SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kay; Ex parte Attorney-General (Qld)* [2016] QCA 269
PARTIES:	**R** **v** **KAY, Reginald James** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 241 of 2016 DC No 109 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 668A Criminal Code
ORIGINATING COURT:	District Court at Ipswich – Unreported, 5 September 2016
DELIVERED ON:	25 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2016
JUDGES:	Fraser and Morrison and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The question raised by the amended reference be answered "not in every such case".**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – MISCELLANEOUS MATTERS – QUEENSLAND – CASE STATED AND REFERENCE OF QUESTION OF LAW – where the respondent is to be tried on one count of serious animal cruelty in the District Court – where pursuant to s 590AA *Criminal Code* (Qld) a judge of that court ruled certain evidence was admissible in the respondent's trial – where in a separate s 590AA application in a similar trial, another judge of that court ruled similar evidence was inadmissible, excluded other evidence, and accepted defence counsel's no case submission over the prosecutor's objection – where, when it became apparent that the second judge would then preside over the trial of the respondent, the prosecutor applied for the judge recuse himself on the basis of apprehended bias because of his rulings in the other application – where the judge made a ruling and direction that he would try the matter the following day but provided no reasons for dismissing the prosecutor's application – where the Attorney-General refers to the Court

of Appeal under s 668A *Criminal Code* (Qld) for its consideration and opinion the question of whether a judge must give sufficient reasons for refusing an application to recuse himself or herself – where the respondent contends that the reference is invalid – whether the judge's ruling was a ruling or direction "as to the conduct of the trial" – whether the reference is of a question of law of "general application and importance" – whether a judge, when refusing to recuse himself or herself, must give reasons for refusing the application that are sufficient for a fair-minded lay observer to appreciate why that observer could not reasonably apprehend that the judge may not bring an impartial mind to the performance of his or her duties

Criminal Code (Qld), s 590AA, s 590AA(1), s 668A, s 669A

AK v Western Australia (2008) 232 CLR 438; [2008] HCA 8, cited
Commissioner of Police v Stehbens [2013] QCA 81, cited
Cypressvale Pty Ltd v Retail Shop Lease Tribunal [1996] 2 Qd R 462; [1995] QCA 187, cited
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, considered
Hatfield v Health Insurance Commission (1987) 15 FCR 487; [1987] FCA 286, cited
Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378, cited
R v Lewis, Ex parte Attorney-General [1991] 2 Qd R 294, cited
R v NP; Ex parte Attorney-General (Qld) [2013] 1 Qd R 368; [2012] QCA 116, cited
R v PV; Ex parte Attorney-General (Qld) [2005] 2 Qd R 325; [2004] QCA 494, cited
R v SAP; Ex parte Attorney-General (Qld) [2006] 1 Qd R 367; [2005] QCA 284, cited
Wainohu v New South Wales (2011) 243 CLR 181; [2011] HCA 24, considered

COUNSEL: M R Byrne QC, with C M Kelly, for the appellant
A Boe for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Nyst Legal for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Philip McMurdo JA. I agree with those reasons and with the order proposed by his Honour.

[2] **MORRISON JA:** I have read the reasons of Philip McMurdo JA. I agree with those reasons and the order proposed.

[3] **PHILIP McMURDO JA:** The respondent, Mr Kay, is charged on indictment with one count of serious animal cruelty contrary to s 242 of the *Criminal Code* (Qld)

(the "Code"). He is to be tried in the Ipswich District Court. His trial was scheduled to be heard by Horneman-Wren DCJ and a jury in the week commencing 5 September 2016. But the demands of another case made that impracticable and on that day this case therefore came before Koppenol DCJ for mention. When it then became apparent that Koppenol DCJ would be the trial judge, the prosecutor objected for what she submitted was his Honour's apparent bias. After the defendant argued otherwise, Koppenol DCJ said:

> "I see no problem in my hearing this matter. Trial will start tomorrow."

Nothing more was said to reveal the reasoning by which his Honour had reached that conclusion.

[4] On the same day, the Attorney-General filed this reference under s 668A of the Code which provides, in part, as follows:

> "(1) The Attorney-General may refer to the Court for its consideration and opinion a point of law that has arisen in relation to a direction or ruling under section 590AA given by another court as to the conduct of a trial or pre-trial hearing."

The relevant ruling was that by which Koppenol DCJ held that he could conduct the trial. The relevant direction was that the trial would commence on 6 September and (inferentially) before him. The reference, as originally filed, raised this question of law:

> "Where an application is made that a judge recuse himself or herself and that application is not expressly ruled on, but is inferentially refused, must the judge give reasons for refusing the application?"

One difficulty with that reference was that, as I have said, Koppenol DCJ had expressly ruled upon the application for recusal.

[5] By s 668A(2)(a), the Attorney-General was required to give notice of the reference to the District Court and to the defendant. That notice was given prior to the scheduled commencement of the trial on 6 September. The District Court was obliged to adjourn the trial until this court gave its opinion on the point of law.[1] Over the defendant's objection the trial was adjourned.

[6] On 19 September, the Attorney-General gave notice of the reference of an amended question. The respondent did not oppose the making of that amendment. The point of law which is now referred to the court is expressed as follows:

> "Where an application is made that a judge recuse himself or herself and that application is refused, must the judge give reasons for refusing the application that are sufficient for a fair-minded lay observer to appreciate why that observer could not reasonably apprehend that the judge may not bring an impartial mind to the performance of his or her duties?"

[7] The respondent argues that, for at least three reasons, this is not a reference which is properly made under s 668A. It is said that the decision of Koppenol DCJ not to recuse himself was not a direction or ruling under s 590AA as to the conduct of a trial. It is

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[1] By s 668A(2)(b); the word "adjourn" in this section includes, where the accused person has not been called upon to plead to the indictment, the postponement of the trial.

said that there is no point of law which is raised by the application. And it is argued that if there is a point of law, it is not one of general application and importance, as several judgments in this court have held to be necessary for a reference under s 668A.

[8] The argument for the Attorney-General is that the (amended) question should be answered in the affirmative. As the question suggests, the Attorney-General's contention is that the judge in the present case did not give reasons as the case required.

[9] If this is a reference duly made under s 668A, the respondent argues that what Koppenol DCJ said in making his ruling was sufficient to expose his reasoning, when put in the context of the respective arguments before him. It is also submitted that the prosecutor's submissions to his Honour revealed no tenable basis for a recusal, so that no reasons (or more detailed reasons) had to be provided.

The pre-trial hearings

[10] On 23 June 2016, the respondent applied, pursuant to s 590AA of the Code, for the exclusion from the evidence at his trial of certain footage which was said to show the respondent's conduct in the training of greyhounds for racing. The footage had been obtained by persons who had trespassed on the property of another man where this conduct had taken place. In a written decision on 29 July 2016, Horneman-Wren DCJ ruled that the footage would not be excluded. By s 590AA(3), that ruling was binding unless the judge presiding at the trial or at another pre-trial hearing, "for special reason", gave leave to reopen the ruling.

[11] A like charge against a defendant named Hoggan was also to be tried in the District Court at Ipswich. For that trial the prosecution intended to tender the same footage and some further footage which had been filmed two days later from a camera illegally installed on the same property. On 26 August 2016, an application was made to Koppenol DCJ under s 590AA to exclude that evidence. Koppenol DCJ ruled that it be excluded. The prosecutor then applied to adjourn the balance of the pre-trial hearing and the trial itself, so that further material could be sought "in order to brief, potentially, the Attorney-General." The prosecutor explained that the judge's ruling to exclude that evidence could become the subject of a reference under s 668A. Counsel for Mr Hoggan opposed that course and submitted that his client should be discharged. The judge then refused to adjourn the further hearing of the s 590AA application and proceeded to hear submissions as to whether a record of interview of the defendant should also be excluded. The judge then excluded that evidence, at which point counsel for the defendant submitted that there was no case to answer and that his client should be discharged immediately. The prosecutor asked for that question to be adjourned over the weekend so that he could consider his case. Koppenol DCJ refused that request, held that there was no case to answer and discharged the defendant.

[12] When the respondent's case was mentioned before Koppenol DCJ on 5 September, there was some discussion about the uncertainty of Horneman-Wren DCJ being able to start the trial on the following day and the unavailability of the respondent's counsel if it commenced after then. The respondent's counsel asked Koppenol DCJ to commence the trial on the following day, 6 September. When asked what was the prosecution's response to that suggestion, the prosecutor said:

> "My application is that your Honour would recuse yourself from hearing that trial on the basis that there's a reasonable apprehension of bias."

[13] There followed some short submissions from the respondent's counsel before his Honour returned to the prosecutor and there was this exchange:

> "HIS HONOUR: … You submit that I should recuse myself because of the perception of bias, I having ruled in another case that the video was inadmissible.
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> MS LOURY: Yes. And can I flesh that out a little further because - and add in addition to that, that application was made before your Honour and the ruling made on the 26th of August 2016 so it's in recent times.
>
> HIS HONOUR: Yes.
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> MS LOURY: The then application made by the Crown to adjourn the matter over the weekend was then refused by your Honour and also your Honour then proceeded to make a decision that there was no case to answer - - -
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> HIS HONOUR: Well, the only other evidence was a record of interview where the police allegedly gave the suspect an indemnity and at the end of the record of interview said, 'No. There's no indemnity.'
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> MS LOURY: The time to make a - - -
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> HIS HONOUR: I threw that out.
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> MS LOURY: The time for a no case submission to be made, however, is at the conclusion of the Crown case and the Crown hadn't had the opportunity - - -
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> HIS HONOUR: Come on, Ms Loury.
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> MS LOURY: - - - to open their case.
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> HIS HONOUR: I threw a trial out once during the opening where a prosecutor said that a girl was molested while she was asleep and no one saw it and the evidence that was going to be led was that the girl was asleep and she was molested. You submit I should wait until that goes right through to the end. Come on.
>
> MS LOURY: Unless the prosecution agrees to the matter being heard on the papers - yes."

[14] After his Honour was referred by the prosecutor to *Ebner v Official Trustee*,[2] he asked the respondent's counsel why he should not recuse himself. The respondent's counsel submitted that the prosecution was engaging in forum shopping to avoid the case being heard by a judge who had made an adverse ruling on the admission of the footage. After having the respondent's counsel confirm his unavailability if the trial did not commence the next day, Koppenol DCJ made the ruling and direction as I have set out above at [3]. After a brief discussion about other evidentiary points, which the respondent's counsel said could be argued at the commencement of the trial on the following day, that hearing concluded.

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2 (2000) 205 CLR 337; [2000] HCA 63.

[15] On the following morning, before the respondent was arraigned, Koppenol DCJ announced that the court had received a notice of the Attorney-General's reference. His Honour read into the record the terms of the original reference before saying:

> "That arose out of an application made yesterday by Ms Loury and I ruled that the trial would proceed today. I place on record the following two points: one, the prosecution's application yesterday for recusal was made orally and without notice to the court. Two … the prosecution did not ask me for reasons for declining its application either before or after my ruling that the trial would proceed today before me."

[16] The respondent's counsel then presented written and oral submissions to the effect that this was not a proper reference under s 668A, so that the court was not required to postpone the trial as, according to s 668A(2)(b)(i), it would have to do with a valid reference. In the course of those submissions, his Honour said that it was his experience when at the Bar that "if a judge made a ruling in an application … and you were not happy with it, you always asked the judge for his or her reasons there and then."

[17] In the course of his further submissions, the respondent's counsel said that in this trial his Honour would be bound by the ruling of Horneman-Wren DCJ and that "there's no application to revisit that at all."

[18] In reply the prosecutor submitted that it was for this court, and not the District Court, to consider the validity of the reference. His Honour accepted that submission and postponed the trial. The respondent's bail was enlarged and the trial was relisted for a sitting commencing on 13 December. The respondent's counsel placed on the record that his client was "perfectly content" to have the trial conducted by Horneman-Wren DCJ if he became available.

Section 668A

[19] I have set out above the terms of s 668A(1). The provision can apply only where there has been a direction or ruling under s 590AA as to the conduct of a trial or pre-trial hearing. Section 590AA provides, in part, as follows:

> "(1) … a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial or any pre-trial hearing."

Section 590AA(2) contains a non-exhaustive list of the types of directions or rulings which may be given under this provision. On any view, a trial court is there given broad powers to direct the conduct of a trial (or any pre-trial hearing). The purpose of this provision, originally numbered s 592A of the Code, is to enable directions and rulings to be made about the admissibility of evidence and conduct of the trial in advance of empanelling a jury, rather than a jury being sent away while questions of law are determined.[3]

[20] Section 590AA(2) does not specifically empower a direction or ruling to be made in response to a recusal application. The respondent argues that the ruling made on 5 September, that Koppenol DCJ would conduct the trial, was not made under this

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[3] Explanatory note to the *Criminal Law Amendment Bill* 2006 cl 108, thereby overcoming the problems highlighted in *R v Judge Noud; ex parte MacNamara* [1991] 2 Qd R 86, as was observed in *R v Gesa and Nona; ex parte Attorney-General* [2001] 2 Qd R 72, 75 [14].

provision. That cannot be accepted. A ruling by a judge as to who will conduct the trial is a ruling as to the conduct of the trial.

[21] The respondent's argument emphasises that a judge's decision to recuse or disqualify her or himself, or not to do so, is not an *inter partes* matter,[4] nor one which of itself (absent another order in consequence of the ruling) is something which can be competently appealed.[5] The suggested relevance of those matters appears to be that it is therefore unlikely to have been intended that such a decision could be reviewed in this court by means of s 668A. However no interlocutory ruling or order in a proceeding under the *Criminal Code* can be the subject of an appeal. Neither the Code nor s 62 of the *Supreme Court of Queensland Act* 1991 (Qld) provides a right of appeal against an interlocutory determination in a proceeding commenced by an indictment[6] and s 590AA(4) provides that a direction or ruling under that provision must not be subject to an interlocutory appeal, but may be raised as a ground of appeal against conviction or sentence. Therefore there is no distinction between a judge's decision on a recusal application and other interlocutory rulings in proceedings under the Code which could be said to indicate the interpretation of s 668A for which the respondent contends. Should it matter, if this had been a civil case, the direction by Koppenol DCJ that the trial would commence before him on 6 September would have been an order against which an appeal could be brought upon the ground that the judge ought to have recused himself.[7]

[22] Section 668A(2) requires this court, when a point of law is referred to it under this section, to hear argument by the Attorney-General and by the accused person (if that person wishes) and then to consider the point and give the Attorney-General its opinion on it. It permits the court to make orders which the court considers appropriate, including the "directions or rulings" it considers appropriate to give effect to its opinion. Those directions or rulings are evidently intended to correspond with those which, having regard to the court's opinion on the point of law, could or should have been given under s 590AA.

[23] What may be referred under s 668A is a point of law. The respondent argues that there is no point of law which is referred to the court in the present case. It is said that there was simply something akin to a discretionary decision made by the judge. However the Attorney-General has not referred to the court the question of the correctness of the judge's ruling and direction. Advice is not sought from this court about whether the judge should have recused himself. The subject of the reference is a question of whether the judge should have given reasons for refusing an application for recusal which are sufficient in the particular sense described in the reference. That is a point of law, involving as it does a question of the content of the judge's duty. In *Commissioner of Police v Stehbens*,[8] Margaret Wilson J (with whom the other members of the court agreed) held, by reference to authority[9] that a failure to give adequate reasons (if established) would be an appealable error of law. The existence and content of a judge's duty to give reasons involves a question of law.

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4 *Southern Equities Corporation Limited & Ors v Bond & Ors* (2000) 78 SASR 339, 364-365 [109]-[113].
5 *R v Watson; ex parte Armstrong* (1976) 136 CLR 248, 266; [1976] HCA 39.
6 *R v Lowrie* [1998] 2 Qd R 579; *R v Long (No 1)* [2002] 1 Qd R 662.
7 *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427, 450-451 [79]-[86].
8 [2013] QCA 81 at [6].
9 The cases were cited at n7 in her Honour's judgment at [2013] QCA 81 at [6].

[24] In several judgments in this court, it has been held that s 668A permits the reference of a point of law only where it involves a question of "general application and importance": *R v PV; ex parte Attorney-General (Qld)*;[10] *R v SAP; ex parte Attorney-General (Qld)*;[11] *R v Naylor; ex parte Attorney-General (Qld)*.[12] In the first of those cases, the President (with whom McPherson JA and Mullins J agreed) reasoned that this qualification to s 668A was required by its use of identical language to that of s 669A(2) for which the same qualification had been discerned in *R v Lewis, ex parte Attorney-General*.[13] In that case, Macrossan CJ said that s 669A was confined to "a point involving principle capable of some general application as opposed to rulings which are dependent upon the manner in which an assessment is made of particular factual situations which are not readily capable of wider application to other situations".[14] The respondent argues that if the reference does raise a point of law, it is not one of general application and importance but instead is simply what this judge should have done in the particular facts and circumstances of this case. That cannot be accepted. The amended reference defines the point of law in terms which are not limited to the present case but would be of general application.

[25] For the Attorney-General it is argued that s 668A should not be confined to questions of law of general application and importance. It is said that s 668A and s 669A operate in relevantly different circumstances: the court's advice under s 669A is not sought for the conduct of a particular case, because the case from which the point of law arose has concluded, whereas the court's advice under s 668A is to affect the conduct of a particular case. Under s 669A, the need to limit the jurisdiction to questions of general importance is evident, namely the need for the court's advice to have some utility. But such a limitation could unduly restrict the intended benefit of s 668A. Because this reference raises a point of law of a general application, it is presently unnecessary to decide whether this restriction, established as it is by at least three decisions of this court, should continue to apply to cases under s 668A.

[26] However it may be noted that the Attorney-General's argument, that the purpose of the court's advice under s 668A is to affect the conduct of the trial of the case from which the point has arisen, indicates a possible flaw in the present reference. A curious feature of this reference is that the point of law did not matter to the ruling and direction which the judge made. Therefore an answer to the question in the reference, either way, would have no consequence for the conduct of the trial. The particular circumstances of this reference might be thought to raise a question of whether the point of law is one which has arisen *in relation to* a direction or ruling under s 590AA. An expression such as "in relation to" can have a wide meaning, but the statutory context must be considered. In *Hatfield v Health Insurance Commission*,[15] Davies J said:

> "Expressions such as 'relating to', 'in relation to', 'in connection with' and 'in respect of' are commonly found in legislation but

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10 [2005] 2 Qd R 325, 326 [5].
11 [2006] 1 Qd R 367; [2005] 284 at 8.
12 [2013] 1 Qd R 368; [2012] QCA 116 at [14].
13 [1991] 2 Qd R 294.
14 [1991] 2 Qd R 294, 300.
15 (1987) 15 FCR 487, 491.

> invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute … .
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> The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear."[16]

The explanatory note to the clause of the *Evidence (Protection of Children) Amendment Bill* 2003 which became s 668A said this of the purpose of the provision:

> "New section 668A (Reference of pre-trial direction or ruling by Attorney-General) permits the Attorney-General to refer to the Court of Appeal a point of law arising in relation to a direction or ruling under section 590AA. At present, rulings on evidence made before the arraignment of the accused are not appellable under section 669A. As a result, the prosecution has no remedy to challenge a pre-trial ruling that results in a case being discontinued. The prosecution also cannot appeal an acquittal.
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> The accused is not being given the same right of appeal, although he or she does have a right to be heard on the reference. While the defence may also have cause to complain about pre-trial rulings, the accused may be acquitted notwithstanding those rulings, but if convicted can appeal against that conviction, including by challenging the ruling."

In my view it is far from clear that a point of law which did not matter for a ruling or direction could be referred under this provision as a point which has arisen in relation to that direction or ruling. However because this question was not fully argued and because of my opinion as to the disposition of this reference, it is unnecessary to express a concluded view.

The obligation to give reasons

[27] In *Assistant Commissioner Condon v Pompano Pty Ltd*,[17] French CJ said that a defining characteristic of courts was the provision of reasons for the courts' decisions. In *Wainohu v New South Wales*,[18] French CJ and Kiefel J said that "The centrality, to the judicial function, of a public explanation of reasons for final decisions and important interlocutory rulings has long been recognised." Their Honours noted that whilst the duty to give reasons has often been linked to the availability of rights of appeal, there is a "wider rationale",[19] for which they cited the summary of the objectives underlying the duty to give reasons which was provided by this extra-curial statement by Gleeson CJ as follows:[20]

> "First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their

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16 See also *Fraser v The Irish Restaurant & Bar Company Pty Ltd* [2008] QCA 270 at [40]-[43] per Muir JA and the cases there cited.

17 (2013) 252 CLR 38, 71-73[67]-[71]; [2013] HCA 7 at [67]-[71].

18 (2011) 243 CLR 181, 213 [54]; [2011] HCA 24 at [54].

19 (2011) 243 CLR 181, 214 [55].

20 (2011) 243 CLR 181, 214-215 [56] citing Gleeson, 'Judicial Accountability' (1995) 2 *The Judicial Review* 117, 122.

> decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Secondly, the general acceptability of judicial decisions is promoted by the obligation to explain them. Thirdly, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions."

As French CJ and Kiefel J there noted, Heydon J had adopted that summary in *AK v Western Australia*,[21] describing "the duty of judges to give reasons for their decisions after trials and in important interlocutory proceedings as 'well-established'".[22] Notably, Heydon J expressed the duty to give reasons for decisions after trials and in *important* interlocutory proceedings, thereby indicating that not every judicial decision requires an expression of reasons. The same qualification appears in the judgment of French CJ and Kiefel J in *Wainohu*, where their Honours noted the qualification by Gibbs CJ, in *Public Service Board (NSW) v Osmond*,[23] that there was no "inflexible rule of universal application" that reasons be given for judicial decisions.[24] Thus in *Wainohu*, French CJ and Kiefel J said:[25]

> "The duty [to give reasons] does not apply to every interlocutory decision, however minor. Its content – that is, the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the court is exercising *and the particular matter the subject of the decision*."
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> (Emphasis added)

Reasons for a decision on a recusal application

[28] In the submissions for the Attorney-General, it was rightly emphasised that the actual and perceived impartiality of judicial officers is of fundamental importance to the administration of justice and that it is essential that the reasoning for a rejection of a claim of actual or apparent bias be evident not only to the parties but to the public. On occasion however, there are applications for recusal which are made with such a clear absence of any basis that their rejection requires no explanation. Indeed in some cases the argument for recusal, more often than not advanced by a party without the benefit of legal representation, can be so irrational as to be difficult to reject in rational terms by anything more than a statement that it is so. The respondent argues that this was such a case but that cannot be accepted. The prosecutor's argument for recusal may or may not have been a strong one. That is not for this court to determine. But it was a rational argument which was advanced upon a combination of circumstances coming from the judge's conduct in disposing of the Hoggan case. It should be noted that the argument was not based solely upon the judge having excluded the evidence of the footage for that trial. The prosecutor's argument was that there was an apparent bias, in that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of a question which the judge might be required to decide in

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21 (2008) 232 CLR 438.
22 (2008) 232 CLR 438, 470 [89] cited in *Wainohu* (2011) 243 CLR 181, 214 [56].
23 (1986) 159 CLR 656, 666; [1986] HCA 7.
24 Cited in *Wainohu* (2011) 243 CLR 181, 213 [54].
25 (2011) 243 CLR 181, 215 [56].

the course of the trial.[26] I intend no criticism of his Honour in saying that the recusal application was not manifestly absurd or baseless.

[29] Koppenol DCJ saw fit to place on the record that the prosecutor had not asked him to give reasons, either before or after his ruling. It fairly appears then that there were reasons which were unexpressed. I do not agree with his Honour's understanding that reasons need not be given if they are not specifically requested. On occasion, a judge may ask the parties whether reasons for a decision are required and their response may confirm that the decision is not one which requires reasons. Whilst it would have been preferable for the prosecutor to request reasons from his Honour, it cannot be thought that if they were otherwise required, having regard to the purposes served by reasons for judgment, those purposes became irrelevant by the prosecutor's silence. As it appears that there were reasons which the judge would have expressed had he been asked to do so, it thereby appears that there were reasons which he ought to have expressed.

[30] But that is not the question raised by the reference. If it were the question, it would involve no point of general importance. What must be considered is the question which it is convenient to set out again here:

> "Where an application is made that a judge recuse himself or herself and that application is refused, must the judge give reasons for refusing the application that are sufficient for a fair-minded lay observer to appreciate why that observer could not reasonably apprehend that the judge may not bring an impartial mind to the performance of his or her duties?"

[31] Clearly the question has been framed by reference to the test for apparent bias as stated by the plurality in *Ebner v Official Trustee*. The question describes the content of the reasons by reference to the hypothetical fair-minded lay observer. That may be a logical description in a case where the judge's decision not to recuse himself or herself was correct. In such a case, the fair-minded lay observer would not have the reasonable apprehension upon which an apparent bias would depend. In such a case, the judge should give reasons which explain why a fair-minded lay observer could not have that apprehension.

[32] But the question as framed in the reference must be considered also in the context of an *incorrect* decision to refuse an application for recusal. In that context, how could reasons be given which would enable the fair-minded lay observer to appreciate why that observer could not reasonably hold that apprehension? If the decision is wrong, (by definition) the relevant apprehension could be held. The question in the reference suggests that nevertheless reasons could be given with the effect that the observer could not hold the apprehension. In some cases, the provision of reasons can remove the prospect of the relevant apprehension being held. But that will not be every case. There will be others where the apprehension could be held with the benefit of reasons: indeed, the reasonableness of the apprehension could be demonstrated by the reasons themselves.

[33] The answer to the question, as framed in the reference, must be that it depends upon the circumstances. The question cannot be answered in the affirmative for a case where the decision to refuse the application was wrong.

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26 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 350 [33].

[34] The difficulty in framing the question here is understandable: the point must be one of general application yet, as is well established, what constitutes a sufficient expression of reasons is dependent upon the facts and circumstances of the individual case. In *Cypressvale Pty Ltd v Retail Shop Lease Tribunal*,[27] McPherson and Davies JJA said that "Whether or not reasons given for a decision can be characterised as adequate or otherwise involves a variety of different considerations" and that "What is adequate depends on the circumstances of the case."[28] They cited a statement by Hutley JA in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd*[29] that "The extent to which a court must go in giving reasons is incapable of precise definition." The judgments in *Cypressvale* extensively discussed the authorities on which courts have attempted to explain what is sufficient in this respect. But ultimately there is no test by which the adequacy of reasons can be assessed, except to say that they should be adequate to serve the purposes for which reasons for judgment are required, as one or more of those purposes apply to the particular case. As French CJ and Kiefel J said in *Wainohu,*[30] the content and detail of the required reasons will vary not only according to the nature of the jurisdiction but the particular matter the subject of the decision.

[35] As should appear, the question raised by the amended reference cannot be answered in the affirmative, at least because the suggested measure of the sufficiency is inapplicable to a case where the judge's decision, that he or she is not apparently biased, is incorrect. The question should be answered "not in every such case".

[36] The amended reference sought a further order as follows:

> "Pursuant to section 668A(2)(d)(ii) of the *Criminal Code*, an order is sought from this Court directing the District Court of Queensland to further consider the prosecution application according to law if the trial is listed to proceed before Koppenol DCJ."

The power under s 668A(2)(d) is as follows:

> "(d) after hearing argument on the reference, the Court —
>
> (i) must consider the point referred and give the Attorney-General its opinion on the point; and
>
> (ii) may make the orders it considers appropriate, including the directions or rulings it considers appropriate to give effect to its opinion."

[37] The direction which is sought could not be described as one which would give effect to the court's opinion on the point of law. As I have discussed, the point of law was not defined in terms of whether reasons or adequate reasons were given in the present case.

Order

[38] I would order that the question raised by the amended reference be answered "not in every such case".

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27 [1996] 2 Qd R 462; [1995] QCA 187.
28 [1996] 2 Qd R 462, 482.
29 [1983] 3 NSWLR 378, 381.
30 (2011) 243 CLR 181, 215 [56].