DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Hanna & McAllum* [2019] QDCPR 50
PARTIES:	**THE QUEEN** (respondent) **v** **HANNA, David Arthur** (applicant/defendant) **and** **McALLUM, Mathew Jason** (defendant)
INDICTMENT NO:	632/19
PROCEEDING:	Application for a trial by a judge sitting without a jury pursuant to s 614(1) *Criminal Code*
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2019
JUDGE:	Judge AJ Rafter SC
ORDER:	**Application by the defendant, David Arthur Hanna, for trial by a judge sitting without a jury dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – APPLICATION FOR NO JURY ORDER – where the defendant Hanna makes an application for a no jury order – where the co-defendant McAllum would consent to such an order – where the identity of the trial judge is known to the parties – where there has been media interest in the applicant's other matters before the courts – where the applicant has been the subject of reports covering the Royal Commission into Trade Union Governance and Corruption – where the applicant submits that the pre-trial publicity may affect jury impartiality – where the applicant submits that the complexity and length of the trial may be unreasonably burdensome to a jury – whether it is in the interests of justice to make a no jury order
COUNSEL:	MJ McCarthy for the applicant/defendant, Hanna BHP Mumford for the defendant, McAllum MT Whitbread for the respondent

SOLICITORS: Fisher Dore for the applicant/defendant, Hanna

AW Bale & Son for the defendant, McAllum

Director of Public Prosecutions (Qld) for the respondent

Introduction

[1] The defendant, David Arthur Hanna, makes application for an order that he be tried by a judge sitting without a jury (no jury order) pursuant to s 614(1) *Criminal Code* (Qld). Mr Hanna is charged in count 1 on indictment 632/19: that between 28 February 2013 and 30 November 2013 at Cornubia in the state of Queensland, he, being an agent, corruptly received from Mathew Jason McAllum and Adam Joseph Moore for himself and another, valuable consideration, the receipt of which would tend to influence him to show, or to forebear to show, favour or disfavour to any person in relation to his principal's affairs.[1]

[2] The indictment charges the defendant, Mathew Jason McAllum, in count 2: that between 28 February 2013 and 30 November 2013 at Cornubia and elsewhere in the state of Queensland, he corruptly gave to Mr Hanna and another valuable consideration, the receipt of which would tend to influence Mr Hanna to show, or forebear to show, favour or disfavour to any person in relation to his principal's affairs.[2]

[3] The trial is listed to commence before Judge Farr SC on 28 October 2019.

[4] The basis of Mr Hanna's application is that it is in the interests of justice to make the order for reasons that include that there has been significant pre-trial publicity that may affect the deliberations of a jury, and/or because of the complexity or length of the trial, it is likely to be unreasonably burdensome to a jury.[3]

[5] The defendant, McAllum, has not made an application for a no jury order. His counsel, Mr Mumford, indicated that Mr McAllum would "abide the order of the court".[4]

[6] In cases where there are two accused persons to be tried together, a no jury order in relation to one of the accused cannot be made unless the court also makes a no jury order in relation to the other accused.[5]

[7] Section 615A(3)(a) provides:

> "(3) To remove any doubt, it is declared that—
>
> (a) each of the accused persons must consent to the making of the no jury order"

[8] I indicated that in my view, abiding by the order of the court did not amount to consent to a no jury order pursuant to s 615A(3)(a). Mr Mumford then said that in the event that a no jury order was made in Mr Hanna's case, his client would consent to the order.

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1 Section 442B(b) *Criminal Code* (Qld); receipt of secret commission by an agent.
2 Section 442BA(b) *Criminal Code* (Qld); gift of secret commission to an agent.
3 Outline of submissions for Mr Hanna at para 1.
4 Outline of submissions for Mr McAllum at para 3.
5 Section 615A(2) *Criminal Code* (Qld).

The identity of the trial judge is known to the parties

[9] The trial listing before Judge Farr SC in the week commencing 28 October 2019 was allocated when the matters were mentioned on 24 May 2019.

[10] An application for a no jury order must be made under s 590AA *Criminal Code* (Qld) before the trial begins: s 614(2).

[11] Where the identity of the trial judge is known to the parties when the application is decided, a no jury order may only be made if there are special reasons for making the order: s 614(3).

[12] Mr McCarthy of counsel who appeared for Mr Hanna made no reference to this issue in his written submissions. In his oral argument on the hearing of the application Mr McCarthy submitted that the extensive media publicity in relation to Mr Hanna and the complexity of the case were special reasons for making the order.

[13] When the trial date was allocated on 24 May 2019, the listings judge indicated that the trial was likely to be before Judge Farr SC, and enquired whether the parties wished to mention the matter before his Honour for case management purposes. On that occasion, Mr Whitbread appeared for the Crown and Mr McCarthy appeared for Mr Hanna. There was no indication at that stage that there was to be an application by Mr Hanna for a no jury order, although Mr McCarthy said that he anticipated that there would be pre-trial issues. The endorsement on the indictment states that the trial was listed before Judge Farr SC. Mr Whitbread's written submissions refer to the fact that the identity of the trial judge is known.[6]

[14] The present application, which was filed on 26 August 2019, has been made at a very late stage of the proceedings. There are practical reasons for insisting that an application for a no jury order be made at an early stage.

[15] The sheriff of Queensland is required to prepare lists of prospective jurors in accordance with s 15 *Jury Act 1995* (Qld). The sheriff is required by s 15(2) to decide the number of persons to be included in each list according to the sheriff's estimate of the likely need for jurors in a particular district. No doubt, the sheriff would have regard to the number of trials and the estimated length of trials in a particular sittings. After notices have been given to prospective jurors and after the period allowed for the return of juror questionnaires, a revised list of prospective jurors is prepared: s 24 *Jury Act 1995* (Qld).

[16] It is therefore important from an administrative point of view that an application for a no jury order be made at an early stage.

[17] The requirement that special reasons exist for making a no jury order where the identity of the trial judge is known to the parties when the application is decided serves the purpose of endeavouring to avoid any appearance of judge shopping. As Gleeson CJ explained in *R v Perry,*[7] when considering the relevant provision in the *Criminal Procedure Act 1986* (NSW) that states that an application for trial by judge alone must be made not less than 28 days before the trial except with the leave of the court:

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6 Outline of submissions for the Crown at para 7.

7 (1993) 29 NSWLR 589 at 594.

> "I have no doubt that one of the legislative purposes underlying s 32(4) of the *Criminal Procedure Act* is concerned with an important matter of appearances. One of the reasons why the legislation provides that an election for trial without a jury must be made before the date fixed for trial is that if an election could be made on the date fixed for trial, it might appear that accused persons were making such elections in the light of the knowledge of the identity of the trial judge."

[18] In *Baker v The Queen*[8] Gleeson CJ, referring to the issue of "special reasons" in a legislative context, said:

> "There is nothing unusual about legislation that requires courts to find 'special reasons' or 'special circumstances' as a condition of the exercise of a power. This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors."

[19] There is perhaps no reason why the factors constituting "special reasons" in s 614(3) could not be the same as those relied upon for the making of the no jury order pursuant to s 615. However, ordinarily the reasons for a late application should be explained. In the present case, no satisfactory reasons were advanced by Mr McCarthy. My impression is that Mr Hanna and his representatives may not have appreciated that the trial was listed before his Honour Judge Farr SC or the importance of making the application promptly. In the overall circumstances of this particular case, I do not consider that the fact that the identity of the trial judge is known is an impediment to the making of a no jury order, if such an order is otherwise appropriate.

Making a no jury order

[20] An order that an accused person be tried by a judge sitting without a jury (no jury order) may only be made if the court considers it is in the interests of justice to do so: s 615(1).

[21] Section 615(4) so far as is relevant to the present application provides that:

> "(4) Without limiting subsection (1)… the court may make a no jury order if it considers that any of the following apply—
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> (a) the trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury;
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> …
>
> (c) there has been significant pre-trial publicity that may affect jury deliberations."

Factual background

[22] The charge against Mr Hanna alleges that he corruptly received valuable consideration from Mr McAllum and Adam Joseph Moore. Mr Moore was charged with the same offence as Mr McAllum, but died shortly after the committal hearing.

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8 [2004] HCA 45 at [13]; (2004) 223 CLR 513 at 523 and [13].

[23] Prior to 2014 and during the period of the alleged offending, Mr Hanna was a senior office bearer with the federal and state branches of the Builders Labourers Federation ("the BLF"). In early 2014 there was a merger of the BLF and the construction and general division of the Construction, Forestry, Mining and Energy Union ("the CFMEU"). Mr Hanna became the president of the CFMEU construction and general division, Queensland and Northern Territory divisional branch and president of the construction and general division of the CFMEU.

[24] On 10 February 2014 the Australian government announced an intention to establish a Royal Commission into trade union governance and corruption ("the Royal Commission"). The Royal Commission was established by letters patent on 13 March 2014.

[25] In 2015 the Royal Commission held public hearings in Brisbane in relation to allegations against Mr Hanna, including the allegations which are the subject of the present charge.

[26] In the course of the hearings Mr Hanna was compulsorily examined, including in relation to matters the subject of the present charge. Mr McAllum and Mr Moore also gave evidence.

[27] As witnesses called to give evidence at the Royal Commission, the defendants and Mr Moore could not claim privilege against self-incrimination.[9] However, any statement or disclosure made by a witness is not admissible in evidence in any civil or criminal proceedings in any court of the Commonwealth, of a state or of a territory, apart from in respect of proceedings for an offence against the *Royal Commissions Act* 1902 (Cth).[10]

[28] The final report of the Royal Commission was delivered on 28 December 2015. The report outlines the allegations against Mr Hanna. The report was published on the Royal Commission website and remains publicly available through the National Library of Australia website. Transcripts of the Royal Commission hearings and selected exhibits remain publicly available.[11]

[29] The following is an overview of the Crown case:[12]

> "Mirvac Qld at the relevant time was a separate operation and entity from Mirvac. It was run by Moore. McAllum was Moore's subordinate. At the relevant time the CFMEU were causing significant problems on building sites by stopping work if workers were not members.
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> The case is largely inferential. It can be demonstrated that Hanna was provided services to build his house which were falsely invoiced to Mirvac. They were ultimately paid by Mirvac. The intention of that action is proven through inference based on the positions of the relevant persons. The union members could not possibly benefit from Hanna having most of a house built at the expense of a national builder. There is a very strong inference Hanna must have

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9 Section 6A(2) *Royal Commissions Act* 1902 (Cth).

10 Section 6DD *Royal Commissions Act* 1902 (Cth).

11 Affidavit of Terence Fisher filed 30 September 2019 at para 17.

12 Attachment C to the outline of submissions for the Crown.

> understood that he was expected to not cause Mirvac trouble or at least direct the union trouble to other non-Mirvac projects and by doing so not acting for the benefit of his members."

Mr Hanna's trials in respect of other charges

[30] In December 2019 Mr Hanna was tried in the District Court at Brisbane in respect of a charge of destroying documents.[13] The charge arose from the Royal Commission hearings. The trial was reported in the electronic and print media.

[31] In July 2019 Mr Hanna appealed to the Court of Appeal against his conviction for destroying documents. The appeal was also reported in the electronic and print media.

[32] In February 2019 Mr Hanna was tried in the District Court at Brisbane for the offence of rape. That trial was also the subject of reporting in the electronic and print media.

Pre-trial publicity

[33] Mr McCarthy submitted that the publicly available evidence from the Royal Commission has been broadly disseminated and that it remains available. He also submitted that the compulsorily obtained evidence is not admissible in this proceeding, and is not available to the prosecution.[14]

[34] Mr McCarthy submitted that it is not possible to ascertain the extent to which potential jurors may be aware of evidence given at the Royal Commission hearings. However, it is usually not necessary to endeavour to ascertain the full extent of the knowledge that a potential juror may have about an accused person. During the jury selection process the jury is usually informed of the identity of the accused, the nature of the charges and the names of prosecution witnesses. It is of course possible for additional information to be provided when enquiring about the impartiality of jurors.

[35] The report of the Royal Commission was delivered in 2015, so notwithstanding that information remains publicly available, the level of public interest may be expected to have diminished.

[36] Mr Hanna's trials in the District Court took place in December 2018 and February 2019, so the reporting of those cases in the electronic and print media is more recent. The most recent media reports appear to be in July 2019 relating to Mr Hanna's appeal against conviction for destroying documents.

[37] The jurors empanelled on criminal trials are directed not to conduct their own investigations.[15] Where appropriate the jury can be informed that apart from the issue of unfairness, it is a criminal offence for a juror to conduct enquiries about a defendant.[16] In an appropriate case the jury can be given written instructions

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[13] Section 6K(1) *Royal Commissions Act* 1902 (Cth).

[14] *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53; (2018) 93 ALJR 1.

[15] Supreme and District Courts Criminal Directions Benchbook No. 4.3-4.4.

[16] Supreme and District Courts Criminal Directions Benchbook No. 4.12.

emphasising the importance that the case is decided on the evidence presented at the trial and that the jury must not conduct their own enquiries or investigations.[17]

[38] In *R v Glennon*[18] Mason CJ and Toohey J explained that:

> "The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. As Toohey J. observed in *Hinch*, in the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them. In *Murphy v. The Queen*, we stated, see also *Reg. v. Von Einem*:
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> > 'But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury. The matter was put this way by the Ontario Court of Appeal in *Reg. v. Hubbert*:
> >
> > "In this era of rapid dissemination of news by the various media, it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select twelve jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence."'
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> To conclude otherwise is to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge."[19]

[39] It has been accepted that the potential prejudice arising from pre-trial publicity can be adequately dealt with by appropriate directions to the jury.[20] I am satisfied that in the circumstances of this case the pre-trial publicity can be adequately addressed by the usual procedures adopted during the jury selection process and appropriate directions to the jury.

Complexity of the case

[40] Mr McCarthy submitted that the nature and volume of the evidence is such that the trial may be unreasonably burdensome to a jury. He pointed out that the Crown's "precis of evidence" is 23 pages in length.[21]

[41] Mr McCarthy anticipates that the Crown may call more than 50 witnesses and that the exhibits comprise almost 700 items, although there is scope for formal admissions to be made which would reduce the evidence to be called at the trial. He

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17 Supreme and District Courts Criminal Directions Benchbook No. 205.

18 (1992) 173 CLR 592.

19 (1992) 173 CLR 592 at 603 (footnote references omitted).

20 *R v Chardon* [2015] QDC 59 (O'Brien CJDC); *R v Chardon* [2016] QCA 50 at [5]; *R v Chardon* [2018] QSCPR 17 (Boddice J).

21 Affidavit of Terence Fisher filed 30 September 2019; Exhibit "TF-2".

nevertheless submitted that there is a degree of complexity arising from the fact that consideration will need to be given to the co-conspirator's rule.[22] He therefore submitted that there is a not insubstantial risk of the potential for a mistrial because of the necessity for rulings at the close of the Crown case in relation to the admissibility of evidence against the individual accused.[23] However, Mr Whitbread for the Crown indicated that he would make clear what evidence was being tendered against each accused.

[42] The estimated length of the trial is three weeks.

[43] I do not consider that the trial is so complex or lengthy that it is likely to be unreasonably burdensome to a jury.

The application of objective community standards

[44] Mr Whitbread submitted that "… the offences involve the consideration of factual issues that require the application of objective community standards. The central issues in the trial will essentially require an assessment of the credibility of some of the Crown witnesses, their conduct together with the effect of the conduct of those witnesses and the applicant/defendant. Given this feature it is submitted that the court should also refuse to make a no jury order. (s 615(5))"

[45] Mr McCarthy did not specifically address this issue. Mr Whitbread did not expand on his written submissions.

[46] Section 615(5) provides:

> "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."

[47] A factual issue in relation to an issue of dishonesty is another example that may involve the application of objective community standards: *AK v The State of Western Australia.*[24]

[48] The fact that a case involves an assessment of the credibility of witnesses does not necessarily mean that trial by jury is the preferable mode of trial. This has been regarded as a neutral factor bearing in mind that a jury is able to discuss the factual issues whereas a judge has the experience of deciding matters of credibility: *R v Qaumi & Ors (No 14)*.[25]

[49] I do not consider that the assessment of the credibility of the witnesses involves the application of objective community standards. In the absence of more detailed submissions, I have not attached any significance to this factor.

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22 *Tripodi v R* [1961] HCA 22; (1961) 104 CLR 1.
23 Outline of submissions for Mr Hanna at paras 36 and 37.
24 [2008] HCA 8 at [95]; (2008) 232 CLR 438 at 473 and [95].
25 [2016] NSWSC 274 at [38]-[42].

The interests of justice

[50] Having considered the nature and length of the trial together with the pre-trial publicity surrounding Mr Hanna, I do not consider that it is in the interests of justice to make a no jury order. I therefore order that Mr Hanna's application for trial by a judge sitting without a jury be dismissed.