties involved in giving a full corroboration warning:

> [T]he complication in requiring a judge to give full corroboration directions in respect of co-defendants implicating each other, would be likely to confuse and bewilder a jury. Especially if there are several defendants, the difficulty of giving the full warning in relation to each, and identifying which pieces of evidence are capable of corroborating each of them, would create a minefield of difficulties.[54]

The present law is to be found in *Henning*. In that case the New South Wales Court of Criminal Appeal said:

> For whereas the standard form of corroboration warning, with all its complexities, may well be inappropriate or undesirable in relation to an accused who gives evidence inculpating a co-accused, there is one matter which must be stressed in all such cases where a warning is

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[50] *R v Corak and Palmer* (1982) 30 SASR 404, 413 (CCA).
[51] See the discussion by Mullighan J in *R v Lawford* (1993) 61 SASR 542 (CCA).
[52] *R v Webb and Hay* (1992) 59 SASR 563, 584 (CCA).
[53] *Robinson v The Queen* (1991) 180 CLR 531, 536: a joint judgment.
[54] *R v Cheema* [1994] 1 WLR 147, 156 (CCA) approved: *Webb v The Queen* (1994) 181 CLR 41, 66 (Brennan J), 94 (Toohey J).

> given. It is essential in the interest of the accused who gives the evidence that the warning should be restricted in terms to those parts of the evidence which inculpate any co-accused. It must be made clear to the jury that the warning is to be applied only when they are considering the case against the co-accused. It must not be left open to them to believe that the warning might attach to the accused's evidence in his own case.[55]

Earlier the court had said that no inflexible rule should apply.[56] And that was the conclusion reached by the High Court in *Webb*.[57]

XI SEPARATE SUMMING UP BY JUDGE TO JURY

You may think that the difficulties in a trial where one accused refers to the criminal disposition of another might be solved by a trial judge giving a separate summing up for each accused.

In three cases at least trial judges in this country have summed up to the jury on each accused separately and then sent the jury out to consider their verdict for that accused. Nelson J did it in *Mitchell*. [58] In that case there were ten accused on charges of conspiracy to defraud banks. His Honour began by summing up generally and then particularly as to Mr Mitchell first, then the remaining accused in four groups. That procedure was the first ground of appeal. The Court of Criminal Appeal held that the trial judge had not acted improperly and dismissed that ground.

In *Annakin* [59] the procedure adopted by Roden J was to direct generally then specifically on each accused. His Honour then sent the jury out until they advised him that they were ready to go on with the summing up. He did not take a verdict until the whole of the summing up was completed. The ground of appeal failed that there should have been separate trials and that Roden J's procedure was flawed.

In *McPhail* [60] the trial judge, Judge Cooper, adopted the same procedure as had Roden J in *Annakin* in that he gave a general summing up followed by a

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[55] *R v Henning* (11 May 1990, NSW CCA, unreported) 49.
[56] *R v Henning* at 47.
[57] *Webb v The Queen* (1994) 181 CLR 41.
[58] *R v Mitchell* [1971] VR 46, 48-54.
[59] *R v Annakin* (1988) 17 NSWLR 202n. (CCA).
[60] *R v McPhail and Tivey* (1988) 36 A Crim R 390 (NSW CCA)

particular summing up and then without taking a verdict for that accused giving the jury a break. He then began his summing up on the next accused. The real vice was not so much in the procedure but in the directions themselves, for the trial judge told the jury that they could take into account any matter which in their opinion could be relevant to the case of a former accused. As you can imagine, in a case of twelve accused in a trial lasting more than seven and a half months, a good deal of evidence admissible against one accused was not admissible against another. The ground of appeal on the failure to give proper directions succeeded.

The reason why there will be a difficulty in giving separate directions in a trial where one accused introduces the criminal disposition of another is addressed directly in *Wooding*.[61] In that case nine accused were charged on one indictment containing seven counts. The essence of the charges was a conspiracy to obtain money by deception involving frauds on the international financial market, and various of the substantive offences used to carry out the scheme. The accused had made statements minimising their own participation and inculpating others: the cut throat defence. Some of the accused gave sworn evidence. The trial judge summed up generally and then on each accused separately. He then took a verdict on that accused before starting his summing up on the next. All appeals succeeded. Lawton LJ, delivering the judgment of the court, said:

> Separate summings up, in our judgment, are inappropriate and likely to lead to unfairness when the jury's verdicts against earlier defendants in the indictment may – despite the most careful direction – make it difficult for the jury fairly to review the evidence of a witness who has already been believed when considering that of a later defendant who has alleged that the witness should not be believed. The likely unfairness stands out for all to see if there is a divided summing up in a case where a number of defendants have put forward 'cut throat' defences.[62]

In *McPhail*, Lee CJ at CL, delivering the judgment with which the other members of the court agreed, approved the above passage in *Wooding*.[63]

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[61] *R v Wooding* (1979) 70 Cr App R 256.
[62] *R v Wooding* 263-264.
[63] *R v McPhail and Tivey* (1988) 36 A Crim R 390, 392.

XII DISCRETION TO EXCLUDE

The discretion to exclude such evidence has been discussed in the earlier comments on the cases. The current state of Australian law is that a judge has the discretion to exclude such evidence. In *Gibb and McKenzie*, the Victorian Court of Criminal Appeal said in a joint judgment:

> A trial judge, however, retains a discretion to exclude such evidence in a proper case. But such an exercise of discretion will necessarily be rare. It is not to be exercised simply because one accused wishes to elicit evidence of the bad character of another accused. [64]

Later the judges explained that a trial judge always has to ensure that the trial is fairly and properly conducted. This duty will sometimes involve ensuring that the freedom granted to accused persons is not abused. [65]

That seems to be the law that has stood the test of time in Australia. There is good reason for it. In the murder case with which the court was considering, a judge would and should have excluded evidence, say, that Mr Gibb had a handful of parking infringements. The proposed evidence must tend to prove or disprove a fact in issue or a fact relevant to a fact in issue.[66] If the probative value of the evidence is so low as not to justify the time, convenience and cost of its proof, the evidence should be excluded in the exercise of discretion. [67]

XIII CONCLUSION

Trials of serious offences are almost invariably trials by jury. But not even appeal courts assume that the decisions of a jury will be 'unaffected by matters of possible prejudice'.[68] It may be only an atmosphere but that alone can be palpable enough. In *Torney* the court said:

> Unfortunately, the atmosphere built up in a trial of this kind sometimes creates an added element of general prejudice against a

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[64] *R v Gibb and McKenzie* [1983] 2 VR 155, 163.
[65] *R v Gibb and McKenzie* at 171.
[66] *Goldsmith v Sandilands* (2002) 76 ALJR 1024, [31] (McHugh J).
[67] *Palmer v The Queen* (1998) 193 CLR 1, 24 [55] (McHugh J); *Nicholls v The Queen* (2005) 219 CLR 196, 223 [56] (McHugh J).
[68] *Gilbert v The Queen* (2000) 210 CLR 414,420 [13] (Gleeson CJ and Gummow J).

> particular accused: indeed it is not altogether an unexpected happening, it is a foreseeable incidence of a joint trial.[69]

In many joint trials an accused will introduce evidence of the convictions and generally of the criminal disposition and propensity of the co-accused. That evidence may be based on first hand knowledge or on belief or even on rumour. Courts have held that evidence of the criminal disposition of the co-accused unknown to the accused at the time of the offence is admissible.[70]

In *Demirok* the court said in a joint judgment:

> Essentially, an accused man is entitled to a trial conducted in accordance with the relevant rules, the objects of which include ensuring that the evidence tendered against him is admissible against him and that he is not exposed to prejudice by the introduction against him of material which is irrelevant or, in some situations, only marginally relevant.[71]

Put more generally, an accused has a right to a fair trial or rather, as Deane J said, 'a right not to be tried unfairly'.[72]

Prosecutors are under an ethical duty requiring fairness to any accused. No such constraints apply to counsel for one accused who seeks to blame another accused. Rather the plain duty of such counsel both to his client and to the court is to conduct the trial so as to achieve a favourable result for the accused for whom that counsel acts.[73] It means that where there is a joint trial in which one accused blames the other or where the defences are cut throat, one of the functions of the defence will be to introduce as much material as possible to establish that defence.

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[69] *R v Torney* (1983) 8 A Crim R 437, 447 (Vic CCA).
[70] *R v Gibb and McKenzie* [1993] 2 VR 155, 170-171.
[71] *R v Demirok* [1976] VR 244, 255.
[72] *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 57 referred to with approval by Mason CJ and McHugh J in *Dietrich v The Queen* (1992) 177 CLR 292, 299.
[73] *Tuckiar v The Queen* (1934) 52 CLR 335, 346.