



## JUDGMENT SUMMARY

### *R v Dubois and O'Dempsey: Reasons for Separate Trial*

On 20 July 2016 each of the defendants, Garry Reginald Dubois and Vincent O'Dempsey, applied for a separate trial. The applications raised a number of legal and factual issues. For reasons delivered on 11 August 2016, the Supreme Court ordered that each defendant be tried separately.

In summary, there was substantial evidence admissible against Dubois which was not admissible against O'Dempsey; and substantial evidence admissible against O'Dempsey which was not admissible against Dubois. This included the evidence of witnesses to whom either Dubois or O'Dempsey (but not both) were said to have confessed. For example, the evidence of Peter Hall about an alleged confession which Dubois made to him in January 1974 was not admissible against O'Dempsey. That alleged confession to Hall contained a detailed account of the murder of Mrs McCulkin, the rape of her daughters, their murder and the burying of three bodies.

The alleged confessions made by O'Dempsey to Warren McDonald (in the late 1990's) and to Kerri Scully (in about 2011-2012) were not admissible against Dubois. Those confessions contained no detail of the circumstances of the murders and did not refer to the rape of the McCulkin daughters.

Had there been a joint trial, a jury would have been required to consider, in the case against O'Dempsey, the alleged confessions made by him, which lacked any detail, whilst, at the same time, disregarding the detail of the alleged murders given by Mr Hall. This would have required the jury to perform a practically impossible task.

Previous decisions about granting separate trials establish that:

- substantial prejudice will not be avoided where directions given by the trial judge to avoid it require "remarkable mental feats" that the jury could not be expected to perform; or
- the prejudice may be such as to "cause a jury even to ignore the directions of a trial judge".

Justice Applegarth's 11 August 2016 judgment includes the following passages:

*"[125] The difficulty of all jurors performing that task is acute in respect of Hall's evidence, which is inadmissible against O'Dempsey, but fills in the picture left incomplete by the statements allegedly made by O'Dempsey to McDonald and to Scully about the McCulkin murders. The inadmissible evidence is prejudicial because of the detail which it provides and its shocking content. This inadmissible evidence tends to bolster the case against O'Dempsey that he confessed to murdering the McCulkins and confirms the evidence of McDonald and Scully about O'Dempsey's character: that of a cold-blooded murderer who had committed a number of murders. This inadmissible evidence, if acted upon, significantly bolsters the credibility of witnesses whose credibility is problematic.*

[126] ... The jury is likely to experience real difficulty in disregarding the detailed and chilling description given by Hall of how the murders were perpetrated and what that account implies about O'Dempsey's character. I cannot be confident that all members of the jury will be able to ignore such chilling evidence which adds detail to otherwise vague and unparticularised evidence from McDonald and Scully about the circumstances in which O'Dempsey allegedly killed the McCulkins. Directions at trial are unlikely to be effective to ameliorate this prejudice. ...

[127] ... Ultimately, the highly prejudicial and inadmissible evidence against O'Dempsey is a source of significant prejudice and that prejudice cannot be adequately ameliorated by directions at trial. The considerations which favour a joint trial are outweighed by the risk that evidence which is inadmissible against O'Dempsey, but which is admissible against Dubois, will prejudice O'Dempsey's right to a fair trial. In the circumstances, there should be an order for separate trials. ...

[128] ... Evidence which is admissible only against O'Dempsey bolsters Hall's account of what Dubois allegedly said, which depicts O'Dempsey as a hardened and cold-blooded killer who murdered the McCulkins.

[129] In addition, O'Dempsey's twice-repeated statement that "Shorty is nothing but a rapist" is highly prejudicial to Dubois for the reasons submitted by him. It bolsters the chance of Hall's evidence being accepted since it corroborates the allegation that Dubois raped one of the McCulkin daughters, but did not personally murder any of the McCulkins.

[130] I consider that there is a significant risk of improper use being made of evidence which is admissible only against O'Dempsey in the case against Dubois, and of the jury impermissibly using that evidence to enhance the credibility of witnesses against Dubois, particularly Hall.

[117] ... a joint trial which results in the conviction of one of both applicants may lead to an appeal in which convictions are set aside on the ground that there should have been separate trials, with a new trial or trials being ordered. The end result may be three trials, instead of two."

For those and other reasons separate trials were ordered. Communication of the reasons to the general public at the time they were given risked prejudicing the pending trial of Dubois, and the pending separate trial of O'Dempsey. The reasons are now available to the general public and may be found here: [R v Dubois & O'Dempsey \[2016\] QSC 176](#).

**NOTE:** This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.

**ALSO NOTE:** The evidence referred to in those reasons refers to the evidence which certain witnesses were expected to give at a trial. Whether they in fact gave such evidence depended on further pre-trial rulings about the admissibility of parts of their evidence, and the actual evidence at the trial of Dubois in November 2016 and at the trial of O'Dempsey in May 2017. Therefore, the reasons given on 11 August 2016 for ordering a separate trial should not be used as a source of reference for the actual evidence given at those trials.