LOW PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND 14/8 C.A. 222/92

1515

THE QUEEN

v.

NEIL RAYMOND SWAIN

Coram: Eichelbaum CJ
Casey J
Henry J

Hearing: 4 August 1992

Counsel: G K Panckhurst for Crown
T W Fournier for Appellant

Judgment: 10 August 1992

JUDGMENT OF THE COURT DELIVERED BY CASEY J

Neil Raymond Swain seeks leave to appeal against the refusal by Holland J to sever counts in an indictment to be presented in the High Court at Christchurch. They are summarised in this extract from his judgment of 13 July 1992 :-

> "The Crown has presented a draft indictment charging the accused with seven crimes arising from four incidents. There are charges of burglary and arson of a house on 29 December 1990, wilful damage by means of an explosive to a suburban police station at Sydenham on 16 September 1991, aggravated burglary, arson of a house and rendering persons incapable of resistance by violent means on 29 November 1991 and possession of a weapon, an incendiary grenade on 13 December 1991.....There is [an] application for separate trials in respect of the counts arising from each of the four separate incidents.

> The Crown's case is that the six counts arising from the first three incidents were carried out by the accused as retaliatory measures intended to cause harm to persons connected with the detection and conviction in May 1991 of some 12 persons described as members of the Harris gang of the shooting and wounding of two members of a rival gang on 27 October 1990."

It was accepted that the seventh count relating to possession of an incendiary grenade should be dealt with separately and an order was made accordingly, but the Judge refused to sever the other six. He found a nexus between the episodes relating to the houses in evidence that the appellant was in possession of goods taken from each, but he observed that the only possible nexus between them and the Police Station bombing lay in the fact that the house victims were involved in the prosecution of the Harris gang, which was investigated by policemen belonging to that Station. There is no challenge to the fact that the various crimes were committed, the only question being whether the appellant was responsible, and the case against him is entirely circumstantial.

Senior Constable Murphy played an active part in the investigation and on 29 December 1990 his house at Cranbrook Avenue was burgled and burnt, forming the subject of the first two counts. The Judge listed the various items from the house found in appellant's possession linking him with that burglary, and there were also his note-book entries suggesting that the constable and others associated with the investigation were the subject of his special interest. An unusual feature was that only the constable's personal papers were taken from a desk, his wife's bankbook, handbag and papers alongside being untouched.

Count 3 relates to the bombing of the Police Station on 16 September 1991, causing extensive damage, the explosives expert concluding that there had been two charges, comprising either Powergel or AN60 gelignite in wooden boxes, with nails

placed on top to produce a shrapnel effect. The appellant was found to possess a road map indicating a route from his home to the vicinity of the Police Station, and in his premises were found the same type of gelignite, safety fuse, detonators and other material capable of being used in such a bomb, together with a manual entitled "Booby-traps", which referred to the addition of nails as shrapnel. He was also in possession of a bomb diagram when searched in prison the day after his arrest in December 1991.

On 29 November 1991 the incidents giving rise to counts 5 and 6 occurred. The two occupants of a house at Carrs Road were confronted at night by two men in balaclavas who took some items, blind-folded them and forced them into a van. After being driven a short distance they were made to watch as their house burned, and were told to think back to what they had done twelve months ago. One of them had given evidence about that time on the prosecution of Harris gang members. A rifle taken from this house was found in the boot of the appellant's car. He was also in possession of a specialised glass removal tool, of a type claimed by the prosecution to have been used to gain access to the two houses. There will be evidence that its use in burglaries is exceptional.

Mr Fournier argued against admissibility, relying in the main on earlier English authorities on similar fact evidence. We drew his attention to the latest pronouncement of this Court in **R v Accused (CA247/91) [1992] 2 NZLR 187, 191**, in which Cooke P said :

> "In as much as A's evidence could not be specifically linked to any of the three remaining charges, it can perhaps be described as similar fact evidence, although it can equally be described as part of the relevant history or res gestae. We do not consider that it matters which description is used. While the description "similar facts" and the associated one "strikingly similar" have been used in New Zealand in the past, largely in deference to English authority, and will no

> doubt continue to be used as convenient labels, the real question is always whether, as a matter of common sense, the evidence is sufficiently supportive of the prosecution case to justify allowing it to go to the jury notwithstanding any illegitimate prejudicial effect that it might have."

We agree with the Judge in seeing this case as one in which each count will involve a consideration of circumstantial evidence, some of which may also be relevant to other counts, and tending to prove the commission of those offences as well. It is not inadmissible simply on that account.

The Crown case will be that the victims and intended victims of all three incidents shared a common link as having been significantly involved in the investigation or trial of the Harris gang; and that each incident included elements of retaliation upon the occupiers of the properties. These common factors give a special significance to evidence implicating the appellant in any one of these episodes, enabling it to be seen as part of a planned retaliation, thereby reinforcing the Crown case that he was responsible for the particular offence charged. As was said in **R v Bindon (CA203/84; 7 November 1984)** :

> "...we consider that the alleged pattern of the accused's conduct is a legitimate matter for the jury to weigh in considering each count separately; it would be artificial to shut out the Crown from relying upon it. If proper warnings are given the prejudicial effect should not exceed the probative value."

Mr Fournier referred us to a passage from **R v Watene (CA87/91; 23 May 1991)** suggesting the need for proof of the accused's involvement in one of the robberies, when similar fact evidence was relied on to prove identity in respect of two separate robberies. A number of different accused had been charged in respect of each. We do not think that approach is appropriate to the present case, which is akin to that in **Bindon**, involving the identity of one accused in several different

episodes. The question for the jury is whether the appellant was responsible for what may be seen as a planned series of retaliatory offences, and to deal with each charge properly they should have access to evidence of all the surrounding circumstances.

In his judgment Holland J referred to the need for a careful direction to the jury about the way they should deal with the separate counts and with the evidence relevant to each. There is no need for us to repeat what he said. We are satisfied that he was right in refusing to order severance, and the application for leave to appeal is dismissed.

Solicitors: Crown Solicitor, Christchurch