IN THE DISTRICT COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 08 of 2024

BETWEEN: **DALLIEN DAKIN**

APPLICANT

AND: **THE REPUBLIC**

RESPONDENT

BEFORE: Resident Magistrate Mr. Vinay Sharma

DATE OF HEARING: 24 May 2024

DATE OF RULING: 10 June 2024

APPEARANCE:

APPLICANT: R Tagivakatini

RESPONDENT: A Driu

RULING

INTRODUCTION

1. The applicant is charged as follows:

Count 1

Statement of Offence

INTENTIONALLY CAUSING HARM: contrary to section 74(a)(b) and (c) and (i) of the Crimes Act of 2016.

Particulars of offence

DALLIEN DAKIN on the 15th day of March 2024, at Meneng District in Nauru, did intentionally engage in conduct that caused harm to J-ka Dakin, his daughter aged 5 years old, without her consent namely, by slapping her on her right cheek continuously, with intent of harming the said J-ka Dakin without her consent.

Count 2

Statement of Offence

INTENTIONALLY CAUSING HARM: contrary to section 74(a)(b) and (c) and (i) of the Crimes Act of 2016.

Particulars of offence

DALLIEN DAKIN on the 15th day of March 2024, at Meneng District in Nauru, did intentionally engage in conduct that caused harm to J-ka Dakin, his daughter aged 5 years old, without her consent namely, by using a large wooden stick and hitting her on her arms, legs and buttocks,

with intent of harming the said J-ka Dakin without her consent.

Count 3

Statement of Offence

INTENTIONALLY CAUSING HARM: contrary to section 74(a)(b) and (c) and (i) of the Crimes Act of 2016.

Particulars of offence

DALLIEN DAKIN on the 15th day of March 2024, at Meneng District in Nauru, did intentionally engage in conduct that caused harm to J-ka Dakin, his daughter aged 5 years old, without her consent namely, by grabbing her hair on her head and pulling it down forcefully, with intent of harming the said J-ka Dakin without her consent.

2. On 23 April 2024 the applicant filed a Notice of Motion to Quash The Charge and an Affidavit of Dallien Dakin in Support of Notice of Motion ("the Application"). The applicant also filed the Defence's Submissions For Quashing of Charge on the same date.

3. The Application sought the following orders:

   1) *The Charge filed on 20th March 2024 be quashed as it is bad for duplicity or multiplicity;*
   2) *The Prosecution to elect only one count; and*
   3) *Any other orders this Honorable Court deems fit.*

4. On 24 May 2024 the respondent filed the Prosecution's Submissions in Response to Quashing of the Charge.

5. On 24 May 2024 the parties were heard on the Application. I have also read the very helpful written submissions of the parties. The gist of the applicant's submissions is that the counts particularizing the offence in the charge are duplicitous on the ground that the 3 counts of the offending could be charged as a single count. On the other hand, the respondent's submissions are that the 3 counts of the offending particularize

different conducts that is alleged to have caused harm to the victim. Further, the respondent submits that the counts in the charge are not duplicitous.

LAW REGARDING DUPLICITY

6. The Supreme Court of Nauru has adopted the Australian approach of strict application of the rule against duplicity: see **Degia v Republic** [2021] NRSC 48; Criminal Case 2 of 2021 (19 November 2021).

7. The rule against duplicity applies in the District Court. I rely on ***Rixon v Thompson*** [2009] VSCA 84; (2009) 22 VR 323; (2009) 195 A Crim R 110 where the Supreme Court of Victoria exercising its appellate jurisdiction made the following findings of law at [49] and [50] of its judgment in relation to the application of the rule against duplicity to summary offences:

> *49. Although there is no equivalent provision regarding the formulation of charges laid in the Magistrates' Court, it seems well established that the rule against duplicity applies with equal force to both summary offences and indictable offences triable summarily. Indeed, a number of the leading authorities dealing with duplicity concern charges laid in Local Courts. 27*
> *50. In S v The Queen,28 Gaudron and McHugh JJ explained the basis of the rule as follows:*
>
> > *The rule against duplicitous counts in an indictment originated as early as the seventeenth century ... It may be ... that the rule grew out of the strict formalities associated with criminal pleadings at a time when the difference between misdemeanour and felony was the difference between life and death. However, the rule against duplicitous counts has, for a very long time, rested on other considerations. One important consideration is the orderly administration of criminal justice. There are a number of aspects to this consideration: a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what*

offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict ...

The rule against duplicitous counts has also long rested upon a basic consideration of fairness, namely, that an accused should know what case he or she has to meet.

8. Kirby J laid out the applicable law in relation to the rule against duplicity in ***Walsh v Tattersall*** [1996] HCA 26; (1996) 188 CLR 77; (1996) 139 ALR 27; (1996) 70 ALJR 884 (2 October 1996) as follows:

> *Criminal pleadings: original strictness and modern relaxations*
> *The common law developed the rules of criminal pleadings for the protection of the liberty of the subject. It required that a person, accused of the commission of a crime, should be informed fully and precisely of the charges contained in the accusation. One rule which evolved from this general principle was the rule against duplicity. No count in any indictment, presentment, information or complaint might charge a person with the commission of more than one offence[31].*
>
> ...
>
> *Principles governing duplicity in criminal counts*
> *In order to resolve the point of principle presented by this appeal, it is useful to examine a number of previous decisions in which questions of duplicity in criminal pleadings have arisen:*
> *1. The rule against duplicity has its origin in the history of English criminal procedure. It is a product of the accusatorial trial which has long insisted upon precision in the statement of the charge which the accused has to meet: John L Pty Ltd v Attorney-General (NSW)[70]; R v Thompson[71]. Under the rule of precision, no one count of the indictment should charge the accused with having committed two or more separate offences[72]. The rule has long been regarded by this Court as an important one[73]. Even where the Court was satisfied that the accused, taking the point, had no substantive merits, except the legal merit of the objection to duplicity, the latter was held to be sufficient if the complaint*

as to form were made out[74]. In that event, the count of the indictment would be bad for duplicity. It would have to be quashed[75].

2. The exact origins of the rule are lost in time. But the rule can certainly be traced to periods in the history of the common law where there was severe technicality and precision with respect to pleadings generally, in some ways inimical to modern approaches to such matters which tend to be impatient with strict rules when they become obstacles to the perceived goal of attaining substantive justice. Some authors explain that the strict approach was developed by judges in a humane desire to alleviate the extreme severity of the law. They would seize upon the slightest defect in the indictment to declare it a nullity[76]. The need for such extreme strictness was in part ameliorated by the reform of criminal punishments. The passage of Jervis's Act in England[77] led, in turn, to legislation such as is now found in the Summary Procedure Act 1921 (SA). By such enactments the excessively technical approach to criminal proceedings, apt for the past, was no longer universally required. Just as in civil procedure there has been a loosening of the rigidities of technical rules where these would defeat the merits, so in criminal procedure and pleadings, there has been, to some extent, a retreat from technicality. This is evidenced in Australian decisions such as Byrne v Baker[78] and in England by Merriman[79]. Allowing for their different history and purposes, it is desirable that the same rationality and concern with justice should inform criminal as well as civil pleading and procedure.

3. Nonetheless, there are special features of criminal procedure which continue to sustain the general tendency in favour of a rule of precision and specificity which has hitherto been enforced in this branch of the law. The reasons have been given many times, including in this Court. In Johnson v Miller[80], Evatt J gave a classic exposition[81]:

> *"It is of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him. This fundamental principle has been deemed applicable to bodies which are not strictly judicial in*

> *character. But the rigorous application of the principle by courts of justice proper is to be regarded as deriving from the court's inherent power and jurisdiction. It is inherent because it is an essential and integral part of any system of administering justice according to law. For various reasons, including the miscarriages caused by technical objections to matters of form, the formal indictment, information or complaint is allowed to become more sparing in the information it imparts. Side by side, the jurisdiction to order particulars may call for more frequent exercise. It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularise the offence charged, neither the court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged. Indeed the matter arises at an even earlier stage. The defendant cannot plead unless he knows what is the precise charge being preferred against him. If he so chooses, a defendant has a right to plead guilty, and therefore to know what it is he is being called upon to answer."*

More recently, and after Merriman was decided in the House of Lords, the same strict rule was followed in this Court in S v The Queen[82]. Gaudron and McHugh JJ explained why[83]:

> *"The rule against duplicitous counts in an indictment originated as early as the seventeenth century ... It may be ... that the rule grew out of the strict formalities associated with criminal pleadings at a time when the difference between misdemeanour and felony was the difference between life and death. However, the rule against duplicitous counts has, for a very long time, rested on other considerations. One important consideration is the orderly administration of criminal justice. There are a number of aspects to this consideration: a court must know what charge it is entertaining in order to ensure that evidence is properly*

admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict ...

The rule against duplicitous counts has also long rested upon a basic consideration of fairness, namely, that an accused should know what case he or she has to meet."

4. For the foregoing reasons of history, good prosecution practice and fair conduct of criminal trials, the general rule of our legal system is still this: that a prosecutor may not ordinarily charge in one count of an indictment, information or complaint two or more separate offences provided by law. In the present case, the Full Court recognised that this was the general rule and the preferable prosecution practice. So much is borne out by many authorities: Marshall[84]; Willis[85]. But certain questions remain. They are: what exceptions to, or modifications of, the strict rule are allowed, and what is to happen where, as here, no objection is taken at the trial but only later on appeal?

5. The apparent artificiality of insisting on applying the rule against duplicity in its full rigour has been highlighted by actual and theoretical instances that have arisen, or been contemplated, where criminal acts occurred in very close proximity to each other. If, for example, criminal acts occurred within a few minutes of time and in close physical proximity, could they be regarded as components of the one activity, so as to be susceptible to treatment as a single count[86]? If the events were seen as part of the one transaction or criminal enterprise this approach has been held to be permissible in England[87]. If a precise understanding of the charge laid, although evidenced by multiple acts, is that it represents a single crime, then a single count is permissible[88]. Many of the apparently conflicting judicial opinions, so criticised by the commentators, represent nothing more than attempts by judges to characterise

multiple acts upon which the prosecution relied and to decide whether or not they could be fairly viewed as the one transaction or criminal enterprise so as to escape an attack on the ground of alleged duplicity: Jemmison v Priddle[89]. The usual explanation given for adopting this approach is that, only by doing so, would the judges be able to avoid reducing the law to technical absurdity: Ballysingh[90]. See also Merriman[91], per Lord Morris[92] and S v The Queen[93], per Brennan J[94].

6. Particular problems arose for the application of the duplicity rule in the case of offences which, of their definition, were constituted by continuous activity. Such offences as keeping a brothel, required proof of particular acts at different times. Similarly, conduct which need not, but in some circumstances might, be constituted by activity over time could quite properly be charged in a single count. Instances where this qualification to the rule against duplicity has been upheld include cases involving charges of harassment[95] and trafficking in drugs[96]. Obviously, nice questions arise as to whether individual acts of supply of prohibited drugs create the same, or substantially the same, offence so as to sustain a single count and to resist an allegation of duplicity[97]. Various verbal formulae have been offered as a suggested test for whether the criminal acts are sufficiently close in time and space as to "fairly and properly be identified as part of the same criminal enterprise or the one criminal activity"[98]. These valiant attempts by judges have been criticised as "glib"[99]. Judges themselves have acknowledged that judicial views in particular cases are not always easy to reconcile: see for example Stanton v Abernathy[100]. Ultimately, what is presented is a question of fact and degree for decision in each case: Eades[101]. Various indicia are proposed to sustain a single count against the charge of duplicity, notwithstanding that it may permit evidence to be adduced of events which, taken individually, could constitute separate offences. The indicia include: (a) the connection of the events in point of time; (b) the similarity of the acts; (c) the physical proximity of the place where the events happened; and (d) the intention of the accused throughout the conduct[102]. Perhaps an indication of the considerable difficulty of the task to be found in is the fact that, in many of the leading cases, there is (as in this case) a division of judicial opinion. For instance, Latham CJ

dissented in Johnson v Miller[103]; Kitto J dissented in Montgomery v Stewart[104]; and Brennan J (as he then was) dissented in S v The Queen[105].

7. Because of the foregoing, it must be accepted as correct that "the courts have never managed to produce a technical verbal formula of precise application which constitutes an easy guide ... as to whether the common law rule [against duplicity] has been infringed"[106]. A choice of legal principle or policy is therefore presented in this appeal which this Court should resolve. Not a great deal of help is given to decisions in a particular case by saying that the test is to look to "the gist of the offence"[107]. Nor is much help afforded by saying that the test is whether multiple acts can "fairly and properly" be identified as part of the same criminal enterprise or activity[108]. With respect, it is not very useful to say that it is "desirable" or "preferable", where separate offences are arguably shown, that the prosecution should formulate separate charges[109]. Unless courts are prepared to support such homilies with sanctions in the case of breach they are unlikely to much influence day to day prosecution practice. Not a great deal of help to the primary decision-maker is given by suggesting that the test is whether the charge, as formulated, has the potential to confuse or embarrass the accused[110]. Clearly, a great deal depends on the nature of the offence. Where the alleged duplicity in the charge is latent, it may only be manifested by the way in which evidence is presented to support the charge[111]. It may not be until the prosecution's case is concluded that it becomes apparent that the prosecution cannot prove all of the acts that have been rolled together in a single composite charge, making plain the unsuitability of the process reliant on that charge[112]. Exceptions to the general rule against duplicity have been allowed where the multiple acts relied on by the prosecution are so close in time and place that they can be viewed as one composite activity; where the offence is one that can be classified as continuing in nature[113]; and in other anomalous cases[114]. However, such cases apart, although the courts in England[115] and New Zealand[116] have taken a more lenient view, this Court has, until now, favoured a rule of strictness. The question is whether this Court should now soften that stance.

8. Although some writers have suggested that the law should be changed to

prevent a duplicity objection being first taken on appeal (see for example Glanville Williams[117]), this is not the common law. There are many cases in England and Australia where the accused has been permitted to raise the point for the first time on appeal: R v Molloy[118]; Wilmot[119]; R v Traino[120]; Stanton v Abernathy[121]. The availability of this facility is sometimes explained on the basis that duplicity in the originating charge affects all that follows and hence the jurisdiction of the court of trial: Jemmison v Priddle[122]. Other authorities doubt this explanation: Stanton v Abernathy[123]. Still others are content to explain the entitlement to raise the point belatedly on the footing that it challenges an essential requirement of the law that "goes to the root of the proceedings"[124]. No useful purpose is served in exploring the doctrinal foundation for the right of belated challenge on the ground of duplicity of the charges. In this appeal the availability of the challenge to the appellant was never contested[125].

9. A finding that the rule against duplicitous charges has been breached does not oblige the court, coming to that conclusion, to dismiss the charge. Where the defect is one of patent duplicity, the proper course is to put the complainant to an election to remove the embarrassment[126]. Where the defect is latent and the particulars do not remove it, the court may direct further particulars; require the complainant to elect and to identify the alleged offences; and/or exercise the power to permit an amendment[127]. If the latent defect, once exposed, suggests a risk that the accused might not have a fair trial on the charges as pleaded, the court should require correction: S v The Queen[128].

The policy of precision in criminal pleading

With all respect to those who are of a different view, I cannot agree to any reduction in the strict approach to resolving questions of duplicity in the pleading of criminal charges. A strict approach has been consistently applied by this Court from Johnson v Miller[129] through Iannella v French[130] and up to S v The Queen[131], the latter having been decided in 1989. Quite apart from the consistent application of the authority of this Court, there are reasons of legal principle or policy which favour the approach of this Court and which resist the approach which has apparently found favour in England and New

Zealand. These reasons are:

1. Compliance with the rule of strictness is a correct practice to require of prosecutors. It obliges them, at the outset of criminal proceedings, to define with accuracy each criminal offence which they intend to prosecute and to identify, in respect of each, the elements of the offence necessary to secure a conviction.

2. The rule of strictness is also desirable for the fair trial of the accused, basically for the reasons identified long ago in Johnson v Miller[132] and restated in S v The Queen[133]. The rule helps to address the attention of the accused (and any legal representative the accused may have) to the elements of each alleged offence. It assists in decisions about how to plead. It clarifies contested questions about the admissibility of evidence relevant to the offences so specified. It contributes to accurate sentencing where a conviction is recorded upon those offences. It also avoids later problems with respect to pleas of autrefois acquit or autrefois convict.

3. Unless a tight rein is kept upon the prosecution practice of rolling up allegedly connected events and presenting them under a single charge, much prejudice can be done to an accused person by the admission of evidence of a generally inculpatory character which would not be allowed under the similar fact rule of evidence and if the rule of specificity of pleading criminal charges continued to be insisted upon. Nowhere is this risk more evident than in cases of alleged sexual misconduct as illustrated by S v The Queen[134]. But it is also a risk present in cases such as Weinel v Fedcheshen[135], this case and perhaps others.

...

5. A holding which would diminish the stringency of this Court's past authority would encourage imprecision in criminal pleading where precision is desirable. It would condone a slackness in the pleading of criminal charges which this Court has hitherto rejected. It would substitute pious words for a strict legal practice which the courts uphold. As this case demonstrates, precision is often needed because the point is not immediately seen by the accused or those

representing the accused. Not all accused are legally represented. Those who are may not be adequately represented. The availability of legal representation in cases involving offences such as those charged here may decline with other demands on public legal assistance. It is therefore desirable that this Court's instruction should be addressed to the practices of prosecutors and to the attention of judicial officers.

9. The rule against duplicity is a general rule. The rule provides that *"a prosecutor may not ordinarily charge in one count of an indictment, information or complaint two or more separate offences provided by law"*.[1] However, there are exceptions to this rule. The exceptions are as follows:
   i. where the prosecution relies on multiple acts that are so close in time and place that they can be viewed as one composite activity;
   ii. *"where the offence is one that can be classified as continuing in nature"*; and
   iii. *"other anomalous cases"*.[2]

DETERMINATION

10. In the current circumstances, the applicant is charged with 3 counts of intentionally causing harm to J-Ka Dakin contrary to section 74 of the ***Crime Act 2016***. For each count there is a different conduct which is alleged to have intentionally caused harm to J-Ka. For the first count the alleged conduct is slapping. For the second count the alleged conduct is hitting the arm, legs and buttocks with a big wooden stick. Lastly, for the third count the alleged conduct is the pulling of J-Ka's hair on her head forcefully downwards. There are 3 distinct conducts that allegedly contravene section 74 of the ***Crimes Act 2016***.

11. Lord Morris of Borth-y-Gest made the following observations in ***DPP v Merriman*** (1973) AC 584 at 592: (at 235)

"It is obvious that a knifing attack by one man who delivers a number of blows may properly be charged as a series of woundings but one must ask oneself

[1] ***Walsh v Tattersall*** [1996] HCA 26; (1996) 188 CLR 77; (1996) 139 ALR 27; (1996) 70 ALJR 884 (2 October 1996)
[2] n1, above

whether this would be an application of common sense in terms of Lord Morris's speech. For my part I see no objection to charging the incident as one offence, provided always that it is clear what the offender is charged with. Similarly, a series of penetrations, by the same offender in the course of one sexual attack need not, in my judgment, be the subject of separate counts so long as they are not seen to be separate and distinct in time or circumstance. The first penetration may be interrupted by the victim's struggles or by a momentary apprehension of detection. It would of course be open in strict point of law to charge each penetration as a separate offence but scarcely consistent with the robust approach suggested by Lord Morris. In such a case I see no objection to charging one count of rape. On an indictment for attempted murder it may be proved that the prisoner knifed the victim two or three times and then pursued him down the street knife in hand. Technically the Crown could charge each knifing and the pursuit as separate offences of attempted murder. There can however be no objection to charging the whole episode as an attempted murder and indeed one has known this to be done. If Sperotto (1969) 71 SR (NSW) 334 decided to the contrary, it should not, in my respectful opinion, be followed."

12. From the above passage it can be gleaned that as a matter of general application it would be proper for a prosecutor, in similar circumstances, to charge an offender of the different or multiple offending conduct in separate counts. However, the courts may in those same circumstances allow the prosecutor to charge an offender of the different or multiple offending under one single count.

13. In the current circumstances, the Director of Public Prosecutions has opted to charge the applicant of the alleged offending conduct in three separate counts. This does not offend the rule against duplicity. Therefore, I find that the applicant's application is misconceived and ought to be dismissed accordingly. Further, this will not prejudice the defendant because if the defendant is found guilty of the alleged offending then during the sentencing the totality principle would apply to ensure a proportionate sentence is made that is just and appropriate in the circumstances.

ORDERS

14. That the Notice of Motion to Quash The Charge and an Affidavit of Dallien Dakin in Support of Notice of Motion filed on 23 April 2024 is dismissed.

Dated this 11th day of June 2023.

Resident Magistrate
Vinay Sharma [Mr.]