

SUPREME COURT OF QUEENSLAND

CITATION: *R v MacGowan* [2014] QSC 277

PARTIES: **THE QUEEN**
(Crown)
v
MACGOWAN, Brandon Peter
(defendant)

FILE NO/S: 26 of 2014

DIVISION: Trial

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 25 August 2014

DELIVERED AT: Cairns

HEARING DATE: 25 August 2014

JUDGE: Henry J

ORDERS: **1. Discharged juror replaced by new juror.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – JURIES – STRIKING AND EMPANELLING – GENERALLY – where a reserve juror was selected – where 12th selected juror was discharged in the final stage of jury selection process – whether reserve juror should move to discharged juror’s position – whether new juror should assume position of discharged juror or reserve juror

Jury Act 1995 (Qld) s 34, s 46, s 56

COUNSEL: T Fuller QC, for the Crown
J Trevino for the defendant

SOLICITORS: Director of Public Prosecutions (Queensland) for the Crown
Legal Aid (Queensland) for the defendant

HENRY J: During the empanelment of the jury in this case I empanelled one reserve juror, Ms M, who sat in the chair ordinarily occupied by juror 13. The learned Crown prosecutor then read out the identifying details of persons who might be called as witnesses by the prosecution. Mr K, who was sitting where juror 12 would ordinarily sit, indicated a potential concern regarding his perceived partiality and was then discharged by me. This necessitated a continuation of the empanelment process to fulfil my intention of having 13 jurors, that is, the conventional 12 jurors plus one reserve juror empanelled.

An issue arose as to whether Ms M should move to the vacated seat of Mr K and join the intended jury of 12 so that the next empanelled juror would become the reserve juror, or whether she should remain in the seat allocated for the reserve juror so that the next empanelled juror would actually assume Mr K's vacated seat and become one of the 12 jurors.

The prosecution urged the former course and defence counsel did not wish to submit either way on the matter. These events were occurring in the midst of empanelment. I did not delay further by hearing substantive argument and acceded to the prosecution's submission as to what ought then occur. Thus the next empanelled juror took Mr K's vacated seat in the position of juror number 12 and Ms M has since continued to sit in the 13th jury seat ordinarily occupied by a reserve juror.

Later, in the jury's absence, I asked counsel to further consider the point with a view to me revisiting it and ensuring that if 13 jurors remained by the end of the summing-up, the reserve juror discharged by me will be the juror who was, as a matter of law, empanelled as the reserve juror.

I have now heard further submissions from counsel. The point is not the subject of any appellate authority to which I have been referred. Practices at first instance, at least in my time in practice, varied.

The point falls for determination as a simple matter of construction. Section 56 of the *Jury Act* reposes a general power in the presiding judge to discharge a juror after the jury is sworn. Section 56(2) relevantly provides:

- (2) *If a juror dies or is discharged before the trial begins, the judge may direct that another juror be selected and sworn.*

The subsection casts no particular light upon the specific point with which I am here concerned. In any event, it ought be read subject to any provision of the Act dealing more specifically with the present issue.

One such provision may arguably have been section 34. It relevantly provides:

34 *Reserve jurors*

- (1) *The judge before which a civil or criminal trial is to be held may direct that not more than three persons be chosen and sworn as reserve jurors.*
- (2) *Reserve jurors —*
- (a) *are to be selected in the same way as ordinary jurors; and*
- (b) *are liable to be challenged and discharged in the same way as ordinary jurors; ...*

- (3) *If a juror dies or is discharged after a trial starts but before the jury retires to consider its verdict, and a reserve juror is available, the reserve juror must take the vacant place on the jury. ...*

On the face of it, section 34(3) arguably suggests that Ms M should, on Mr K's discharge, have taken his vacant place on the jury, that is, as juror number 12. However, such an argument depends on whether Mr K's discharge occurred after the trial had started, that being the pivotal point in time with which section 34(3) is concerned.

Consideration of the issue of when a trial has started is coloured by the circumstances in which the issue arises. The issue in the present circumstance is informed by the structure of the Act and more particularly, section 46 which is contained within the same part of the Act as section 34, namely "Formation of juries". The division within which section 46 falls is "Final stage of jury selection process". Section 45 defines that specific stage as being:

“...the final stage of the jury selection process when all jurors and reserve jurors have been selected and sworn but the jury panel has not yet been discharged.”

Section 46 then specifically indicates what should occur if a juror is discharged during that specific stage of proceedings. It provides:

46 *Judge's discretion to discharge juror in final stage of jury selection process*

- (1) *When the judge reaches the final stage of the jury selection process, the judge may discharge a person who has been selected as a juror or a reserve juror if the judge considers there is reason to doubt the impartiality of the person.*

...

- (3) *If a person is discharged under this section, another person must be selected from the jury panel to take the person's place as a juror or reserve juror. (Emphasis added.)*

The distinction made in subsection (3) between “the person's place as a juror or reserve juror” is instructive. It distinguishes between whether the juror discharged was at the time of the discharge in place as “a juror or reserve juror”. In that context “a juror” is a reference to one of the 12 persons then in place to constitute the jury of 12 and not the person in place as the “reserve juror”.

If a discharged juror was in place as a reserve juror that is the place the freshly empanelled replacement juror must take. On the other hand, if the discharged juror was in place as a juror, that is, as one of the 12 persons then in place to constitute the regular jury, then that is the place the freshly empanelled juror must take.

It follows in the present trial that, because the discharged juror Mr K was one of the 12 persons then in place to constitute the regular jury at the time of his discharge, it was his place the freshly empanelled juror should have taken. That course was, in the upshot, followed. In the event that by the conclusion of the summing-up one of the

regular jury of 12 has not been discharged, it is Ms M, who has remained during the trial seated as juror number 13, the reserve juror, who will be discharged.

I record for completeness that in hearing brief argument in this matter defence counsel indicated he held instructions that, in the event that there had been any irregularity which, as I have indicated there has not been, that was waived by Mr MacGowan.