SUPREME COURT OF QUEENSLAND

CITATION:	*R v D'Arcy* [2005] QCA 292
PARTIES:	**R** **v** **D'ARCY, William Theodore** (appellant/applicant)
FILE NO/S:	CA No 199 of 2004 DC No 1208 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2005
JUDGES:	McMurdo P, Keane JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE - where appellant was alleged to have committed a number of sex offences against children while working as a primary school teacher in the early 1970s - where the appellant had since left teaching and pursued a career in state parliament - where the appellant's political career had been brought to an end by other criminal charges relating to sexual offences involving children - where the appellant's political career and previous criminal convictions had received substantial media attention - where appellant applied to the trial judge pursuant to s 47 *Jury Act* 1995 (Qld) for permission to question potential jurors as to whether this pre-trial publicity had prejudiced them against him - where the request to question potential jurors was refused by the trial judge - whether the pre-trial publicity surrounding the appellant amounted to "special reasons for inquiry" as required by s 47 *Jury Act* 1995 (Qld)

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS - STAY OF PROCEEDINGS - PRE-TRIAL PUBLICITY - where appellant was the subject of criminal proceedings arising out of charges for indecent dealing and wilful exposure - where the appellant had been the subject of adverse publicity arising out of previous trials for similar offences - where the appellant claimed that important evidence had been lost since the offences were alleged to have been committed more than 30 years ago - where application was made to the trial judge that a fair trial was impossible in the circumstances and that a permanent stay of proceedings should be granted - where this application for a permanent stay was refused - whether the trial judge had been correct to refuse the appellant's application for a permanent stay

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE AND INSUPPORTABLE VERDICT - where appellant submitted that evidence of one prosecution witness contradicted the evidence of the complainant to such an extent that the jury could not have been satisfied beyond reasonable doubt of the appellant's guilt - whether the resolution of the differences between the evidence of witnesses is a matter for the jury - whether the jury's decision to convict was unreasonable

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSON - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - SEXUAL OFFENCES - where appellant was convicted after trial by jury on two counts of indecent dealing with a girl under 12 years and one count of wilfully exposing his penis with intent to offend - where trial judge had sentenced the appellant to six months imprisonment to be served cumulatively with the sentence of 10 years and six months already imposed upon the appellant for previous offences - whether the sentence imposed on the appellant was manifestly excessive

Jury Act 1995 (Qld), s 47

Murphy v The Queen (1989) 167 CLR 94, applied
The Queen v Glennon (1992) 173 CLR 592, applied

COUNSEL: K C Fleming QC, with A F Maher, for appellant/applicant
R G Martin SC for respondent

SOLICITORS: Martinez Quadrio Lawyers for appellant/applicant
Director of Public Prosecutions (Queensland) for respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for dismissing the appeal against conviction and refusing the application for leave to appeal against sentence.

[2] **KEANE JA:** On 27 May 2004, the appellant was convicted on two counts of indecent dealing with a girl under the age of 12 years and on one count of wilfully exposing his penis with intent to offend. The offences were alleged to have occurred on a date unknown between 1 January 1971 and 10 August 1971 at a primary school in South East Queensland. The appellant was a teacher at the school and the complainant was one of his pupils.

[3] The appellant had previously been convicted in the Supreme Court at Brisbane on 11 November 2000 of offences involving the sexual abuse of children who were his pupils at another school between June 1963 and July 1965. On 22 November 2002, he was convicted in the District Court at Brisbane of one count of indecently dealing with a girl under the age of 17 years between 6 July 1969 and 28 May 1972.

[4] Prior to his conviction in November 2000, the appellant had been a prominent figure in State politics. He had attracted criticism in the media for his alleged frequent absences from his electorate office and the Legislative Assembly, his involvement in an internet casino and other political controversies. His convictions in 2000 and 2002 and his subsequent imprisonment were attended with much publicity. There was a mistrial of other charges against the appellant in 2003.

The Crown case

[5] The first count of indecent dealing related to an offence which was alleged to have taken place on a "sick bed" in a two room demountable building which was used as a library and a classroom for the lower grades at the school. This demountable building was beside the original school house which was a single wooden building on stilts. The other two counts concerned an incident alleged to have occurred in the office of the original school building.

[6] As to the first count, the complainant gave evidence that she had finished her assigned work and was told by the appellant to "go down and tidy up the library". She went down to the library. A short time later, the appellant entered the library. He pulled her down on top of him on the sick bed with her back to him. He pulled her legs on either side of his legs and put his hands between her legs and massaged her vaginal area on the outside of her underpants while he moved her body up and down on top of him. She could feel a lump in his trousers pressing against her tailbone.

[7] In relation to the second and third counts, the complainant's evidence was that just before the complainant's birthday in August 1971 the appellant told her to come to his office in the original school building after she had finished her lunch. She did so. He told her to close the door. He was sitting at his desk rubbing his penis with his right hand. She was "transfixed", not knowing what to do because she was scared. He put his penis away and did his trousers up. He then grabbed her wrist

and pulled her down onto his knee and tried to kiss her with an open mouth. She pulled away and slapped him. She escaped by climbing out of the window and went back to the school yard.

[8] There was evidence from the complainant's former husband that when the complainant was 16 years of age, she told him that she had been interfered with by a teacher named D'Arcy.

[9] The Crown called two other witnesses who had been pupils at the school at the relevant time. One of these witnesses, Mrs S, gave evidence that the complainant had been called on occasion to the appellant's office and that the door was closed. On many occasions, when she needed to get the key for the sports equipment locker, she would knock on the door and when she went in, after having waited to receive permission to do so, would usually see the appellant, with the complainant sitting on his lap, with his arm high up on the skin of her thigh.

[10] The other former student, Ms M, gave evidence of one occasion when, having been given a message to deliver to the appellant, she had stood in the doorway to his office and seen him with his hand on the complainant's bottom. He quickly removed his hand when he saw Ms M standing in the doorway.

[11] It was not suggested to these witnesses that they had colluded with the complainant to bring false charges against the appellant.

[12] Further, in relation to the first count, the Crown also called a former teacher at the school, Mrs D, whose evidence was that the demountable building was a single room with no library and no sick bed. Mrs S said that there was a demountable building with a lot of books in it, but she was not sure whether "that was actually what we called our library". Ms M said that there was a sick bay situated at the rear veranda of the main school house. She remembered the office and the sick bay as originally being "all in one area ... office one side, sick bay and the bed was on the other side". She said that the sick bed was moved to one of the demountables, and gave evidence of actually seeing Mrs D sitting on the sick bed on one occasion in the demountable.

The appellant's case at trial

[13] The appellant did not call, or give, evidence. The case put by his counsel in cross-examination consisted of suggestions to the complainant that her version of events was not to be relied upon having regard to the lapse of time and a faulty memory, particularly in relation to the layout of the school buildings.

[14] The appellant applied to the learned trial judge pursuant to s 590AA of the *Criminal Code* 1899 (Qld) to be permitted to question potential jurors pursuant to s 47 of the *Jury Act* 1995 (Qld) ("*Jury Act*"). It was argued on his behalf that there was a real risk that potential jurors would have formed a prejudicial view of the appellant prior to the trial, and that the appellant should therefore be allowed to question them to ascertain whether they might not be able to bring an open mind to their deliberations. The learned trial judge refused the application. His Honour had been the trial judge in the November 2002 trial of the appellant. A similar application had been made on that occasion. His Honour refused the appellant's application in this case for essentially the same reasons as those which led his Honour to reject the appellant's application on that earlier occasion.

[15] The appellant also applied pursuant to s 590AA of the *Criminal Code* for a permanent stay of the proceedings because the adverse publicity he had received, including the publicity which attended his prior convictions for like offences, and the loss of evidence consequent upon the great delay between the alleged offences and the trial of the charges meant that a fair trial was impossible. In particular, counsel for the appellant pointed to evidentiary problems arising out of an inability to call certain witnesses to testify as to the nature and extent of the appellant's contact with the complainant and the loss of records relating to the configuration of the school buildings at the material time. This submission was supported by an affidavit from Mr Alan Bennett, the appellant's solicitor. This application was also refused by the learned trial judge. Once again, his Honour's reasons were essentially the same as those which led his Honour to reject a similar application by the appellant in the 2002 trial.

The appeal

[16] On appeal, it is argued that the learned trial judge erred in refusing the appellant's applications and that, as a result, the appellant suffered a miscarriage of justice.

[17] It was also argued on appeal that the verdict of the jury was "unsafe and unsatisfactory" on the footing that "no reasonable jury could have ignored the evidence of Mrs D".

The application under s 47 of the Jury Act

[18] Section 47 of the *Jury Act* provides relevantly as follows:

> "(1) If a judge who is to preside at a civil or criminal trial is satisfied, on an application by a party under this section, that there are special reasons for inquiry under this section, the judge may authorise the questioning of persons selected to serve as jurors and reserve jurors when the court reaches the final stage of the jury selection process . . . "

[19] On two previous occasions, in appeals brought by the appellant, this Court has considered the appellant's complaint that he was wrongly denied the opportunity to question the jurors as to whether pre-trial publicity adverse to the appellant had prejudiced them against him.[1] On both occasions those complaints were rejected because the appellant had not shown "special reasons for inquiry" under s 47 of the *Jury Act*. In relation to the first appeal to this Court, an application for special leave to the High Court was rejected. On the second occasion the appeal to this Court was from the decision of the learned trial judge in this case whose reasons for rejecting the appellant's application on that earlier occasion were largely repeated in this case.

[20] It is not now submitted that these earlier decisions of this Court were erroneous in point of legal principle. Rather, the appellant seeks to show that the present case is to be distinguished from those earlier decisions in that there were, in this case, "special reasons for inquiry". The appellant argues that the intensity of the adverse publicity relating to the appellant should be seen as having accumulated over the years prior to his trial in May 2004 so that there were, at that time, "special reasons

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[1] *R v D'Arcy* [2001] QCA 325; (2001) 122 A Crim R 268; *R v D'Arcy* [2003] QCA 124; (2003) 140 A Crim R 303.

for inquiry" so as to enliven the power to authorize the questioning of jurors pursuant to s 47 of the *Jury Act*.

[21] In my respectful opinion, the appellant's attempts to distinguish this case from the earlier decisions of this Court involving the appellant must fail. In this regard, the decision of this Court on the appellant's second appeal is particularly significant. At that time, the appellant had suffered adverse publicity associated with his conviction in 2000 for sexually abusing his pupils. He had also been the recipient of adverse publicity associated with political controversies in which he had been embroiled. The appellant acknowledged that, since the second appeal, there has been no substantial repetition of the adverse publicity concerning him. In relation to the specific charges involved in the present case, the appellant's previous convictions and the appellant's political reputation, there can be no suggestion that the appellant's position was any worse than in November 2002. Indeed, as the learned primary judge held, these are all matters which have receded further into the past.

[22] As a result, there is no basis on which this Court might distinguish the circumstances of this case from those which formed the bases for the earlier decisions of this Court. I consider that the appeal on this ground must fail unless those earlier decisions can be said to be clearly wrong in point of principle. In my respectful view, those decisions were clearly correct in point of principle and, as I have noted, the appellant made no submissions to the contrary.

[23] Section 47 of the *Jury Act* allows potential jurors to be questioned as to the impartiality where there are "special reasons for inquiry" in that regard. In *Murphy v The Queen*[2] it was said that the foundation for an application for an inquiry of the jurors would "ordinarily … take the form, at least initially, of an affidavit relating to the disposition of a particular juror or jurors"; and the cases where potential jurors generally may have been affected by adverse publicity "are exceptional cases".

[24] As this Court has made clear in its previous decisions involving this appellant, a sufficiently exceptional case is not made out simply by pointing to adverse comments made in the media and suggesting that such comments have a general tendency to lead jurors to develop prejudicial feelings against an accused. To go so far, and no further, does not establish the "sufficient foundation of fact to justify acceding to the application".[3] To go only so far does not establish a risk that individual jurors may not be "impartial" in the sense that they may be actually biased against the accused, or unable or unwilling to comply with the directions of the trial judge to ignore prejudicial comments in the media about him.

[25] The adverse publicity to which the appellant had been subjected in the media was something which the jury would inevitably be told to ignore. There was no reason shown for doubting the willingness or the ability of the jury to comply with the directions given to safeguard the entitlement of the appellant to a fair trial.[4] They were given such directions in this case, both at the commencement of the trial and during the summing up, and there is no reason to suppose that they were unwilling or unable to act in conformity with the directions given to them by the learned trial judge.

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2 (1989) 167 CLR 94 at 103 - 104.

3 *Murphy v The Queen* (1989) 167 CLR 94 at 104.

4 *R v Lewis* [1994] 1 Qd R 613 at 636; *R v Dudko* [2002] NSWCCA 336 at [18] - [21]; (2002) 132 A Crim R 371 at 374 - 375.

[26] Finally, in relation to this ground, I should mention a further consideration which weighed with the learned trial judge in declining the appellant's application. His Honour was concerned that to allow the jurors to be questioned about their knowledge of, and attitude to, the appellant's political history and previous convictions would be apt to recreate problems for a fair trial which the passage of time had already solved. In my respectful opinion, while this was not a case where "special reasons for inquiry" were demonstrated, if "special reasons for inquiry" were shown here, this was a consideration which could rightly be taken into account in refusing, as a matter of discretion, to authorize the questioning of jurors.

The permanent stay application

[27] In the two previous trials involving the appellant, applications for a permanent stay have been rejected, and the rejection has been upheld on appeal. Once again, the appellant does not submit that those decisions were erroneous in point of legal principle. Rather, he seeks to submit that the accumulation of prejudicial comment, and the loss of evidence peculiar to this case, warrant this Court taking a different view on this issue in this case.

[28] It is well established that a permanent stay may be ordered only when pre-trial publicity is so adverse and so extraordinary that no directions by the trial judge including adjournments or changes of venue are apt to ensure the possibility of a fair trial.[5] High authority confirms that the law does not proceed upon a sceptical view of the intelligence or integrity of juries, or their ability rationally to determine issues of guilt or innocence strictly by reference to the evidence adduced at trial. Rather, the law proceeds upon the assumption that jurors may be relied upon to determine issues of guilt or innocence in accordance with their sworn oath. The administration of criminal justice necessarily depends upon the compliance by jurors with directions from the trial judge to base their verdict on the evidence given before them on the trial and to disregard information otherwise acquired.[6] That jurors may be aware of prior convictions or other matters adverse to an accused does not make it likely that they would deliberately ignore, or be unable to follow, such directions.

[29] In my opinion, the appellant advances no sufficient basis on which this Court could distinguish the present case from its previous decisions as to the sufficiency of the directions given by the trial judge as an antidote to concerns in relation to pre-trial publicity adverse to the appellant. Further, any such prejudice has now receded even further into the past.

[30] Insofar as the appellant seeks to rely on the loss of evidence from records or witnesses, that situation obtained as well in the earlier proceedings and, especially, in the appellant's second trial.[7] In the present case, the affidavit of Mr Bennett showed that potential witnesses were no longer available and that potentially relevant records had been lost. But this evidence merely raised speculation about the loss of evidence. Such evidence may have hindered as much as it might have helped, the appellant in mounting a successful defence. Speculation of this kind is

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5 *The Queen v Glennon* (1992) 173 CLR 592 at 605, 615 - 616; *R v Long; ex parte Attorney-General (Qld)* [2003] QCA 77 at [166]; (2003) 138 A Crim R 103 at 142.

6 *The Queen v Glennon* (1992) 173 CLR 592 at 614 - 615; *Gilbert v The Queen* [2005] HCA 15 at [13], [31]; (2000) 201 CLR 414 at 420, 425; *R v Lewis* [1994] 1 Qd R 613 at 617; *R v Long; ex parte Attorney-General (Qld)* [2003] QCA 77 at [166]; (2003) 138 A Crim R 103 at 141 - 142.

7 *R v D'Arcy* [2003] QCA 124 at [12]; (2003) 140 A Crim R 303 at 305 - 306.

not sufficient to warrant a permanent stay.[8] The appellant adduced no evidence to advance the proposition that relevant evidence which might assist his defence had been lost. And, of course, the Crown called Mrs D whose evidence, if accepted, could well have assisted his defence. Finally, in this regard, the learned trial judge gave the jury clear directions warning them of the possibility that the lapse of time may have prejudiced the ability of the appellant to mount a cogent defence by reason of the loss of evidence and the dimming of memories.

[31] In my opinion, the appellant has failed to demonstrate a basis for the conclusion that, in this case, any obstacles in the way of a fair trial due to adverse publicity or delay could not be overcome by appropriate directions to the jury.[9]

An unreasonable verdict

[32] The appellant submits that no reasonable jury could have ignored the evidence of Mrs D, which cast doubt on the complainant's evidence, especially in relation to the first count of indecent dealing.

[33] In my opinion, having regard to the whole of the evidence, the jury may well have reasonably taken the view that differences in the evidence of the witnesses as to the configuration of the school buildings was of little moment, or even that the complainant, supported as her evidence was by the evidence of Ms M, was more likely to have a clear memory of the school facilities of which she gave evidence than Mrs D, especially having regard to the complainant's uncontradicted evidence of the abuse she suffered and her complaint, when she was 16 years of age, to her former husband about the appellant's misconduct.

[34] In any event, the resolution of the differences between the evidence of Mrs D and the complainant was very much a matter for the jury. That the jury resolved the issue in favour of the complainant (and Ms M) does not give rise to a basis for concern that the verdict of the jury was unreasonable.

The application for leave to appeal against sentence

[35] The learned sentencing judge sentenced the appellant to six months imprisonment to be served cumulatively upon the sentences previously imposed on the appellant in respect of his earlier convictions. For the appellant it is contended that the imposition of a further sentence of six months cumulatively upon the ten years and six months already imposed upon the appellant was manifestly excessive.

[36] The learned sentencing judge was mindful of the need to ensure that the sentence he imposed for these offences should not be out of proportion to the combined seriousness of all his offending conduct. Nevertheless, these offences were serious in their own right. These offences were committed on occasions subsequent to, and separate from, the occasions of the offences for which the appellant had already been sentenced. It was open to the learned sentencing judge to conclude that some further punishment, additional to that which had already been imposed, was warranted. Because of the appellant's serious abuse of his position of trust to fix upon an additional six months reflects, in my respectful view, a moderate approach.

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8 *R v Wrigley* [1998] QCA 412; CA No 330 of 1998, 4 December 1998 at [12] - [15] per Chesterman J.

9 Cf *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 47; *R v Lewis* [1994] 1 Qd R 613 at 634 - 640; *The Queen v Glennon* (1992) 173 CLR 592 at 598.

[37] In these circumstances, it cannot be said that the sentence was manifestly excessive.

Conclusion and orders

[38] In my opinion the appeal should be dismissed. The application for leave to appeal against sentence should be dismissed.

[39] **DUTNEY J:** I agree with the orders proposed by Keane JA and with his reasons for proposing those orders.