

SUPREME COURT OF QUEENSLAND

CITATION: *R v Johnson* [2015] QCA 61

PARTIES: **R**
v
JOHNSON, Glenn Charles
(applicant/appellant)

FILE NO/S: CA No 139 of 2014
DC No 1646 of 2013

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Criminal

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE: 20 April 2015

DELIVERED AT: Brisbane

HEARING DATE: 16 April 2015; 20 April 2015

JUDGES: Morrison JA and Atkinson and Applegarth JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Sung Do Lawyers are granted leave to withdraw from the record.**
2. The Appeal is adjourned to a date to be fixed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – OTHER – where the applicant’s counsel made an oral application to adjourn the matter – where the original reason for seeking adjournment was that the junior counsel could not act without breaching the *2011 Barristers’ Rule* r 95(d) – where the senior counsel had limited instructions from the instructing solicitors – where the instructing solicitors wished to withdraw from the matter – where subsequently senior counsel also sought to withdraw from the matter – where the applicant was not aware that the application for an adjournment was being made on his behalf – where the adjournment if granted would be the second adjournment of the matter – where the Court required the presence of the applicant and the applicant’s solicitors to determine the matter – where when the applicant was informed of his counsels intention to seek an adjournment and withdraw the applicant consented – whether the applicants’ solicitors should be granted leave to withdraw – whether the matter

should be adjourned

Bar Association of Queensland Barristers' Conduct Rules 2011,
r 95(d)

Jury Act 1995 (Qld), s 70(3)

Bergin v Holzaphel, Ex parte Holzaphel [1953] St R Qd 167,
cited

Evans v Davies [1991] 2 Qd R 498, cited

COUNSEL: J D Batch QC for the applicant/appellant
M Byrne QC for the respondent
T G Zwoerner (*sol*) as a representative of Legal Aid
Queensland

SOLICITORS: Sung Do Lawyers for the applicant/appellant
Director of Public Prosecutions (Queensland) for the
respondent
Legal Aid Queensland

- [1] **MORRISON JA:** On 15 April 2015, senior counsel for Mr Johnson sent an email to the registry seeking to adjourn the application for leave to appeal, and the appeal, scheduled to commence on 20 April. One of the grounds was that junior counsel had recently withdrawn and he was to argue four of the five grounds in the appeal.
- [2] The Court's response to that email, sent on 16 April, was that the Court expected the matter to start on 20 April, noting that:
- the appeal had been adjourned once before in November 2014;
 - the appellant had filed extensive outlines on all points;
 - there was still a reasonable period of time in which to arrange alternative counsel to deal with the grounds that junior counsel was to argue;
 - there is a public interest in having the appeal heard without unnecessarily delay; and
 - no formal application to adjourn had been made.
- [3] On 16 April 2015, senior counsel made an oral application to adjourn the hearing.
- [4] Among the points made by senior counsel were:
1. Junior counsel had been obliged to withdraw from the case because of r 95(d) of the *Bar Association of Queensland Barristers' Conduct Rules 2011*. Junior counsel had sworn several affidavits upon which it was proposed to rely, one of which was contested to some degree.
 2. Senior counsel had prepared to argue the one ground, and it would be difficult to retain alternative counsel for the other grounds.
 3. The solicitors on the record, Sung Do Lawyers, had announced their intention to seek leave to withdraw, leaving senior counsel without instructions.
 4. In the circumstances, senior counsel did not wish to appear on 20 April without instructions.

5. In the present circumstances, Mr Johnson would be disadvantaged on 20 April.
- [5] As the submissions developed, it became apparent that Mr Johnson may not have been aware that the application to adjourn was being made and might well oppose it being made.
- [6] Senior counsel for the Crown did not oppose the adjournment and made two points:
- the conduct of junior counsel at trial, the same junior counsel who had withdrawn recently, would be under attack, and so he would've been obliged to withdraw under other parts of the *Bar Association of Queensland Barristers' Conduct Rules 2011* in any event.
 - his view was that if Legal Aid Queensland became involved for Mr Johnson, a different view might well be taken of the way to conduct the appeal, and there was merit in that being allowed to occur.
- [7] Because of the Court's concerns over Mr Johnson's potential lack of representation on 20 April, and particularly that he might not even be aware of the application made on his behalf, the Court adjourned the further hearing of the application to 20 April, requiring Mr Johnson and the solicitors to be present and urging senior counsel to take such steps as may be reasonably taken in the interim to commence the Legal Aid process.
- [8] Today, Mr Batch QC has again appeared in a limited capacity on behalf of Mr Johnson, instructed by Sung Do Lawyers. The Court has had the benefit of hearing also from Mr Byrne for the Crown and Mr Zwoerner from Legal Aid Queensland.
- [9] The position seems to be this, as things stand today: Mr Batch QC is instructed only for the purposes of seeking the adjournment and not further, and that is the same position for Sung Do Lawyers, who appear only in order to give those instructions and then seek leave to withdraw. An affidavit of Mr Kim has been filed in respect of the withdrawal from the record, and those orders have been made.
- [10] The Legal Aid representative, Mr Zwoerner, has informed the Court that they have had a brief chance to confer with Mr Johnson and anticipate that they will be able to involve counsel in considering taking over the appeal sometime this week. The Court is grateful for that information.
- [11] The circumstances are such that this matter cannot proceed today for some of the reasons raised by Mr Batch QC and some of the reasons by Mr Byrne QC. Part of the difficulties in advancing this matter today involve the process that has been engaged in obtaining evidence from a juror as to what transpired in the jury room. As it appears in the material that we have available to us, that juror approached junior counsel from the trial, who until recently was junior counsel in the appeal. As a consequence of that, an affidavit was prepared, which was witnessed by junior counsel, and that deposes to various matters that transpired in the course of deliberations, the juror expressing concern that he not go into the detail of what was said from one juror to another.
- [12] There is an argument that that affidavit is inadmissible, and that point has been made by Mr Byrne QC on behalf of the Crown. There is also an argument that the obtaining of that material, the disclosure by the jury and participation in obtaining it may infringe s 70(3) of the *Jury Act 1995* (Qld). That is a matter of concern, because the obtaining

of that information involved counsel who were to appear in the appeal and, from its terms, involved senior counsel in conferring with that jury as well.

- [13] It is by no means clear that that affidavit is admissible, though it will be received on the appeal no doubt to determine that very question. That affidavit is central to the main ground of the appeal. The other grounds concern the way in which the trial was conducted, failure to direct the jury and matters of that sort. The importance of that point to the overall conduct of the appeal cannot be understated. Questions will no doubt arise on the appeal, foreshadowed by Mr Byrne QC, as to the way in which the trial was conducted by junior counsel. Questions will no doubt arise in the conduct of the appeal itself concerning the obtaining of the affidavit from the juror and, I might say, the experts who purport to depose to various expert opinions concerning that juror's condition, and the involvement of counsel in doing that as well.
- [14] As I say, it is by no means clear to me that that affidavit is admissible and will finally be received, and expectations based upon that should be tempered, in my view.
- [15] The other matters of concern are that any counsel who appears in the appeal needs to have substantive instructions. That's not possible for Mr Batch QC or for Sung Do Lawyers, and instructions obtained by the services of Mr Johnson's niece, though perfectly well intended, do pose a limitation.
- [16] In the circumstances, I am satisfied the matter should not proceed today and that Legal Aid should be given an opportunity to involve itself and make an assessment of this case. I make the observation, though, that this case has been adjourned once before. There is a public interest in it being determined, quite apart from the personal interest which Mr Johnson has in its being determined, given that his release date for the period of imprisonment is fast approaching. For all of those matters, I am persuaded that the matter should be adjourned to a date to be fixed, but that the matter should be approached with some urgency to bring it on as soon as may be done. That, of course, will be determined at least in the first instance by the ability of Legal Aid to cope with their introduction to this case.
- [17] **ATKINSON J:** I agree.
- [18] **APPLEGARTH J:** I agree, and I would add this: it is unfortunate, to say the least, that this appeal has to be adjourned, and it is adjourned in circumstances in which the appellant, Mr Johnson, has only recently made the acquaintance of lawyers from Legal Aid Queensland. That really arose as a result of the hearing late last week. The Rules of the Bar which precipitated the application for the adjournment last week are not technical rules. Even before the enactment of the *Barristers' Conduct Rules*, dealing with counsel giving evidence and swearing affidavits, there has been a longstanding rule that counsel appearing in matters do not give evidence. It is almost axiomatic that counsel, who have important functions to perform for their client and for the administration of justice, are not at the same time witnesses.
- [19] I trust that Mr Johnson is not under the misapprehension that this adjournment arises because of some technicalities. It is far from a technical matter that someone who was counsel at a trial and who wishes to give evidence concerning the trial should not be counsel at the appeal.

[20] One could have regard to any books on professional ethics that would tell you this. For example, it has been said that:

“It is not the practice, nor is it desirable that counsel who took part in a proceeding the subject of an appeal should swear affidavits as to the events which occurred in the proceeding appealed from. Such affidavits should be made by the solicitor who instructed the counsel concerned.”¹

Of course, sometimes there are exceptional circumstances.

[21] Apart from the obvious undesirability of counsel swearing affidavits and then purporting to appear as appeal counsel, the appeal raises very complicated issues concerning the reception of evidence from a jury. I say very little about it. I can, however, say from personal experience that if a solicitor or a counsel or a client is approached by a juror after a trial, then that counsel or solicitor or party has to act with scrupulous care. I had personal experience of this in the case of *Evans v Davies* [1991] 2 Qd R 498, and the immediate instinct of any lawyer would be to be extremely careful in speaking to a juror. That is because one immediately appreciates the common law and the statutory restrictions upon jurors disclosing matters. Also, it is important that if a juror wishes to make a statement, that that statement is taken in the juror’s own words by an independent solicitor, if possible. None of this happened.

[22] I make no comment about the conduct of junior counsel during the trial. It is not necessary for me to do so. I only wish to say that, from my understanding of how matters have transpired in the conduct of the appeal, Mr Johnson has not been well served by junior counsel in the conduct of this appeal. It is also unfortunate, to say the least, that that junior counsel prevailed upon the solicitor, who has now had an opportunity to withdraw, to come onto the record rather than have Mr Johnson do, as he now has done, and apply for legal aid.

[23] Anyone who is asked to be senior counsel in an appeal of this kind would also need to be scrupulous about observance of rules concerning the reception of evidence from counsel and to only take on the matter if counsel thought that he or she had sufficient experience in this area of practice.

[24] It is vitally important that Mr Johnson seek and obtain competent legal advice both in respect of the present and foreshadowed ground of appeal and any other grounds of appeal. Fortunately, he has now come into contact with Legal Aid Queensland, I would say, far too late. Legal Aid Queensland appeared today as a courtesy to the Court, and I would hope that it would devote appropriate resources to this matter and ensure that Mr Johnson is quickly acquainted with the issues in this appeal so that the further conduct of this appeal is not further delayed. I join in the presiding judge’s comments about the importance of this matter being kept under review so that the appeal can proceed, if it does, at the earliest possible opportunity after Mr Johnson has received competent advice.

[25] **MORRISON JA:** The orders then are that Sung Do Lawyers have leave to withdraw from the record and the appeal is adjourned to a date to be fixed.

¹ G N Williams, *Harrison’s Law and Conduct of the Legal Profession in Queensland* (Brisbane: Lawyers Bookshop, 2nd ed, 1984) 111 citing *Bergin v Holzaphel, Ex parte Holzaphel* [1953] St R Qd 167 at 172.