SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sica* [2011] QSC 261
PARTIES:	**R** **v** **SICA, Massimo** (applicant)
FILE NO:	SC No 84 of 2011
DIVISION:	Trial
PROCEEDING:	Pre-Trial Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2011
JUDGE:	Chief Justice
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – TRIAL HAD BEFORE JUDGE WITHOUT JURY – GENERALLY – where applicant charged with three counts of murder – where applicant seeks no jury order under s 615 Criminal Code (Qld) – where the trial was likely to be lengthy and potentially complex – where there was circumstantial evidence – where the case had attracted substantial pre-trial publicity – where an decision in the case had earlier been given by the Court of Appeal and was available on the Court's webpage – whether a no jury order should be made *Criminal Code* 1899 (Qld), s 615 *Jury Act* 1995 (Qld), s 34 *Doney v R* (1990) 171 CLR 207 *Gilbert v R* (2000) 201 CLR 414 *R v Fardon* [2010] QCA 317 *R v Glennon* (1992) 173 CLR 592 *Western Australia v Martinez* (2006) 150 A Crim R 380
COUNSEL:	S Di Carlo for the applicant M R Byrne SC, with B G Campbell, for the respondent
SOLICITORS:	Howden Saggers for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** The applicant has been charged with three counts of murder. The trial has been set down to commence on 30 January 2012. The applicant seeks an order under s 615 of the *Criminal Code* that he be tried by a Judge sitting without a jury.

[2] Section 615 provides:

> "**615 Making a no jury order**
>
> (1) The court may make a no jury order if it considers it is in the interests of justice to do so.
>
> (2) However, if the prosecutor applies for the no jury order, the court may only make the no jury order if the accused person consents to it.
>
> (3) If the accused person is not represented by a lawyer, the court must be satisfied that the accused person properly understands the nature of the application.
>
> (4) Without limiting subsection (1), (2) or (3), the court may make a no jury order if it considers that any of the following apply—
>
> (a) the trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury;
>
> (b) there is a real possibility that acts that may constitute an offence under section 119B would be committed in relation to a member of a jury;
>
> (c) there has been significant pre-trial publicity that may affect jury deliberations.
>
> (5) Without limiting subsection (1), the court may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of objective community standards including, for example, an issue of reasonableness, negligence, indecency, obscenity or dangerousness."

[3] The primary submission advanced by Mr Di Carlo, who appeared for the applicant, was that because of its probable length and complexity, the trial would likely be unreasonably burdensome to a jury. As to length, he suggested that a trial would occupy six months, with a jury of 12 and three reserve jurors, the maximum number permitted under s 34 of the *Jury Act* 1995. He referred to recent reports of distress experienced by jurors because of the length of the trial of Mr Standen in the Supreme Court of New South Wales, and whether jurors could reasonably be expected to give proper attention over such a lengthy period. There would, he submitted, be need for a specially crafted daily routine so that jurors would have the opportunity to attend to personal and business needs. Also, he submitted, the available pool of jurors would probably end up so limited that trial by "peers" would not be secured, especially if the court took the course of notifying prospective jurors in advance of the likely length of the trial.

[4] I observe in that regard that there would likely be some limitation in the availability of jurors, with a trial of that length, and serving on such a jury may well have more appeal to persons who are retired, or students, or persons out of employment. But it is I think unhelpful to speculate about that, and it would be quite wrong to suggest that a jury of that composition would not discharge its responsibility conscientiously and well, or not warrant the description of trial by peers.

[5] Mr Di Carlo submitted that the length of the trial may be affected by the present position, where the applicant would be representing himself. The applicant has declined an offer of legal aid whereby he would be represented by lawyers from within the Legal Aid office, although he has challenged that decision. If he appears for himself, the safety of admissions which might otherwise be forthcoming to limit the trial could not be assured, so that the prospect of reducing the length of the trial would be diminished.

[6] Also, with a trial of that length, there would be risk that more than five jurors could be discharged for one reason or another, with the consequence that the trial would have to be aborted. In my view that speculative possibility should not influence the determination of the present application.

[7] Mr Di Carlo relied also on the likely complexity of the case, referring to computer based material and telephone conversations. That could result in disruptions because of the need for legal argument, with consequent frustration for jurors.

[8] Mr Byrne SC who appeared for the respondent, acknowledged that it will be a lengthy trial, of at least eight to 10 weeks duration, although he would not be drawn on any longer period and he acknowledged that any lengthy trial would be burdensome for a jury. While also acknowledging the substantial volume of the evidence to be presented, he suggested there was nothing especially complex by way of scientific, medical or other technical evidence. The circumstantial evidence case, well suited for determination by a jury, will be supplemented by evidence from Ms Bowman of an alleged admission: her credibility, Mr Byrne submitted, would likewise best be assessed by a jury.

[9] Mr Di Carlo additionally relied on the publicity which the case has attracted over some years. The prosecution accepted that the case has attracted substantial publicity, and its own share of notoriety. Mr Byrne pointed out that some of the publicity was generated by the applicant himself. Whether that "may affect jury deliberations" (s 615(4)(c)), should be determined on the basis the jury would be given the usual directions about confining their determination to the evidence etc.

[10] Mr Di Carlo referred to the circumstance that the decision given by the Court of Appeal on 16 February 2010 has been accessible on the court's webpage, and drew attention to paragraph 35 of the reasons for judgment. A prospective juror could have read that, he submitted, a possibility which Mr Byrne rejected as fanciful. I confirm that all judgments relating to the applicant were today removed from the webpage. I accept Mr Byrne's submission in relation to that aspect.

[11] Before expressing my response to the other submissions which have been made, I record my view that s 34 of the *Jury Act* should be amended to leave to the discretion of a trial judge how many, if any, reserve jurors should be sworn. That was my view as I followed the recent trial of Dr Patel. The present limitation to no more than three does not accommodate an unfortunate contemporary reality, which is that criminal trials are taking longer these days. I respectfully recommend that consideration be given to a review of that present limitation.

[12] I proceed on the basis that my discretion under s 615 to make a "no jury order" is unfettered. The court may make such an order only if the court considers it warranted "in the interests of justice". Sub-section (4) provides examples of cases where the court

may make such an order, and sub-section (5) provides an example of a situation where the court may decline to make the order. But as those sub-sections make clear, the discretion established by sub-section (1) remains unfettered. It has been unnecessary for me to discuss what was said in *R v Fardon* [2010] QCA 317, para 80, beyond expressing my agreement with the proposition that it falls to an applicant to demonstrate that the "interests of justice" warrant the court's exercising its discretion in favour of making such an order.

[13] Of course a trial consuming some months will be burdensome for jurors. Steps would be available to alleviate that burden to some extent, such as by not sitting one day a week and reducing sitting time. But a trial of that length will inevitably be burdensome. There is the possibility that with a lengthy commitment, the attention of jurors may waiver from time to time. That would be a matter for monitoring by the trial judge. One must proceed on the basis that the jurors will be true to their oaths or affirmations, and follow the trial judge's directions. See *Gilbert v R* (2000) 201 CLR 414, 420 and *R v Glennon* (1992) 173 CLR 592, 603. One likewise should proceed on the basis that the jury will determine the matter only by reference to the evidence, uninfluenced by pre-trial publicity.

[14] From what I have been told of the case, there should be no particular complexity which would fall beyond the capacity of the jurors, and it seems to me that the resolution of the circumstantial case, and the assessment of the credibility of the evidence of Ms Bowman, are ventures for which jurors are traditionally well-equipped. See *Doney v R* (1990) 171 CLR 207, 214.

[15] While acknowledging it would be burdensome, I do not consider it would be unreasonably burdensome to a jury to require trial by jury in this case, allowing for the significance of bringing the collective wisdom of 12 members of the community, rather than that of one judge, to the determination of a circumstantial trial involving the alleged murder of three siblings. The "interests of justice" militate in favour of jury trial in this situation. Whether the verdict be guilty or not guilty, its being the verdict of a jury rather than a judge alone should command more confident acceptance by both the accused, the prosecution and the community, and that bears importantly on the interests of justice. As observed by EM Heenan J in *Western Australia v Martinez* (2006) 159 A Crim R 380, 392ff:

> "…I am of the view that, having regard to the multiplicity of issues of fact underlining the prosecution's circumstantial case against the accused, there is likely to be great advantage in obtaining the collective judgment which only a jury can provide on behalf of the community as to whether or not that evidence satisfies such a tribunal beyond reasonable doubt that the charges have been proved. For that matter, it is equally important from the viewpoint of the community at large that any decision that the accused or some of them is or are not guilty of the charges laid, should be made by a tribunal representing the wider perspective of community standards than any single decision maker can reflect…no matter how great his or her experience may be."

[16] For these reasons, I refuse the application.