

Backup Charges

Brent Redfern v R [2012] NSWCCA 178

I recently received a question regarding backup charges. An accused had been charged with both Robbery and Deal with Proceeds of Crime. The solicitor felt that this was 'overkill and just nasty' since the purpose of the robbery was to obtain the proceeds. I explained that Proceeds was a backup charge in case the accused beat the more serious robbery charge. This article aims to assist legal practitioners appearing in the Local Court of NSW.

Definition

Section 165(1) Criminal Procedure Act defines a back up offence:

back up offence, in relation to an indictable offence, means an offence—

- (a) that is—
 - (i) a summary offence, or
 - (ii) an indictable offence that is capable of being dealt with summarily by the Local Court in accordance with the provisions of Chapter 5, and
- (b) all the elements of which are elements that are necessary to constitute the first indictable offence, and
- (c) that is to be prosecuted on the same facts as the first indictable offence.

The Typical Scenario

The most common example is where the accused is charged with both Common Assault and Assault Occasioning Actual Bodily Harm. An injury is an essential element of the AOABH charge. So, the police will try to prove the assault and an injury. If they prove the assault but not the injury, then the accused is acquitted of the AOABH but found guilty of the less serious backup charge. If police prove the injury, then the accused is found guilty of AOABH and the backup charge is withdrawn.¹

Deal with Proceeds of Crime is often laid as a backup to other property offences like Robbery, Break Enter & Steal or Larceny. If police fail to prove an element of the property crime (usually the identity of the robber / burglar) they can still convict the accused of dealing with the proceeds of the robbery / burglary. Again, the backup should be withdrawn if the more serious offence is proved.

What If Police Don't Withdraw the Backup?

It's important to establish at the outset whether a sequence is a backup charge. This is usually obvious from the particulars on the CAN and the Facts Sheet. If they refer to one incident involving one complainant and the second sequence is consumed within the

¹ s167(1)(a) Criminal Procedure Act

gravamen of the first sequence, then it's a pretty safe bet that it's a backup. If in doubt, email the OiC and ask.

Part & Parcel of the Primary Offence?

If the police are being unreasonable, then the court has to determine as a matter of law whether the second sequence is duplicitous. The leading case is Brent Redfern v R.² Mr Redfern pleaded guilty to drug supply and had a proceeds of crime charge taken into account on a Form 1. He then appealed to Court of Criminal Appeal which found that the proceeds of crime sequence was duplicitous and should not have been taken into account.

Adams J (McClellan & Hoeben concurring) held at [17]:

It is self evident, as it seems to me, that the totality of the applicant's criminality in the charged offences is not increased by the fact that he had in his possession the money paid to him for the supply of the drugs. It would be as sensible to have charged and punished him additionally with possession of the drugs for the purpose of supplying the undercover police officer because he had the drugs in his possession. Both the possession of the drug itself and the proceeds of sale are part and parcel of the primary offence. It needs hardly to be said that it is immaterial that he had the cash in his possession at the point of sale as distinct from in the safe in his home. To punish him additionally for either one of those aspects of his conduct is to double count: see Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure Act) 1999 No 1 of 2002 [2002] NSWCCA 518; (2002) 56 NSWLR 146 at [42] ff; Thorn v R [2009] NSWCCA 294; (2008) 198 A Crim R 135 at [27]; Nahlous v R [2010] NSWCCA 58; (2010) 77 NSWLR 463 at [13]-[15]; Schembri v R [2010] NSWCCA 149 at [11]-[16]; Maglis v R [2010] NSWCCA 247 at [9]; cf Hinchcliffe v R [2010] NSWCCA 306.

So, the key question is whether the second sequence is 'part and parcel of the primary offence'. An older way of expressing this is to say that the second sequence is consumed within the gravamen of the primary sequence.

I'm available every day if you have any interesting issues.

Chris Nowlan
Barrister-at-Law
Ph: (02) 8251 0066
chris@chrisnowlan.com

² Brent Redfern v R [2010] NSWCCA 178