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The Supreme Court of the Northern Territory (Mildren ACJ, Blokland and Reeves JJ)
14 December 2010
[2010] NTSC 69

Criminal Law – jury trial of Aboriginal men for murder – whether the *Juries Act 1962* (NT) infringes s 80 of the Constitution – whether the *Juries Act 1962* (NT) is inconsistent with the *Racial Discrimination Act 1975* (Cth) – entitlement of accused persons to a fair trial – whether accused persons are entitled to be tried by a racially balanced jury – summoning jurors – whether the Sheriff summoned jurors in accordance with the *Juries Act 1962* (NT) – Court's inherent jurisdiction to stay proceedings.

Facts:

On 11 June 2010, two Aboriginal residents of Alice Springs, Graham Woods and Julian Williams, pleaded not guilty to the murder of Edward Hargraves, a non-Aboriginal person. The accused were remanded to stand trial on 14 September 2010 at the Supreme Court in Alice Springs. However, the accused applied to change the venue of the trial from Alice Springs to Darwin due to a perceived risk that they would not receive a fair trial. In July 2010, Blokland J rejected this change of venue application and confirmed that the trial would commence as initially planned (see *Woods & Williams v The Queen* [2010] NTSC 36).

In August 2010, the Sheriff of the Supreme Court of the Northern Territory began obtaining an array of jurors for the September sittings of the Supreme Court in Alice Springs. The Sheriff used a computer to randomly select 350 persons from the annual jury list for the trial, and then forwarded the list to SAFE NT, a division of the Police, Fire and Emergency Services, to check whether any person was disqualified from service as a juror. After disqualifying 92 persons from jury service, the Sherriff then requested a precept from the Chief Justice directing him to summon 291 persons. The Sherriff then sent the summonses by ordinary post to the addresses recorded on the annual jury list.

In September 2010, prior to the trial, the accused sought to discharge the jury panel and adjourn the trial on three grounds. First, the accused argued that the *Juries Act 1962* (NT) ('Juries Act') was invalid because it infringes s 80 of the Constitution. Second, the accused contended that the Juries Act was inconsistent with the *Racial Discrimination Act 1975* (Cth) ('RDA') because its operation infringes the right contained in art 5(a) of the *Convention on the Elimination of All Forms of Racial Discrimination*. Third, the accused argued that the Sheriff had failed to summons jurors in accordance with the Juries Act.

In relation to the second ground, the principal issue that arose was whether ss 10(3)(a) and 30(b) of the Juries Act contravene ss 9 and 10 of the RDA. Section 10(3)(a) of the Juries Act disqualifies from jury service any person who within the previous seven years had either been in custody or on conditional liberty imposed as part of a sentence of imprisonment. Section 30(b) of the Juries Act permits the delivery of jury summonses by ordinary post. The accused argued that these provisions disproportionately impact upon the Aboriginal population of Alice Springs such that the jury selected for their trial would likely include a disproportionately low number of Aboriginal people. Due to the prevalence of racial issues surrounding the case, the accused contended that this would impair their entitlement to a fair trial by jury.

Held, per curiam, quashing the array, discharging the jury panel and staying the proceedings:

As to whether the Juries Act infringes s 80 of the Constitution:

1. The Juries Act does not infringe s 80 of the Constitution because s 80 has no application to the trial of Territory offences: [24]; *R v Bernasconi* (1915) 19 CLR 629, followed.

As to whether the Juries Act is inconsistent with the RDA:

2. An accused person is entitled to be tried by an independent and impartial jury selected in accordance with the law, but this does not mean that the jury array needs to be racially balanced or comprised of the same proportion of people of a particular race: [58]–[67]; *R v Grant & Lovett* [1972] VR 423 followed, *R v Ford (Royston)* [1989] 3 WLR 762 followed, *R v Smith (Lance Percival)* [2003] 1 WLR 2229 followed, *Porter v Magill* [2002] 2 AC 357 followed; *Kingswell v The Queen* (1985) 159 CLR 264, cited; *Rojas v Berllaque (Attorney General for Gibraltar intervening)* [2004] 1 WLR 201, distinguished; *R v Smith* (unreported, District Court of NSW, 19 October 1981), distinguished; *Roach v Electoral Commissioner* (2007) 233 CLR 162, distinguished.

3. The proportion of Aboriginal people in a jury array does not limit or impair the accused persons' entitlement to a fair trial by jury. There are a range of measures taken before and during a criminal trial to ensure that racial prejudice does not influence the deliberations of the jury: [51], [60]–[62].

4. The imprisonment disqualification provision in s 10(3)(a) of the Juries Act is specifically sanctioned by the Northern Territory legislature as a disqualifying criterion for jury service. In light of what the High Court said in *Western Australia v Ward* (2002) 213 CLR 1, [103], s 9(1) of the RDA does not invalidate s 10(3)(a) of the Juries Act: [25]–[31]; *Gerhardy v Brown* (1985) 159 CLR 70, followed; *Western Australia v Ward* (2002) 213 CLR 1, cited.

5. Section 30(b) of the Juries Act does not contravene s 9 of the RDA. Even if it did, the remedy for that is found in the scheme established by Part III of the RDA. It does not therefore assist the accused persons in the circumstances of their case: [19], [32]–[35]; *Gerhardy v Brown* (1985) 159 CLR 70, followed; *Western Australia v Ward* (2002) 213 CLR 1, followed; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 followed.

6. Section 30(b) of the Juries Act does not offend s 10(1) of the RDA because the alleged impairment associated with s 30(b) can be cured by the Sheriff effecting personal service on prospective jurors under s 30(a) of that Act: [36]–[41]; *Western Australia v Ward* (2002) 213 CLR 1, considered.

As to whether the Sheriff failed to summon jurors in accordance with the Juries Act:

7. The Sheriff did not summons jurors in accordance with the Juries Act. Specifically, the Sheriff did not have authority to choose the persons to be summoned under s 27 of the Juries Act because the Chief Justice had not yet issued a jury precept: [81]–[82]; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, cited.

8. The Juries Act did not authorise the Sheriff to rely solely upon the checks made by SAFE NT as to whether persons on the jury list were disqualified from the list by s 10 of the Juries Act: [85].

9. The fact that the checks were carried out without any statutory authority by an organisation connected with the police is objectionable on the basis that the police are interested in the prosecution of offenders. In such circumstances, there is a ground for challenge for favour on the basis that the Sheriff's actions are not necessarily consistent with the principle of indifference: [97]; *R v Ilic* (1959) Qd R 228, distinguished; *R v Diack* (1983) 19 NTR 13, distinguished; *Katsuno v The Queen* (1999) 199 CLR 40, distinguished.

As to whether the accused persons were entitled to orders discharging the jury panel and adjourning the trial in the exercise of the Court's inherent jurisdiction to secure their right to a fair trial:

10. Where statute regulates the process from which a randomly selected panel will be chosen to try the accused and the purpose of that process is designed to achieve fairness, non-compliance with the statute may require a stay to achieve a fair trial at law. In this case, the combination of (a) the Sheriff acting without authorisation of the Chief Justice's precept and (b) the checks for disqualification being made by a party who is not indifferent to the prosecution lead to the conclusion that any trial conducted drawn from the array assembled would not fulfil the legal requirements of a trial by jury and would not be fair or seen to be fair: [104]–[106], [116]; *Dietrich v The Queen* (1992) 177 CLR 292, followed; *Reg v Ford (Royston)* [1989] 3 WLR 762, cited; *Brown v The Queen* (1986) 160 CLR 171, cited.