# "Gone with the Wind": The Demise of the Rule Against Duplicity in Western Australia

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The decision of the Court of Criminal Appeal of Western Australia, in *Chew v R*,[1] highlights in a vivid manner the profound art of grafting rules evolved in English cases to a Code provision[2] to either bypass or narrow the scope of another provision that may impede the application of the "new"' rule. The decision also offers a useful insight into the modes by which a section or a combination of sections may be used to confine or minimise the relevance of a rule that tends to compromise prevailing notions of "fairness"[3] and "efficiency"[4] in regard to the administration of criminal justice.

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1 [1991] WAR 21. There was an appeal by the appellant from the decision of the Court of Criminal Appeal of Western Australia to the High Court (see (1992) 107 ALR 171). The appeal was heard in regard to the issue of whether the appellant had made improper use of his position as a chairman of directors "to *gain*, directly or indirectly, an advantage for himself or any other person or to *cause* detriment to the corporation". The High Court upheld the decision of the Court of Criminal Appeal on this issue and dismissed the appeal. No issues on duplicity were raised during the appeal to the High Court. Hence this comment will focus on the issues relating to duplicitous charges that were raised before the Court of Criminal Appeal.

2 *Criminal Code Act* 1913 (WA) (as amended). All subsequent references in this paper to the term "Code" refer to the *Criminal Code Act* 1913 (WA) (as amended).

3 The courts have often stressed the need to be "fair" in criminal proceedings: see *Frijaf v R* [1982] WAR 128 at 133-134; *Carew v Carone* [1991] WAR 1 at 11; *McKinny v Q* (1991) 65 ALJR 241 at 244. The Royal Commission (Great Britain) offered a useful explanation of the scope of the concept of "fairness" in its report on *Criminal Procedure* (1981) at 127: "Is the system fair; first in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted (that is tried by a court) rather than be dealt with in any other way (by cautioning, for example), and secondly in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of case are treated locally or nationally?"

4 In explaining the scope of the concept of "efficiency", the Royal Commission indicated that the question to be asked in regard to a prosecution system is: "Is it efficient in the sense it achieves the objectives that are set for it with the minimum use of resources and minimum delay?" - see work cited at footnote 3, at 128.

In *Chew* the accused had been convicted, after a trial before a jury, on four counts of committing offences under s 229(4) of the *Companies (WA) Code*.[5] On appeal to the Court of Criminal Appeal of Western Australia it was contended by the appellant that the convictions on each of the four counts should be quashed as each one of them was bad for duplicity. The appellant had been charged in each of the four counts in the Indictment with "... making improper use of his position as a chairman of directors to gain advantage for himself and to cause detriment to GCA Ltd". The counts dealt with "improper conduct" on the part of Chew on four different occasions.

Chief Justice Malcolm indicated that on a "literal" interpretation, s 229(4) envisaged three different offences committed by an officer or employee of a corporation:

(a) making improper use of his position to gain an advantage for himself;

(b) making improper use of his position to gain an advantage for another; and

(c) making improper use of his position to cause detriment to the corporation.[6]

However, His Honour took the position that the section dealt only with a single offence of "conduct by way of an act or omission which is improper" leading to one or more prohibited consequences.[7] Referring to the views of the English Court of Criminal Appeal in *R v Clow*[8] Malcolm CJ pointed out that since the English courts do not view a count in which the accused has been charged with an indivisible act that included two offences as bad for duplicity, it would not be appropriate to identify a count that referred to "... one offence by one action which was unnecessarily alleged to have had two consequences when one or the other of them would have been sufficient"[9] as duplicitous.

In *Clow* the accused had been charged with causing death by dangerous driving under s (1) of the *Road Traffic Act* of 1960. The indictment alleged that the accused had "caused the death of .... by

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5 Section 229(4) of the *Companies (WA) Code* reads: "An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation."

6 [1991] WAR 21 at 40.

7 Citation at footnote 6, at 37.

8 [1965] 1 QB 598.

9 Citation at footnote 6, at 37.

driving a motor car at a speed and in a manner dangerous to the public having regard to all the circumstances".[10]

Lord Parker CJ, in delivering the judgment of the Court of Criminal Appeal, concluded:[11]

> Accordingly, however illogical it may seem, the line of authority is clear ... even if these are separate offences, it is permissible to charge them conjunctively as in the present case if the matter relates to one single incident, as of course it does in the present case, the death of the unfortunate lady concerned.

By grafting the above principle in *Clow* to the first paragraph of s 582, Malcolm CJ was able to conclude that each of the four counts had adequately "set forth" the necessary particulars concerning the offences with which the accused was charged, and avoid the stringent requirements prohibiting duplicitous counts in s 585.[12]

The rules concerning the "form of an indictment" in s 582 of the *Criminal Code* deal with the description of an offence in a count. The rule against duplicity in s 585[13] of the *Criminal Code* is based on an altogether different premise. It is based on the principle that each count in an indictment is for purposes of making submissions on evidence and final judgment, a separate indictment. As Murray J pointed out:[14]

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10 Citation at footnote 8, at 598.

11 Citation at footnote 8, at 602.

12 Citation at footnote 6, at 40. Section 582 reads: "An indictment is to be intituled with the name of the court in which it is presented, and must, subject to the provisions hereinafter contained, set forth the offence with which the accused person is charged in such a manner and with such particulars as to the alleged time and place of committing the offence, and as to the person, if any, alleged to be aggrieved, and as to the property, if any, in question, as may be necessary to inform the accused person of the nature of the charge. It is sufficient to describe it in the words of this Code or of the statute defining it. Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative or the doing or the omission to do any act in any one of any different capacities or with any one of any different intentions or states any part of the offence in the alternative, the acts, omissions, capacities, or intentions or other matters stated in the alternative in the enactment may be stated in the alternative in the statement of the offence in the indictment charging the offence: Provided that the court may at any stage of the proceedings amend the statement if it appears to the court to be so framed as to be embarrassing."

13 Section 585 reads: "Except as hereinafter stated, an indictment must charge one offence only, and not 2 or more offences: ..."

14 Citation at footnote 6, at 63.

> In the *Criminal Code*, s 585, subject to the special rules provided, generally "an indictment must charge one offence only, and not two or more offences". In the Code, s 582, the word "indictment" is used in a different sense to refer to the charge of a particular offence. In that sense, each count in this document termed an indictment in the context of s 585, was itself an indictment within the meaning of s 582.

It follows, therefore, that a count in an indictment which charges an accused with having committed two or more separate offences is as objectionable as the trial of an accused simultaneously upon two separate indictments. The rule against duplicity evolved as a rule of "fairness" in order to enable the accused to know the case he or she had to meet, and related to matters such as the plea of *autre fois acquit* and *convict*, submission of no case to answer and the plea of mitigation at the sentencing stage. Further, if several acts were referred to in one count it may also be difficult for judges to isolate the acts that were viewed by each member of the jury as "proved" in ascertaining the guilt of the accused and this may in turn lead to inconsistencies in sentencing practices.[15]

Justice Murray, on the contrary, steered clear of making any suggestions on "grafting" rules evolved from principles laid down in English cases and stated:[16]

> But quite distinctly from the particulars of the charge, section 582 also makes it clear that provided the charge continues to deal with but one offence, then a particular pleading rule will apply to permit the allegation of a particular element or "part of the offence" in the alternative, subject only to the proviso that, where the interests of justice required, the court will order the amendment of an indictment to concentrate on one or more of the alternatives which the indictment raises in the statement of a particular element of the offence. That is ordinarily done by requiring the Crown to elect, in a proper case, upon which basis it will proceed and then to order the indictment accordingly.

After indicating that there was only one offence in each count and upholding the validity of the counts under the third paragraph of s 582, Murray J sought to reinforce his views by referring to cases that had ruled on the validity of similar counts. His Honour pointed out that pleading the results of the improper conduct of the accused in terms of an advantage to the accused and a detriment to a corporation "... is not to engage in duplicitous pleading of two offences, but to plead in a way that involves a surplusage"[17] that may well relate to the nature of the evidence that the prosecutor may adduce to prove either detriment or advantage. In doing so, His

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15 See also Archbold's *Criminal Pleading Evidence and Practice*, Vol 1, 1992 (4th ed), at 78.

16 Citation at footnote 6, at 64.

17 Citation at footnote 6, at 65-66.

Honour referred to what has been traditionally described as the "surplusage" rule.[18]

His Honour also referred to the decision in *Mylonas & Ors v Q*[19] where the Court of Criminal Appeal of Western Australia applied the "evidentiary significance" rule to save a seemingly duplicitous charge. It was contended in this case that the charge of "conspiring to cultivate cannabis with intent to sell or supply" was bad for duplicity because the evidence adduced at the trial related to the cultivation of cannabis in two separate properties and since there were two conspiracies each conspiracy ought to have been mentioned in different counts. It was held that the overt acts of cultivation in two different locations merely constituted evidence of the purpose behind a single conspiracy and the count was not bad for duplicity. Chief Justice Burt stated:[20]

> The agreement is the *actus reus* not the cultivation which is an overt act of *evidentiary significance* only. It may be observed in passing that if the appellants' argument were right a single agreement pursuant to which it was expressly agreed that cannabis would be grown at two places at two different times could never be made the subject of a charge under s 33(2) as the indictment would necessarily be duplex. I cannot think that that could have been contemplated.

Likewise, Murray J held that the reference to "advantage" or "detriment" in the four counts referred to "particulars" that may be used by way of evidence to prove the elements of the offence under s 229(4) of the *Companies (WA) Code*.[21] Chief Justice Malcolm's explanation of the scope of the "evidentiary significance" rule in regard to the offences in the four counts was more explicit:[22]

> In my opinion, the gaining of an advantage or the causing of a detriment are relevantly elements of the offence created by section 229(4) of the *Companies Code* rather than merely matters of particulars. In my view also, however, the facts, matters or things said to constitute the advantage or detriment are a matter of particulars. In the context of the law of tort damages are an essential element in a claim for negligence, but the nature of the damage is a matter for particulars which may be made up of a series of items. The same is true of advantage or detriment.

By referring to previous decisions that had narrowed the scope of the duplicity rule in s 585 and reduced it to a "phantom"

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18 Refer to *Donaldson v Butcher* (1932) SASR 16 for an explanation of the scope of this rule; see also Archbold's *Criminal Pleading Evidence and Practice*, Vol 1, 1992 (4th ed), at 75.

19 [1987] WAR 261.

20 Citation at footnote 19, at 264. The appellants in this case had been charged under s 33(2) of the *Misuse of Drugs Act* 1981 (WA) (as amended).

21 Citation at footnote 6, at 67.

22 Citation at footnote 6, at 39-40.

provision in the *Criminal Code*, Murray J skirted the issues concerning the "uncertainty" that the defence may face at a trial in making decisions on "submissions of no case to answer" and mitigation pleas at the sentencing stage. Both judges merely confined their submissions to the impact that their decisions would have on the plea of *autre fois acquit* or *convict* in a situation where there is "uncertainty of conviction" (see below).

Section 614 of the *Criminal Code* indicates that if the accused wishes to quash an indictment on the ground that the count is duplicitous, he or she should seek to do so before pleading to the indictment. Further, s 590 of the Code provides that every direction to quash an indictment "for any defect apparent on its face must be taken by motion to quash the indictment before the jury is sworn, and not afterwards; ...".

Even though no application was made to quash the indictment on grounds of duplicity before the jury was sworn in, Malcolm CJ indicated that an indictment that is bad for duplicity will not be quashed on appeal unless there was "uncertainty as to conviction". Should there be such uncertainty the appeal court may hold there was "a miscarriage of justice" under s 689(l) of the *Criminal Code*. His Honour, thereafter, went on to explain why a "duplicitous count" leading to "uncertainty of conviction" will provide an adequate ground for appeal: "The prejudice said to flow from uncertainty of conviction is the difficulty for the accused in pleading *autre fois convict* if another charge is laid arising out of the same facts."[23]

His Honour then concluded that there would be no "uncertainty of conviction" in a situation where the count referred to the offence and two of the prohibited consequences:[24]

> In such circumstances, so long as all of the members of the jury are agreed that an advantage was gained or a detriment caused (or as in this case both an advantage and a detriment) it is immaterial whether individual jurors found that this was so on different factual basis from others, so that there was no unanimous agreement on the particular advantage or detriment or combination of them.

In conclusion, it may be said that the remnants of the rule against duplicity are still being blown about in the "winds of change" initiated by the courts in Western Australia in the interests of "efficiency" and "fairness". Defence counsel may still be afforded an opportunity to bring back from obscurity, when convenient, a "rag bag" plea of duplicity to persuade an appeal court that the jurors were confused as to exactly what the accused was guilty of and that

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23 Citation at footnote 6, at 45 (per Malcolm CJ); at 68 (per Murray J).
24 Citation at footnote 6, at 44-45.

this may in turn have led to an "uncertainty" in regard to the conviction. The approaches adopted by Malcolm CJ and Murray J, however, clearly confirm the demise of the duplicity rule as a rule of procedure in Western Australia and, in effect, echo the prophetic words of Dickson J in another Code jurisdiction fifteen years ago:[25]

> The rule developed during a period of extreme formality and technicality in the preferring of indictments and laying of informations. It grew from the humane desire of judges to alleviate the severity of the law in an age when many crimes were still classified as felonies, for which the punishment was death by the gallows. The slightest defect made an indictment a nullity. That age has passed. Parliament has made it abundantly clear in those sections of the *Criminal Code* having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.

25 *R v City of Sault St Marie* [1987] 2 SCR 1299 at 1307.