MAGISTRATES COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**May v Commonwealth of Australia and Helicopter Resources Pty Ltd (No 1)**
Citation:	**[2019] ACTMC 20**
Hearing Date(s):	17 & 18 June 2019
Decision Date:	18 June 2019
Before:	**Magistrate Theakston**
Decision:	See [17]
Catchwords:	**CRIMINAL LAW – Procedure** – Amendment of information – defect in form or substance – creation of uncertainty and duplicity – unfair prejudice to the defendants – timing of application – impact on Court resources
Legislation Cited:	*Criminal Procedure Act 2009* (Vic) s 8 *Magistrates Court Act 1930* (ACT) s 28 *Work Health and Safety Act 2011* (Cth) s 233
Cases Cited:	*Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; 239 CLR 175 *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37; 93 NSWLR 338 *DPP v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55; 49 VR 676 *Kirk Group v Industrial Relations Commission of NSW* [2010] HCA 1; 239 CLR 531 *Martin v Purnell* [1999] FCA 872; 93 FCR 181
Parties:	Christopher May (Informant) Commonwealth of Australia (First Defendant) Helicopter Resources Pty Ltd (Second Defendant)
Representation:	**Counsel** Mr P Neil SC (Informant) Mr C Jacobi (Informant) Mr B Narula (Informant) Mr D Hallowes SC (First Defendant) Ms C Currie (First Defendant) Mr G O'Mahoney (Second Defendant) **Solicitors** Commonwealth Director of Public Prosecutions (Informant) Maddocks (First Defendant) Norton White (Second Defendant)

File Number(s): CC 44149 - 44151 of 2017; 44152-44154 of 2017

MAGISTRATE THEAKSTON:

The application

1. The Commonwealth of Australia and Helicopter Resources Pty Ltd face a joint criminal hearing charged with offences of failing to comply with their duties to ensure the health and safety of workers, where the failure exposed workers to the risk of death or serious injury. The informations giving rise to the charges were filed and served some 18 months ago and the matter listed for a six week hearing. On the first day of the hearing the prosecution made an application to amend the charges. On 18 June I refused that application and these are my reasons why.

Background

2. The charges concern three events that occurred in late 2015 and early 2016 in the Australian Antarctic Territory. It is alleged that helicopters operated and piloted by Helicopter Resources, under an arrangement with the Commonwealth, landed on ice that was prone to hidden crevasses. The pilots of those helicopters also walked on the ice as part of their duties. Tragically on the third occasion a pilot, Mr David Wood, fell into a hidden crevasse. He was subsequently rescued but died shortly thereafter.

3. As is required in offences of this type (see *Kirk Group v Industrial Relations Commission of NSW* [2010] HCA 1; 239 CLR 531 at [14]), the prosecution has particularised the act or omission that amounted to the offence, including identifying the risk to the health and safety of the workers and the specific measures that they say would have address the hazard of the hidden crevasses and the associated risks, and which were reasonably practicable.

4. As originally particularised, those measures included a systematic process of assessing the landing sites for the existence of crevasses. That process involved a number of cascading or sequential steps, some of which involved assessments that of themselves may lead to the conclusion the site would not be suitable due to the risk of crevasses being present. Those steps can be summarised as:

    (a) assessing publicly available satellite imagery, to determine if there is indicia of crevassing and the location of the ground line, and if likely to be only minimal crevassing at the site, to proceed to the next step;

    (b) conducting an air task assessment of the site for the purpose of assessing the risk of crevassing;

    (c) having a trained person conduct a low sun angle helicopter reconnaissance to assess if crevassing, and if likely to be only minimal crevassing at the site, to proceed to the next step;

    (d) having a trained person conduct helicopter-crevasse probing of the site;

    (e) marking boundaries of any area deemed safe to land and walk; and

(f) repeating the process if more than two weeks has elapsed or if there has been a significant weather event, since the last assessment.

5. The charges included additional specified measures, probably in the alternative. This was raised with the prosecution, along with the possibility that the charges may therefore be duplicitous. I also noted that the relief available under s 233 of the *Work Health and Safety Act 2011* (Cth) for duplicitous charges may not be available as the 'factual circumstances' associated with the first and additional specified measures may not be the same: *DPP v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55; 49 VR 676. Ultimately, the prosecution elected to proceed only with a single specified measure in each charge.

The amendment

6. The prosecution sought leave to vary the particulars of the charges in a number of ways, namely:

   (a) To replace the incorrectly named pilots in two of the charges against Helicopter Resources. In their original form, those charges were internally inconsistent in that regard and the references to the erroneous pilots made those parts of the particulars nonsensical. That amendment was by consent.

   (b) To re-frame the above site assessment process, such that each step was expressed in the alternative. That is, the defendants failed to comply with their duty to ensure the health and safety of workers by permitting the landing and walking on the sites when the Commonwealth had not taking one or more of those steps.

   (c) To replace the word 'likely' with 'possible' in the charges against Helicopter Resources where reference was made to the potential for crevasses.

   (d) To qualify the specified measure that pilots should don appropriate clothing when outside of their helicopters, by adding the expression 'as soon as reasonably practicable'.

7. There was a fifth amendment that fell away once the prosecution elected to abandon contractual provisions within the agreement between the defendants as being a specified measure particularised in the charges applicable to Helicopter Resources.

Consideration

8. Issue was taken by the defendants in relation to whether s 28 of the *Magistrates Court Act 1930* (ACT) had been enlivened by the application. That provision appears to be the sole source of power for the Court to amend an information, other than perhaps by consent. It reads:

> **Power of court to amend information**
>
> (1) If at the hearing of any information or summons any objection is taken to an alleged defect in it in substance or form or if objection is taken to any variance between the information or summons and the evidence adduced at the hearing of it, the court may make any amendment in the information or summons that appears to it to be desirable or to be necessary to enable the real question in dispute to be decided.
>
> (2) The court must not make an amendment under subsection (1) if it considers that the amendment cannot be made without injustice to the defendant.

9. This provision applies in two circumstances. Only the first applies here as at the time of the application there had been no evidence adduced. The first circumstances is where an objection is taken to an alleged defect in the charge in relation to its form or substance. There is nothing within the provision to suggest that the prosecution could not 'object' to the form or substance of the information. Further, the second circumstance would be nonsensical if it contemplated only a defendant could object to a variance between the information and the evidence adduced at the hearing. I also note that with modern prosecuting arrangements, the person prosecuting a matter may not necessarily be the person who filed the information. I also note that Miles J in *Martin v Purnell* [1999] FCA 872; 93 FCR 181 at [31] made observations about the function of s 28 and when doing so described the provision as providing an opportunity for the informant to 'provide a further formulation of the offence charged or to provide particulars of the facts relied on'. Accordingly, I have taken the prosecutor's application as an objection for the purpose of this provision.

10. The prosecutor pointed to a perceived risk about their prospects of securing a conviction as the alleged defect for the purpose of the provision. In short, they viewed their prospects as better should the various steps in the site assessment measure be particularised in the alternative rather than cumulatively. They also conceded that any defect would only trigger the provision for the purpose of addressing that defect, and would not create an opportunity to rely upon the provision to make amendments at large.

11. While I have some sympathy for the prosecution wanting to put its case in the strongest way possible and note that some other jurisdictions have more flexible powers to amend charges, see for example s 8 of the *Criminal Procedure Act 2009* (Vic), I must apply the provisions of the *Magistrates Court Act 1930* (ACT) as they are. I am not persuaded that the mere possibility of a stronger case would amount to a defect in substance or form and therefore engaged the above provision. If I am wrong about this, I have also considered other matters put forward by the defendants.

12. It was submitted that the reframing of the site assessment measure would create impermissible uncertainty and duplicity. I disagree. The proposed amendment would create a degree of complexity that would not amount to uncertainty or lead to there being more than one offence described within the individual charges. What was being proposed was that the defendants had breached their duties by allowing the helicopters to land, and the pilots to walk, on the sites where the Commonwealth had not conducted at least one of the specified steps for site assessment. Under that description, the offence would only have been committed if none of those specified steps had been taken and at least one of those steps had been reasonably practicable. There was simply one offence described and no way to distil the separate steps into separate offences.

13. In contrast, the original description involved the offence being committed in circumstances where the multi-step site assessment process had not been conducted and it was at the time reasonably practicable to conduct that process. That could be established by proving that the Commonwealth had not performed at least one of those steps and that each of the steps was reasonably practicable. Put another way and assuming that none of the steps had been undertaken by the Commonwealth, for a defendant to succeed, in the first case it needed to only point to a reasonable doubt about the reasonable practicability of one relevant step (*Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37; 93 NSWLR 338 at [26]), whereas in

the proposed amendments, it needed to point to reasonable doubt about the reasonable practicability of each of the alternative steps.

14. The prosecution submitted that there would be no significant change to its case as the underlying substratum of facts, and the associated evidence remained the same. There was no change to the hazard or the associated risks. However, this understates the significance of the proposed amendments. As can be seen above and while the prosecution evidence may remain essentially unchanged, the adjustment in the prosecution case would have meant that the defendants would need to focus on each of the steps within the site assessment process, rather than just a chosen few. I accept that in the circumstances where the defendants have been preparing their forensic approach for 18 months and would have made a range of forensic decisions, including what evidence and lines of enquiry they would pursue, the bringing of this application on the first day of the six week hearing would create an unfair prejudice amounting to an injustice to each defendant.

15. Similar issues, although possibly not as significant, arises in relation to the other amendments sought.

16. During submissions, there was no suggestion that such injustice could be alleviated by adjourning the proceedings. However, if that had been proposed I would have been very reluctant to allow the amendments on that basis. The matter had been listed for hearing for many months and involved numerous directions hearings. There was no explanation for the late timing of the application. The throwing away of the significant time allocated to the hearing would have had a substantial impact upon the business of the Court, including the ability of the Court to attend to other matters, such as matters involving defendants who are remanded in custody and awaiting a hearing. That impost upon the business of the Court, along with the late and unexplained timing and the nature of the application would weigh strongly against an adjournment of the proceedings: *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; 239 CLR 175.

17. For the above reasons I refuse to amend the informations, other than to replace the name ‘Bryan Patterson’ with the names ‘Mr David Wood and Mr Paul Sutton’ at paragraphs 14 and 15 of Charge 2 and paragraphs 15 and 16 of Charge 3 in the information applicable to Helicopter Resources Pty Ltd.

I certify that the preceding seventeen [17] numbered paragraphs are a true copy of the Reasons for the Ruling of his Honour Magistrate Theakston.

Associate: Priyanka Koci

Date: 28 June 2019