SUPREME COURT OF QUEENSLAND

CITATION:	*R v Clough* [2008] QSC 307
PARTIES:	**R** **v** **COLIN BARRY CLOUGH** (applicant)
FILE NO:	SC No 10 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application – 590AA *Criminal Code*
DELIVERED ON:	28 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2008
JUDGE:	Mackenzie J
ORDER:	**Pursuant to s 615(1) of the *Criminal Code,* Colin Barry Clough be tried by a Judge sitting without a jury**.
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – TRIAL HAD BEFORE JUDGE WITHOUT JURY – GENERALLY – where the accused was charged with murder – where the trial would involve mental health issues including the availability of a defence of insanity or diminished responsibility – where a potential issue at trial would be the effect of evidence of amphetamine use on the availability of those defences – where the accused made application for a no jury order – whether it was in the interests of justice that a no jury order be made *Criminal Code* 1899 (Qld), s 590AA, s 614, s 615 *Mental Health Act* 2000 (Qld), s 267, s 269, s 382 *Arthurs v State of Western Australia* [2007] WASC 182, considered *Hone v Western Australia* (2007) 179 A Crim R 138; [2007] WASCA 283, cited *R v Shearsmith* [1967] Qd R 576, cited *State of Western Australia v Dallmeyer* [2008] WADC 108, cited *State of Western Australia v Martinez* (2006) 159 A Crim R 380; [2006] WASC 25, considered *TVM v Western Australia* (2007) 180 A Crim R 183; [2007] WASC 299, considered

COUNSEL: B G Campbell for the respondent
R A East for the applicant

SOLICITORS: Director of Public Prosecutions (Qld) for the respondent
Legal Aid Queensland for the applicant

[1] **MACKENZIE J:** This is an application pursuant to s 614 and 615 of the *Criminal Code* for an order that the accused be tried by Judge alone, or, as it is called in s 614, a "no jury order". He is charged with murder.

[2] The case involves mental health issues with a possible overlay of drug use in the days before the offence. There were proceedings in the Mental Health Court but the matter was eventually listed for trial. The matter had been set down for trial several months before the application was brought. When it was set down, the option of trial by Judge alone was not part of the law of Queensland. In accordance with the usual practice for substantial trials, the identity of the Judge assigned to conduct the trial was made known to the parties at an early stage.

[3] The relevant amendment inserting a new division into the Code, Chapter 62 Chapter Division 9A was assented to on 19 September 2008. The application complies with s 614(2) and (6). The application was made before the trial was to begin within the meaning of s 614(2) since the jury panel for it had not attended before the court. It was assumed for the purpose of argument of the application that the intent of that provision was that the trial began when the particular jury panel attended before the particular court for the purpose of being empanelled in the trial, although other interpretations of it are perhaps possible. It is not necessary to explore that issue further for the purposes of this application.

[4] The focus in s 614(3) is on whether it was known before the matter is decided who the trial Judge will be. Ordinarily, the word "decided" implies a later point in time than when the application is "made" or "filed". The form of the recent amendment to the Code to permit trial by jury alone suggests that it was influenced by Pt 4 Div 7 of the *Criminal Procedure Act* 2004 (WA). The provision relating to the time when the trial begins for the purpose of s 614 and the provision which assigns relevance to the identity of the trial Judge being known to the parties "when the application is decided" are both provisions that do not appear in the Western Australian provisions that correspond with s 614. The Western Australian provision simply says that any application must be made before the identity of the trial Judge is known to the parties. There is no authority in Western Australia to grant an application after that time.

[5] The Western Australian approach no doubt reflects the well-founded concern that, in some cases, there might be a temptation to "judge shop" by assessing whether it might be more advantageous to seek a "no jury order" or to go to trial before a jury once the identity of the trial Judge was known. I am not concerned that there is any element of that in the present case for reasons that will appear later.

[6] The safeguard in s 614(3) against such an application being made in those circumstances is a requirement that a no jury order may be made only if the court is satisfied that there are special reasons for making it. The essential concept is that, in applications where special reasons must be established, once that threshold is reached, and in cases where the identity of the trial judge is not known and it is not applicable, the court may make a "no jury order" if it considers it is "in the interests

of justice to do so". That is, in my view, an unfettered discretion to make such an order if, having regard to the issues in a particular case and any other matters bearing on what might be properly encompassed in the notion of the interests of justice in that case, the Judge considering the application is of the view that it is, in fact, in the interests of justice to make such an order. Section 615(4) gives non-exclusive examples of particular circumstances that may be taken into account by the court in deciding whether or not to make a no jury order.

[7] The corresponding Western Australian provision has generated differences of opinion over matters basic to its application. Research has found three cases where single Judges of the Western Australian Supreme Court have written reasoned decisions. On the only occasion, as far as research can find, when a trial by Judge alone was considered at appellate level (*Hone v Western Australia* (2007) 179 A Crim R 138; [2007] WASCA 283), the issues raised at first instance in the cases which will be mentioned shortly were remote to the question which concerned the Court of Appeal.

[8] In chronological order, the three decisions of single Judges of the Western Australian Supreme Court are *State of Western Australia v Martinez* (2006) 159 A Crim R 380; [2006] WASC 25 (Heenan J); *Arthurs v State of Western Australia* [2007] WASC 182 (Martin CJ); and *TVM v Western Australia* (2007) 180 A Crim R 183; [2007] WASC 299 (McKechnie J). Three fundamental issues, the second of which is not easy to articulate very precisely, upon which differing views have been expressed are:

(a) Whether, when an application for a no jury order is made, the court should treat the relevant sections as expressing a neutral position as to the preferred mode of trial;

(b) Accepting that the relevant provisions suggest that, in some cases, the application of community standards may play a significant role in the exercise of the discretion, to what extent are perceptions of the relative value, in terms of public acceptability, of verdicts of a jury or a Judge sitting alone relevant; and what are the limits when consideration of exercising the discretion extends beyond the specific examples referred to in a provision like s 615(4)?

(c) The weight that should be given to subjective views of an accused person.

[9] With regard to (a), the affirmative views of Heenan J at para [23] and Martin CJ at para [71] are to be contrasted with those of McKechnie J at paras [13] and [20].

[10] With regard to (b), there is a difference of views between Heenan J at paras [6], [33] and [36] and Martin CJ at paras [61] to [66].

[11] With regard to (c), there is a difference between the views of Martin CJ at paras [70] and [80] and McKechnie J at paras [30] to [32] and [35].

[12] It is not necessary to express a final conclusion on any of those issues to decide this application, but some observations will be made. Firstly, the example in s 615(4) of significant pre-trial publicity is absent from this case. The issue of the relationship between the discretion to make a no jury order and other means of ensuring a fair

trial such as questioning jurors to test impartiality, and change of venue if the publicity is localised rather than widespread, does not have to be addressed here.

[13] Legislative recognition that one aspect of the interests of justice, input from the community through jurors who are representative members of it in a jury trial, is expressed in s 615(5). Section 615(4)(a) and (b) also recognise that there may be circumstances in which jurors ought not to be required to perform what is sometimes described as the highest duty of citizenship.[1] As mentioned above, s 615(4)(c) focuses on another situation, where significant pre-trial publicity may affect jury deliberations, as one where trial by jury may not be in the interests of justice.

[14] The opening words of s 615(4) make it plain that the circumstances in which a no jury order may be made are not limited to those categories of cases. But the starting assumption, once the indictment is presented, is that there will be a trial by jury, absent a no jury order based on a finding that it is in the interests of justice to conduct the trial by Judge alone. If such an order is not made, the trial proceeds as a jury trial. The fact that a trial by jury is, to use a modern analogy, a default position, is not, however, inconsistent with considering an application under s 614 without any preconception or presumption about the appropriate mode of trial in that particular case.

[15] The exercise of the discretion to make a no jury order in the interests of justice has to be considered in the setting of the particular case. In my view the subjective views of an accused person are but one factor to be considered, and are not decisive. In some cases those views will coincide with matters which would be of concern to the court, for example, the effect of sustained and negative publicity concerning the applicant's case on the ability to conduct a fair trial. In other cases, it may be of little weight, because it does not raise issues that are, objectively, likely to require a trial by Judge alone in the interests of justice. The perceived but ill-founded concern that trial by jury would lead to greater risk of personal embarrassment than a trial by judge alone relied on by an applicant in *State of Western Australia v Dallmeyer* [2008] WADC 108 is an example of the kind of distinction being made in what has been said above on this subject.

[16] One of the practical difficulties with the application was that it was set down on the eve of trial, and as discussion with counsel developed, it became apparent that there were still issues to be resolved, principally with the psychiatrists who will be called as witnesses if the matter goes to trial, because further pharmacological evidence that seemed to require their consideration had only just been received. As submissions developed, it became apparent that there may be further issues about conducting the trial that might be unpredictable until all necessary further consultations were held. In particular, the further material would need to be considered in connection with what I apprehend to be one of the likely issues, the effect of any voluntary ingestion of drugs that may be proved in a case where the focus of the psychiatric evidence was on whether the underlying mental condition of the applicant would otherwise entitle him to a defence of insanity or diminished responsibility. On the first return date, Mr East who appeared for the applicant was concerned that disclosure of the full psychiatric material to me might result in

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[1] It is unnecessary to consider whether a decision as to substantial impairment involves application of a "community standard"; but it is perhaps slightly different from the examples in s 614(4).

matters becoming known that would not be in evidence or be issues at the trial. He considered that it had an inhibiting effect upon disclosing that material to me because I had been listed to be the trial Judge.

[17] While Judges are generally more insulated from any prejudicial effects of such material than jurors might be, there are distinct advantages in having an application for trial by Judge alone determined by someone other than a person who is to be the trial Judge and avoiding subsequently listing a trial before a Judge if he or she has considered such an application. There may even be grounds for criticism if it is otherwise.[2]

[18] Perhaps because the application was brought in circumstances of urgency, the material in its original form was deficient. The application contained no particulars of what constituted special reasons relied on to address the threshold question in s 614(3). As the discussion developed, the recency of the amendment was raised. In my view that, standing alone, is a makeweight at best. The passing of time will render it even less relevant and eventually redundant. In any event, the lateness of the application seemed to have mainly arisen for other reasons. There was no material filed in support of the application which, in my view, is not a practice that should be followed. The application is brought under s 590AA(2)(da) and Chapter 9 of the *Criminal Practice Rules* and the application should be accompanied by any evidence supporting grounds relied on for a no jury order.

[19] In the result, because of the difficulties about the conduct of the trial in the short term, the application was adjourned on the return date and at the next criminal review the trial was de-listed. No formal listing has, as I understand it, yet been made for its hearing in the new year. The identity of the trial Judge will not be known at the time when the application is "decided", on the assumption that the word bears its ordinary meaning. When the hearing of this application resumed it was submitted that the need to show special circumstances had dissolved because of that.

[20] That, in my view, is correct. At the time the application is decided, the identity of the trial judge is not known. The circumstances of the present case are such that there were genuine reasons for the listing of the trial being vacated. However, in other circumstances, and in particular, if there is no demonstrable bona fide reason to adjourn the trial, any attempt to avoid the stricture in s 614(3) by having the trial delisted would, no doubt, be scrutinised very carefully. This case is entirely different from that kind of case, since the question of whether the trial was ready to proceed was, effectively, agitated by the court itself.

[21] When the hearing of the application resumed, there was material placed before the court. A concession was made by Mr East that, although there was some complexity in the matter, he did not submit that it was likely to be unreasonably burdensome for a jury to comprehend the evidence.[3] He also conceded that this was not a case where there was any concern that the applicant would not objectively get a fair trial if it were to be a jury trial. However, Mr East said, on the basis of the treating psychiatrist's report, that the applicant's condition was still fragile, although

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[2] Cf. Martin CJ in *Arthurs v State of Western Australia* [2007] WASC 182, para [52].
[3] *Criminal Code* 1899 (Qld), s 614(4)(a).

he was fit for trial. It was submitted, effectively, that that might cause difficulty in managing the trial as it progressed.[4]

[22] The principal reason advanced in favour of the application was that the trial would essentially concern mental health issues. He expressed the view the facts of the killing would not be in dispute. The only area in which contentious issues were likely to arise was whether the applicant was entitled to the defences of insanity or diminished responsibility, and what effect, if any, evidence that might tend to suggest that he had voluntarily consumed amphetamines and cannabis prior to the killing had on the availability of those defences.

[23] Mr East submitted that since the jurisdiction of the Mental Health Court with respect to questions of this kind was exercised by a Judge constituting the Mental Health Court sitting alone,[5] it was, by extension, appropriate for a no jury order to be made in the present case. Stated that way, the proposition is too wide. A primary function of the Mental Health Court is to decide whether the person who is the subject of a reference to it is of unsound mind when the alleged offence occurred and, if the offence is murder and the person was not of unsound mind, whether he or she was of diminished responsibility at the time when the alleged offence occurred.[6] But one of the limitations on the Mental Health Court's powers is that it must not make one of those decisions if a fact that is substantially material to the opinion of an expert is so in dispute it would be unsafe to make the decision.[7]

[24] It is true that an historical reason for the establishment of the predecessor of the Mental Health Court, the Mental Health Tribunal, was to avoid the unfortunate spectacle of the need for a perfunctory trial by jury of an offender whose mental illness was not doubted. But it was also recognised that, where the validity of the diagnosis was dependant on factual questions that were in dispute, it was appropriate for the facts to be determined in the usual way by a jury. *R v Shearsmith* [1967] Qd R 576 is an example of the rationale for that policy decision being made.

[25] Judicial comments that certain kinds of cases tend to be heard by Judge alone should not be treated as more than an observation based on current experience, or perhaps fashion, in the jurisdiction in which they are made and perhaps a reflection that the kinds of issues in them are often of a kind which influences the decision whether it is in the interests of justice that there should be trial by Judge alone or not. But having said that, an assessment has to be made, in each individual case, where the interests of justice lie in it.

[26] The importance of placing reliable information about the likely issues in the trial before the Judge hearing the application for a no jury order is illustrated in *Hone v Western Australia* by the history of the application, recounted at paras [18]-[23] by Miller JA, and the complications that followed when the information proved inaccurate.

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[4] Argument was not developed as to the limits of this proposition. The submission was based on concern for the accused's welfare rather than concern about a risk of deliberate disruption. As a tentative opinion, the contingency that an accused may disrupt a trial deliberately should be left within the province of s 617.

[5] *Mental Health Act* 2000 (Qld), s 382.

[6] *Mental Health Act* 2000 (Qld), s 267.

[7] *Mental Health Act* 2000 (Qld), s 269.

[27] While prophesying is a risky undertaking, the concern that that kind of problem may arise in this case seems less from what I glean from the submissions. The more likely outcome is that it will simplify rather than become more complex. This case, as I understand it, will not involve any significant issue concerning the facts of the killing itself, but will involve the following issues:

1. Whether the accused was suffering from a mental disease within the meaning of s 27 at the time of the killing;

2. If so, whether he was deprived by it of one of the capacities under s 27;

3. If not, was one of the capacities substantially impaired?

4. Does circumstantial or scientific evidence support a conclusion that he took amphetamines intentionally, and, if so, when in relation to the time of the killing?

5. If so, did voluntarily taking amphetamines aggravate or combine with a mental disease that existed (but would neither have led him to kill his wife nor deprive him of or substantially impair one of the s 27 capacities) and transform it into one where he killed his wife because of lack of, or substantial impairment of, a s 27 capacity?

[28] I would not have concluded that the first three of those questions, or the fourth, insofar as it relates to drawing inferences from facts observable by lay witnesses that a person had taken an intoxicating or stupefying substance, (which may be a subject pursued by the Crown), would have tipped the balance in favour of a no jury order had they stood alone in this case. They are the kinds of questions that are well within the capacity of juries to answer, and it was not suggested, having regard to the concessions made, that there was any reason why it was in the interests of justice not to have trial by jury because of the nature of those questions alone.

[29] But in the present case, as I understand it, there is scientific evidence that tests that were performed with a view to establishing whether there were residual compounds in the applicant's blood that suggested that he had consumed amphetamines can only say that the result is not inconsistent with ingestion of an amphetamine type drug, and cannot establish quantitatively how much of the drug was consumed, if at all, or when the drug was taken in relation to the killing. The lay evidence and the scientific evidence may not necessarily be contradictory, but their relationship would have to be considered.

[30] The fifth question would be guided by expert psychiatric opinion, but, in this particular case, has the potential to be particularly and unusually complex because of the issues in drawing the border line between the defence of insanity or of diminished responsibility and a lack of capacity caused or contributed to by the effects of voluntary drug consumption on a pre-existing mental illness. To that may be added a possible issue of intoxication in relation to formation of intent and some complexity with regard to onus of proof in respect of the various issues.

[31] It is those additional factors that satisfy me that it is in the interests of justice that a no jury order be made in this case. I order that pursuant to s 615(1) of the *Criminal Code* that Colin Barry Clough be tried by a Judge sitting without a jury.