SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chardon* [2016] QCA 50
PARTIES:	**R** **v** **CHARDON, John William** (applicant)
FILE NO/S:	CA No 70 of 2015 DC No 358 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Criminal
ORIGINATING COURT:	District Court at Southport – [2015] QDC 59
DELIVERED ON:	Order delivered ex tempore 4 December 2015 Reasons delivered 4 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2015
JUDGES:	Margaret McMurdo P and Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Delivered ex tempore on 4 December 2015:** **The application for a declaration that the applicant be tried on indictment number 4267/14 presented in the District Court at Southport by a judge without a jury is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – OTHER MATTERS – where an indictment charging the applicant with three offences of indecent treatment of a child and one offence of rape was presented at the District Court at Southport on 10 September 2014 – where the applicant applied for two pre-trial directions: (1) that the venue of the trial be transferred to Brisbane, and (2) that he be tried by a judge sitting without a jury – where both applications were dismissed and a Form 26 Notice of Appeal was filed against the dismissal orders – where at the hearing of the appeal, counsel for the applicant acknowledged that s 590AA(4) of the *Criminal Code* (Qld) precludes a right to appeal before conviction or sentence against a pre-trial direction or ruling made under s 590AA(1) of the *Criminal Code* (Qld) – where accordingly, the appeal was dismissed – where once the appeal was dismissed, leave was sought on behalf of the applicant to file an application in which a declaration was sought that the applicant be tried on indictment 4267/14 presented in the District Court at

Southport by a judge without a jury – where there was no objection and leave was granted – where the Court ordered the application be dismissed at the hearing of the appeal and that reasons of the order be provided at a later date

Criminal Code (Qld), s 590AA, ch 67
District Court of Queensland Act 1967 (Qld), s 63
Jury Act 1995 (Qld), s 37, s 43, s 48, s 69A
Supreme Court of Queensland Act 1991 (Qld), s 29(3)

Anderson v Attorney-General (NSW) (1987) 10 NSWLR 198, considered
Bacon v Rose [1972] 2 NSWLR 793, cited
Bourke v Hamilton [1977] 1 NSWLR 470, cited
R v Long (No 1) [2002] 1 Qd R 662; [2001] QCA 318, considered
Re Rozenes; Ex parte Burd (1994) 68 ALJR 372; [1994] HCA 11, cited
Sankey v Whitlam (1978) 142 CLR 1; [1978] HCA 43, considered

COUNSEL: P J Davis QC, with A Kimmins and Y Chekirova, for the applicant
M R Byrne QC, with J A Wooldridge, for the respondent

SOLICITORS: Paddington Law for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** On 4 December 2015 the applicant sought a declaration in this Court that he should be tried by a judge without a jury on an indictment charging him with sexual offences involving children. On that day the Court dismissed his application stating that it would publish its reasons later. What follows are my reasons for joining in that order of the Court.

[2] This Court has the power to make declarations in criminal proceedings, for example where the primary court has exceeded jurisdiction: see *Supreme Court of Queensland Act* 1991 (Qld) s 29; *Constitution Queensland Act* 2000 (Qld) s 58; *Commonwealth Constitution* chp III; *Kirk v Industrial Court (NSW)*[1]; *Bacon v Rose*[2] and *Bourke v Hamilton*.[3] This Court also has a more general jurisdiction to make declarations concerning a right, duty or obligation in criminal proceedings where there are exceptional or special circumstances: see *Anderson v Attorney-General (NSW)*[4] and *Sankey v Whitlam*.[5]

[3] Clearly the impugned ruling of the District Court judge refusing the application for a judge alone trial was made within jurisdiction; it was not suggested otherwise. The applicant has failed to demonstrate any exceptional circumstances justifying the

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1 (2010) 239 CLR 531.
2 [1972] 2 NSWLR 793.
3 [1977] 1 NSWLR 470.
4 (1987) 10 NSWLR 198.
5 (1978) 142 CLR 1, Gibbs ACJ 20-27; Stephen J 78-81; Mason J 81-82.

granting of the declaration; indeed, all discretionary considerations weigh strongly against granting it.

[4] The impugned ruling concerned an exercise of discretion in interlocutory proceedings. The applicant claimed the primary judge erred in exercising his discretion to refuse in two ways. The first, he contended, was that his Honour wrongly took into account the assessment of pre-trial publicity he made in refusing the application for a change of venue. The second, he contended, was that the judge did not give any or sufficient weight to the fact that the applicant considered he would be prejudiced if his trial proceeded before a jury. As to the first contention, the application for a change of venue and the application for a judge alone trial were heard and determined together. The judge gave his reasons for refusing the application for a judge alone trial immediately after his reasons for refusing the application for a change of venue and in the same judgment. In refusing the application for a judge alone trial, his Honour noted that the level of pre-trial publicity in the case was not such as to prohibit a jury from deciding the case according to its merits on the evidence. In reaching that determination, his Honour was entitled to refer to his reasons assessing the extent and effect of pre-trial publicity in refusing the application for a change of venue. In doing so, his Honour did not err. As to the second contention, it was self-evident that the applicant in bringing the application for a judge alone trial was submitting that a jury trial could result in unfairness to him. There can be no doubt that this experienced criminal trial judge fully appreciated that the applicant considered that a jury trial could prejudice his defence. His Honour was not required to state the blatantly obvious. The applicant has not shown that the judge made any error in the *House v The King*[6] sense in refusing to order a judge alone trial.

[5] His Honour's conclusion that any potential prejudice can be adequately dealt with by appropriate directions from the trial judge was well supported by authority: see, for example, *R v Glennon*.[7] His Honour also rightly noted that the provisions of the *Jury Act* 1995 (Qld) protect an accused person's right to a fair trial: see, for example, *Jury Act* s 37, s 43, s 48 and s 69A. The legislature has made crystal clear in s 590AA(3) and (4) *Criminal Code* 1899 (Qld) that it intends there be no interlocutory appeal from orders of this kind, whilst preserving an accused person's right to raise any complaints about the interlocutory order in a subsequent appeal against conviction or sentence.[8] These are powerful considerations weighing against the granting of the declaration. Further, as Gotterson JA explains in his reasons,[9] there are sound policy concerns supporting this legislative intent.

[6] The applicant demonstrated neither excess of jurisdiction, nor exceptional circumstances such as to warrant the granting of the declaration, nor any judicial error. The matters relied on by the applicant, whether alone or in combination, do not counterbalance the persuasive factors to which Gotterson JA and I have referred and which weigh strongly against granting the declaration.

[7] For these reasons I joined in the order of this Court on 4 December 2015 dismissing the application for a declaration that the applicant should be tried by a judge without a jury.

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6 (1936) 55 CLR 499, 507.
7 (1992) 173 CLR 592, Brennan J, 614-616, Dawson J agreeing at 625.
8 *Criminal Code* s 590AA(4).
9 At [27] and [28].

[8] **GOTTERSON JA:** An indictment charging the applicant, John William Chardon, with three offences of indecent treatment of a child and one offence of rape was presented at the District Court at Southport on 10 September 2014. The applicant later applied under s 590AA(1) of the *Criminal Code* (Qld) ("the Code") for two pre-trial directions. One was that the venue of the trial be transferred to Brisbane.[10] The other was that he be tried by a judge sitting without a jury.[11] These applications were heard together at Southport on 25 February 2015. Both applications were dismissed on 19 March 2015. On 17 April 2015, the applicant filed a Form 26 Notice of Appeal to this Court against the dismissal orders.[12]

[9] The Form 26 is headed "Notice of Appeal or Application for Leave to Appeal against Conviction or Sentence" and states that it is for appeals other than under s 118 of the *District Court of Queensland Act* 1967. As its heading suggests, the Form 26 is for appeals under Chapter 67 of the Code. Chapter 67 confers statutory rights of appeal against conviction and against sentence passed on conviction.[13] It does not confer a right to appeal before conviction or sentence against a pre-trial direction or ruling made under s 590AA(1). That it does not do so is explained by, and conformable with, the express prohibition in s 590AA(4) that such directions or rulings must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence.[14]

[10] At the hearing of the appeal on 4 December 2015, senior counsel for the applicant, who had not represented him when the Form 26 was filed, acknowledged that the avenue of an appeal at the interlocutory stage was not open to his client. Accordingly, the appeal was dismissed.[15]

[11] Once the appeal had been dismissed, leave was sought on behalf of the applicant to file an application in which the following relief was sought:

> "A declaration that the applicant should be tried on indictment 4267/14 presented in the District Court at Southport by a judge without a jury."

No relief was sought in respect of a change of venue. In the absence of objection, leave was granted.[16] Submissions on that application were then heard.

[12] At the conclusion of the hearing, and after a brief adjournment, the Court made an order that the application be dismissed with reasons to be published at a later date. The following are my reasons for that order.

Jurisdiction

[13] I preface my reasons with the observation that the application was filed upon the premise that this Court possesses a jurisdiction to make a declaration of the type sought. The respondent did not concede jurisdiction but made submissions on the

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10 The source of power to so order is s 63 of the *District Court of Queensland Act* 1967: *R v Yanner* [1998] 2 Qd R 208.

11 The source of power to so order is s 614(1) of the Code. Such an application must be made under s 590AA before the trial begins: s 614(2).

12 AB338-339.

13 Section 668D(1) and (2).

14 For completeness, I note that the *District Court of Queensland Act* 1967 does not confer a right to appeal against orders made under Part 4 thereof: see the exception in s 118(1)(a). Section 63 is in Part 4.

15 Appeal Transcript 1-4 116.

16 *Ibid* 133.

footing that such a jurisdiction existed. Those submissions centred upon discretionary factors which would tell against the making of the declaration sought.

[14] It need be said at once that this Court does not have original jurisdiction under s 590AA(1) to hear and determine an application for a judge only trial. The jurisdiction under that section to make pre-trial directions and rulings is conferred upon a judge of the court in which the indictment in question has been presented. Here, that court is the District Court and not this Court.

[15] During the hearing of the application, senior counsel for the applicant was asked to clarify the jurisdictional basis for the declaratory relief sought. On several occasions, he said that it was in exercise of a supervisory jurisdiction over the District Court.[17] In support of the existence of such a jurisdiction, he referred to the following observation of Byrne J, sitting as a member of this Court, in *R v Long (No 1)*:[18]

> "Perhaps despite ch. 67 of the *Code*, this Court, in an original jurisdiction, made by declaration effectively pronounce on the correctness of interlocutory orders in proceedings upon indictment."

His Honour cited s 29(3) and the now-repealed s 68(2) of the *Supreme Court of Queensland Act* 1991.

[16] In my view, there are difficulties with this submission at several levels. Firstly, the relief sought by the application is not appropriate for the exercise of a supervisory jurisdiction. The relief would not operate in a supervisory way upon any order made by a judge of the District Court. The application therefore does not seek relief which, to use the words of Byrne J, would effectively pronounce upon the correctness of any order of the District Court. Additionally, the court or judge whom it is sought to have supervised by relief is not a party to the application.[19]

[17] Next, the observation by his Honour does no more than canvass a possibility. It is not an expression of opinion that such a jurisdiction does exist. Further, s 29(3) to which his Honour referred, states that this Court may, in proceedings before it, exercise every jurisdiction or power of the Supreme Court wherever lawfully sourced. The section itself is therefore not an additional source of jurisdiction not otherwise conferred on the Supreme Court.

[18] It was alternatively submitted that this Court possesses an original jurisdiction to make the declaration sought. In oral argument, the Court was taken to a number of instances where declarations had been made concerning criminal proceedings, including *Bacon v Rose*[20] and *Bourke v Hamilton*.[21]

[19] The nature and extent of the jurisdiction to make declarations concerning criminal proceedings was considered by the High Court in *Sankey v Whitlam*.[22] Speaking of the jurisdiction to make "declarations of right", Gibbs ACJ observed that that expression is used in a sense that is "wide and loose".[23] His Honour said that it

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17 Appeal Transcript 1-6 114-5; 1-8 114-5; 1-10 17.
18 [2001] QCA 318; [2002] 1 Qd R 662 at [53].
19 As would occur when exercise of the supervisory jurisdiction by prerogative writ was invoked: see, for example, *R v Schwarten; Ex parte Wildschut* [1965] Qd R 276.
20 [1972] 2 NSWLR 793.
21 [1977] 1 NSWLR 470.
22 (1978) 142 CLR 1.
23 At 23.

"includes what might more precisely be described as privileges, powers and immunities".[24]

[20] This observation was subsequently regarded by the Court of Appeal of New South Wales in *Anderson v Attorney-General for New South Wales*,[25] as a confirmation of jurisdiction on its part to declare that an indictment presented in the District Court was bad in law. The existence of the jurisdiction was not disputed by the Attorney-General. That proceeding necessarily required determination of the legal validity of the indictment that had been presented against the applicants for declaratory relief.

[21] That, and the other instances of declarations into which the applicant referred here, were of proceedings in which the legal validity of a step or finding concerning the applicant for relief was in issue.[26] Those respective proceedings are significantly different from the present. Here, the appellant has not asserted, and could not assert, an underlying right to a trial by a judge without a jury which the decision made on 19 March 2015 denied him. Nor has he sought to impugn the decision to refuse such a trial as one that could not lawfully have been made by the pre-trial judge.

[22] I have made these observations to illustrate that it is far from clear that this Court has jurisdiction to grant the declaratory relief sought. Whether there is jurisdiction is problematic at the least, in my view. On this occasion, the Court did not have the benefit of full argument on the issue.[27] In these circumstances, I would refrain from making a determination of it.

[23] I am, however, of the firm view that, if such a jurisdiction exists, discretionary considerations would weigh conclusively against the granting of the declaratory relief sought.

Discretionary considerations

[24] In *Long (No 1)*, Byrne J further observed that if a declaratory jurisdiction existed, it would not be exercised "in other than most exceptional circumstances".[28] Similar observations had been made by Gibbs ACJ in *Sankey*[29] and by Kirby P in *Anderson*.[30] No circumstances of that order have been shown to exist here.

[25] Other considerations against the making of the declaration sought are as follows. First, as I have noted, the declaration does not seek to have vindicated any legal right, privilege or immunity that the applicant claims to enjoy. Nor has the applicant attempted to establish, much less established, that the only way that the discretion here can be lawfully exercised is by directing that he be tried by a judge only.

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24 *Ibid*.

25 (1987) 10 NSWLR 198.

26 In *Bacon v Rose*, it was the commencement of proceedings without the necessary Ministerial approval; in *Bourke v Hamilton*, it was a finding at committal that a *prima facie* case had been made out.

27 That was attributable largely to the timing of the making of the application and the fact that the filed written submissions did not address the issue.

28 At [53].

29 At 25.

30 At 200; see also *Rozenes v Beljajev* [1995] 1 VR 533, at 571.

[26] Secondly, the foreclosure of rights of appeal at an interlocutory stage with respect to pre-trial directions and rulings is a powerful consideration against granting declaratory relief which could have a practical outcome broadly analogous with that of an appeal. This consideration is reinforced by the provisions of s 590AA(3) which provide that such directions and rulings are binding "unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to reopen the direction or ruling".

[27] Thirdly, the policy underlying s 590AA(4) obviously is to avoid fragmentation of the criminal trial process. Strong judicial endorsement of that policy was expressed by Dawson J, sitting as a single justice of the High Court, in *Re Rozenes; Ex parte Burd*,[31] in which the discretion was exercised against granting an order *nisi* in prerogative proceedings in respect of a criminal trial. The accused had been arraigned but the jury had not been empanelled. His Honour said:

> "This Court has repeatedly indicated that the fragmentation of a criminal trial by proceedings to contest the rulings of a trial judge, by way of either leave to appeal or prerogative relief, is highly undesirable and will only be allowed in exceptional circumstances.[32] As Brennan J said in *Beljajev v Director of Public Prosecutions*,[33] 'The jurisdiction of this Court is not fitted to the supervision of interlocutory processes of a criminal trial'."

[28] Whilst the trial has not begun in the applicant's case, the observations of Brennan J make it clear that this policy is not confined to the circumstance where the trial is actually underway.

Disposition

[29] In my view, these discretionary considerations would combine forcefully against the exercise of any jurisdiction this Court may have to grant the declaration sought.

[30] **MORRISON JA:** I have had the advantage of reading, in draft, the reasons prepared by Gotterson JA. They reflect my own reasons for joining in the orders made on 4 December 2015.

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31 (1994) 120 ALR 193 at 195.

32 See eg *The Queen v Iorlano* (1983) 151 CLR 678 at 680; *Yates v Wilson* (1989) 168 CLR 338 at 339; see also *McNamara v The Queen* (1978) 20 ALR 98; *R v Garrett* (1988) 49 SASR 435 at 451.

33 (1991) 173 CLR 28 at 32.