



Précis Paper

Appeals Against the Discharge of a Whole Jury

Running a jury trial in a criminal matter is as demanding as any task a lawyer can face in practice. When will the court interfere with a decision of a trial judge to discharge a jury? For all practitioners across Australia this discussion is interesting and important even though it examines a particular NSW statute. The stature of our presenters is also another inducement to watch and listen.

Discussion Includes

- Discharge of individual jurors under s 53B of the *Jury Act 1977* (NSW)
- Discharge of whole jury under s 53C of the *Jury Act 1977* (NSW)
- Interlocutory appeal to the Court of Criminal Appeal against discharge of whole jury under s 5G of the *Criminal Appeal Act 1912* (NSW)
- Analysis of rationale for introduction of s 5G
- Appealing against discretionary decisions of a trial judge – the *House v The King* test

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Appeals Against the Discharge of a Whole Jury

1. In this edition of BenchTV, Stephen Odgers SC (Barrister) and Gabriel Wendler (Barrister) discuss the NSW Court of Criminal Appeal's (Bathurst CJ, Harrison and Button JJ) recent decision in *R v Lamb; R v Mason; R v Hill* [2016] NSWCCA 135. In that case a judge indicated that he had decided to discharge a jury in a criminal trial which had been going for some days, the Crown opposed the discharge and brought the matter to the Court of Criminal Appeal to be dealt with under a new provision, s 5G of the *Criminal Appeal Act 1912* (NSW).
2. Mr Wendler did not appear in the trial but was briefed to appear for two of the three accused, Mason and Hill, represented on a joint indictment in the Court of Criminal Appeal.

The Trial: *R v Lamb; R v Mason; R v Hill* [2016] NSWCCA 135

3. The accused were charged with the offence of entering a dwelling house with intent to commit a serious indictable offence (intimidation) in circumstances of both aggravation and special aggravation. It was pleaded that the circumstances of aggravation included the fact that they were in company and the circumstances of special aggravation were that they had inflicted grievous bodily harm upon the alleged victim in the house. It was believed that this was a "payback" assault as one of the members of Mason's family had been seriously assaulted by the alleged victim of the offence and it appeared that the three men sought to exact "vigilante justice" on the complainant.
4. The prosecution's case involved elements of joint enterprise, that is the three men were working together and were thus equally responsible for what each of them did.
5. The trial was originally due to commence in Moree as the offence had been committed in Narrabri, but there were difficulties paneling a jury in Moree due to the number of jurors who sought to be excused due to rural commitments. The judge in Moree decided to move the venue to Sydney and the trial proceeded in Sydney.
6. The trial went for 11 days and during the summing up the judge received a note from the foreman (a jury member who acts as the chairman and spokesperson for the jury) which suggested that one of the accused, Mr Lamb, had communicated with two of the jurors in such a way that two jurors felt intimidated by the approach. The note from the whole jury stated in part "We are uncomfortable as we feel that this was an attempt to intimidate the jury." The judge examined the foreman in court as a witness in order to determine with greater accuracy and detail what the impact of the approach was upon the two jurors who were directly involved and the collateral impact on the balance of the jury.

7. Counsel for Mr Lamb gave an explanation that the approach was innocent and Mr Lamb had become confused in relation to where the court house entrance was and had just made an innocent inquiry of a particular juror who then informed another juror.
8. In the end, the judge discharged the two jurors who had been allegedly intimidated or approached by one of the accused under s 53B of the *Jury Act 1977* (NSW) which enables a judge to discharge a juror if it appears to the court that the juror is not able to give impartial consideration to the case. In the view of the judge, those jurors would not be able to remain impartial in the rest of the trial.

SECTION 53B:

Discretionary discharge of individual juror

The court or coroner may, in the course of any trial or coronial inquest, discharge a juror if:

- (a) *the juror (though able to discharge the duties of a juror) has, in the judge's or coroner's opinion, become so ill, infirm or incapacitated as to be likely to become unable to serve as a juror before the jury delivers their verdict or has become so ill as to be a health risk to other jurors or persons present at the trial or coronial inquest, or*
 - (b) *it appears to the court or coroner (from the juror's own statements or from evidence before the court or coroner) that the juror may not be able to give impartial consideration to the case because of the juror's familiarity with the witnesses, parties or legal representatives in the trial or coronial inquest, any reasonable apprehension of bias or conflict of interest on the part of the juror or any similar reason, or*
 - (c) *a juror refuses to take part in the jury's deliberations, or*
 - (d) *it appears to the court or coroner that, for any other reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act as a juror.*
9. While procedurally, a jury trial can continue even though two jurors out of twelve have been discharged, the question then arose as to whether the balance of the jury should also be discharged under s 53C of the *Jury Act* which provides that a court must discharge the jury (as a whole) if of the opinion that to continue with the remaining jurors would give rise to the risk of a substantial miscarriage of justice.

SECTION 53C:

Discretion to continue trial or coronial inquest or discharge whole jury

- (1) *If a juror dies, or the court or coroner discharges a juror in the course of a trial or coronial inquest, the court or coroner must:*
 - (a) *discharge the jury if the court or coroner is of the opinion that to continue the trial or coronial inquest with the remaining jurors would give rise to the risk of a substantial miscarriage of justice, or*

- (b) *if of the opinion that there is no such risk and subject to section 22, order that the trial or coronial inquest continue with a reduced number of jurors.*
- (2) *A court or coroner that discharges a jury under subsection (1) (a) may stay the proceedings on such terms as the court or coroner thinks fit if a party gives notice of an intention to lodge an application for leave to appeal for review of the decision under section 5G of the Criminal Appeal Act 1912 .*
- (3) *Where a jury in civil proceedings is discharged under this section, the proceedings may, without any new process for that purpose, be set down for trial either at the same or any subsequent sittings, as the court may order.*
10. The Crown strongly opposed the discharge of the jury since the foreman had explained that the impact of the approach was not significant on other jurors and the jury was still prepared to continue to act. The Crown also indicated that they would avail themselves of the right under s 5G of the *Criminal Appeal Act 1912* (NSW) to proceed to have the decision to discharge the jury reviewed.
11. One alternative option to discharging the jury would be for the judge to give the jury certain instructions, for example by explaining that the judge had investigated the approach, found that the approach was completely innocent with no intention to intimidate and directing the jury to completely disregard it.
12. Nonetheless, the judge decided that there was a risk of a substantial miscarriage of justice. In making this decision, the judge took into account that the approach and the offences with which the accused were charged both involved a component of intimidation, as well as the ambiguity of the foreman's answers to questions about the jury. The foreman changed his position when he was asked similar questions. For example at one point he said that only two jurors had expressed concerns but then at another point he said there is some discomfort amongst the jurors, which suggested there was still a problem with the remaining jurors. The judge considered the possibility of giving directions but ultimately decided that he was required to discharge the jury as the test in s 53C was satisfied. One risk of a substantial miscarriage of justice was that an adverse interest by the jury against one of the accused from the approach to jury members would flow through to their assessment of the other two accused.
13. The judge did not make a formal order discharging the jury, rather he just indicated that it was what he would do. It was on that basis that the Crown proceeded to seek a stay of any order discharging the jury and indicated that they would proceed under s 5G of the *Criminal Appeal Act* and file an interlocutory application for leave to appeal the judge's intimation that he would in fact discharge the jury.

Section 5G of the Criminal Appeal Act

14. Section 5G was inserted into the *Criminal Appeal Act* in 2008 by the *Jury Amendment Act 2008* (NSW) No 24 in order to expand the interlocutory jurisdiction of the *Criminal Appeal Act*. The *Jury Amendment Act 2008* was a response to the NSW Law Reform Commission Report No 117 (2007) concerning amendments to the *Jury Act* in relation to powers to discharge a jury and the economic impact, cost and delay of jury trials that do not proceed. Section 5F of the *Criminal Appeal Act* provides jurisdiction for applications to appeal against interlocutory judgments or orders. Section 5G expanded that jurisdiction to review decisions of a coroner or court to discharge a jury. The desire was to be able to have an interlocutory review if the court has possibly wrongly discharged a jury, while the trial is technically proceeding, and if the judge is found to have erred to essentially overturn that decision and require the trial to proceed till finality.

SECTION 5G:

Appeal against discharge of whole jury

- (1) *The Attorney General, Director of Public Prosecutions or any other party to a trial of criminal proceedings before a jury may appeal to the Court of Criminal Appeal for review of any decision by the court to discharge the jury, but only with the leave of the Court of Criminal Appeal.*
 - (2) *The Court of Criminal Appeal is to deal with an appeal as soon as possible after the application for leave to appeal is lodged.*
 - (3) *The Court of Criminal Appeal:*
 - (a) *may affirm or vacate the decision appealed against, and*
 - (b) *if it vacates the decision, may make some other decision instead of the decision appealed against.*
 - (4) *If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.*
 - (5) *This section does not apply to the discharge of a jury under section 51, 55E, 56 or 58 of the Jury Act 1977.*
15. Section 5G identifies three functionaries which have standing to appeal a decision to discharge a jury: the Attorney-General; the Director of Public Prosecutions (DPP); and a party to the criminal trial.
16. Section 5(2) provides that the appeal should be heard by the Court of Criminal Appeal as soon as possible after the application for leave to appeal is lodged. In this case, the appeal was heard within two days of the trial judge's decision to discharge the jury. As it was the

Director's application, the Director had the responsibility to bring the matter on expeditiously. The presenters note that this can create difficulties since the Court of Criminal Appeal mentioned that they did not have all the documentation they may have ideally liked to have had to review the decision, but they thought they had enough to proceed.

17. Historically s 5G has only been activated on 3-4 occasions since coming into operation in 2008. This case was the first occasion where the Director of Public Prosecutions had sought a review under s 5G.

Court of Criminal Appeal: *R v Lamb*; *R v Mason*; *R v Hill* [2016] NSWCCA 135

18. Oral arguments were heard in front of the Court of Criminal Appeal. The DPP was arguing that the judge was wrong to discharge and the respondents, the lawyers representing the accused, were arguing that the judge was correct.
19. The Crown's position was that the decision to discharge was unreasonable and plainly unjust relying on principles from *House v The King* (1936) 55 CLR 499, one of the leading decisions on appeals against discretionary decisions involving evaluative judgments. The High Court in *House v The King* stated that, when there is an appeal against a discretionary decision, it is not for the appeal court to decide what they think should have happened but rather they have to show either that there was a clear error (e.g. failing to take into account a relevant factor) or that the decision was so unreasonable that it must have involved an error of principle. The Crown could not point to any specific legal error so they simply argued that the decision was unreasonable and thus the test for appellate review had been satisfied.
20. The Crown also sought to adopt a test identified by the High Court in *Crofts v R* (1996) 186 CLR 427 which asks whether there was a situation of compelling, immediate necessity to discharge. The response to that from the respondents was that there was a statutory test under s 53C and there was no need to turn to a common law test, especially from a case which was many years prior to the introduction of the relevant provision of the *Jury Act*. The Court of Criminal Appeal found it was not necessary to evaluate the legal relationship between *Crofts*' common law test and the test identified in s 53C.
21. On Mr Odgers' SC reading of the judgment, the Court's decision turned on whether or not the test in *House v The King* had been met. One judge did suggest that it could have been reasonable for the trial judge not to discharge, pointing to the possibility of giving directions to the jury and a whole range of factors, including that the trial was almost concluded, which would have supported a decision not to discharge. However, the Crown did not satisfy the test in *House v The King* as it could not be said that the decision to discharge was unreasonable as there was a basis on which it could be justified. Thus, the Court did not intervene. In determining that it was not unreasonable, the Court focused upon the offence

with which the three respondents were charged and the fact that it had as part of its composition the idea of intimidation, which was what had been complained about by two members of the jury. They also noted that there was ambiguity in the foreman's report concerning the two jurors and whether their concerns had infiltrated the balance of the jury. Ultimately, the Court of Criminal Appeal did not find it unreasonable for the trial judge to discharge the jury as there was a risk of substantial miscarriage of justice in the circumstances.

22. Mr Odgers SC notes that an appellate court should be careful in overturning the decision of a trial judge just because they come to a different view since the trial judge has certain advantages in actually being present in front of the foreman and other jurors and having a sense of the atmosphere of the trial.

Implications

23. Mr Wendler believes that the result in *R v Lamb*; *R v Mason*; *R v Hill* was correct.
24. The whole purpose of amendment to the Criminal Appeal Act was an economic one, in order to increase the efficiency and reduce costs from jury trials. The jurisdiction is unique as no other State or Territory has a similar jurisdiction as in NSW.
25. The jurisdiction under s 53C is not often exercised but is likely to become more prevalent as trials become larger, longer and more complex and as practitioners come to know the jurisdiction better.

BIOGRAPHY

Stephen Odgers

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Stephen Odgers was admitted to practice in 1981, called to the NSW Bar in 1989 and appointed as a Senior Counsel in 2000. His area of practice is criminal law, specialising in criminal appeals. He is a chair of the Criminal Law Committee, NSW Bar Association; member of the National Criminal Law Liaison Committee, Law Council of Australia and Adjunct Professor, Faculty of Law, University of Sydney.

Gabriel Wendler

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Gabriel Wendler was admitted to the NSW Bar in 1988 having previously been admitted to legal practice in South Australia. He has an Australia-wide criminal trial and appellate practice. He has also appeared in major criminal trials in New Zealand and Fiji. He has been counsel in numerous High Court appeals. He is an appointed member of the NSW legal aid complex criminal trial and appellate panels. He is a past member of the NSW Bar Association Criminal Law Committee.

BIBLIOGRAPHY

Focus Case

R v Lamb; R v Mason; R v Hill [2016] NSWCCA 135

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_criminal/benchmark_15-07-2016_weekly_criminal_law_review.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/577ed85be4b058596cb9d379>

Cases

House v The King (1936) 55 CLR 499

Crofts v R (1996) 186 CLR 427

Legislation

Jury Act 1977 (NSW)

Criminal Appeal Act 1912 (NSW)

Jury Amendment Act 2008 (NSW) No 24

Other

NSW Law Reform Commission Report No 117 (2007)