HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

PETER ANDREW FITTOCK APPLICANT

AND

THE QUEEN RESPONDENT

Fittock v The Queen [2003] HCA 19
Date of Order: 13 February 2003
Date of Publication of Reasons: 10 April 2003
D7/2001

ORDER

Application dismissed.

On appeal from the Supreme Court of the Northern Territory

Representation:

G D Wendler with S H MacFarlane for the applicant (instructed by Laurence J Fittock)

T I Pauling QC, Solicitor-General for the Northern Territory with N Rogers for the respondent (instructed by Director of Public Prosecutions (Northern Territory))

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with C J Horan intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia and J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

R A Pepper intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

S M Crennan QC with R M Doyle intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

S J Gageler SC intervening on behalf of the Australian Capital Territory Attorney-General (instructed by ACT Government Solicitor)

CATCHWORDS

Fittock v The Queen

Constitutional law (Cth) – Indictable offence – Trial by jury – Whether law enacted by the Legislative Assembly of the Northern Territory a "law of the Commonwealth" – Whether s 80 of the Constitution applies to trials on indictment in the Supreme Court of the Northern Territory for offences against a law of the Commonwealth – Whether Territory law permitting reserve jurors, who are discharged prior to commencement of jury deliberations, is inconsistent with s 80 of the Constitution.

Constitution, s 80.
Criminal Code (NT), ss 162, 165, 348.
Judiciary Act 1903 (Cth), s 70A.
Juries Act 1962 (NT), ss 6, 37, 37A.
Northern Territory (Self-Government) Act 1978 (Cth), Pt III, Div 1.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. At the conclusion of the oral argument for this application for special leave to appeal, the Court ordered that the application be dismissed. What follows are our reasons for joining in that order.

2 The applicant was tried on indictment in the Supreme Court of the Northern Territory on two counts; one of murder, and the other of attempted unlawful killing. The jury returned a verdict of guilty on each count. An application for leave to appeal was made to the Court of Criminal Appeal of the Northern Territory (Angel, Mildren and Riley JJ). After full argument, the Court dismissed the application[1].

3 The application for special leave to appeal to this Court was heard concurrently with that of *Ng v The Queen*[2]. Again, arguments were advanced respecting the operation of s 80 of the Constitution, but with the additional considerations flowing from the circumstances that the applicant was tried before the Supreme Court of a Territory in which there is a system of representative self-government, and for offences against the statute law of that Territory.

4 Questions arise as to whether s 80, in its terms, could have had any application at the trial of the applicant. That section speaks of "any offence against any law of the Commonwealth".

5 The indictment specified that the offences occurred at Borroloola in the Northern Territory. In the Northern Territory, the offences of murder and attempted murder are found respectively in ss 162 and 165 of the *Criminal Code* (NT) ("the Code"). The Code was enacted as Sched 1 by s 5 of the *Criminal Code Act* 1983 (NT) by the Legislative Assembly of the Northern Territory. The Legislative Assembly has the powers conferred by Pt III, Div 1 (ss 6-12) of the *Northern Territory (Self-Government) Act* 1978 (Cth).

6 The applicant wishes to contend that, despite the legislative source of ss 162 and 165 of the Code, nevertheless he was tried for an offence against a law of the Commonwealth within the meaning of s 80 of the Constitution. He also disputes the contention by the Attorney-General of the Commonwealth, who was heard in opposition to the application, that, even in cases where what

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1 *Fittock v The Queen* (2001) 11 NTLR 52.

2 [2003] HCA 20.

indubitably is involved is an offence against a law of the Commonwealth, s 80 would have no application to any trial on indictment in the Supreme Court of the Northern Territory. For that proposition, the Attorney-General relies upon *R v Bernasconi*[3]. The applicant would have the Court re-open that decision.

7 On the other hand, the Solicitor-General for the Territory, who appeared for the respondent, took a different position to that of the Commonwealth. The Solicitor-General canvassed an approach to *Bernasconi* and later authorities in this Court which would produce the result that, whilst s 80 applies to trials on indictment in the Supreme Court of the Northern Territory for offences against any law of the Commonwealth[4], it did not apply in the present case where the offences were against Territory laws.

8 The Solicitor-General further submitted that, in any event, the reserve juror provisions of the *Juries Act* 1962 (NT) ("the Juries Act"), which applied to the trial of the applicant, do not conflict with what is required of a trial "by jury" within the meaning of s 80. That being so, no occasion was presented which made it necessary to enter upon consideration of the remaining issues.

9 That submission and approach should be adopted. The result of doing so is that an appeal would have no prospects of success and, on that ground, special leave should be refused.

10 Section 6 of the Juries Act provides:

> "Where, under a law in force in the Northern Territory, an offence prosecuted in the [Supreme] Court is required to be tried with a jury, the jury shall consist of 12 jurors who shall be chosen and returned in accordance with this Act."

It is not disputed that, on pleading not guilty, the applicant was entitled, pursuant to s 348 of the Code, to a trial by jury under Territory law.

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3 (1915) 19 CLR 629.

4 Section 70A of the *Judiciary Act* 1903 (Cth) permits the holding in any Territory (or State) of the trial on indictment of an offence against a law of the Commonwealth which was not committed within any State.

11 At the trial of the applicant, 12 jurors were impanelled pursuant to s 6 and the general procedural provisions in s 37 of the Juries Act. Section 37 is expressed as subject to s 37A. The latter section makes detailed provision respecting reserve jurors. It empowered the Supreme Court to direct that not more than three jurors be chosen and returned as reserve jurors. Pursuant to a direction under s 37A, two jurors were returned as reserve jurors. One reserve juror was discharged before the Crown opened its case. Following the summing up, the trial judge discharged the remaining reserve juror and a jury of 12 retired to consider its verdict. This last step was taken under s 37A(5) which states:

> "Immediately before the jury retires to consider its verdict, a reserve juror who has not replaced a juror shall be discharged."

12 The submissions by the applicant were somewhat imprecise. On one view, they involved the proposition that s 37A was invalid for repugnancy to s 80 of the Constitution. One result of so holding would appear to be that s 6 of the Juries Act applied in an unqualified form and required, contrary to what took place, a jury of 12 persons. On that footing, the trial would have miscarried under Territory law, as well as for failure to observe the requirements of s 80. However, it is unnecessary to pursue these matters, all of which turn upon the phrase "by jury" in s 80.

13 The Territory legislation differs from the Victorian legislation considered in the application in *Ng*. There is no provision for ballotting out from among the whole body of jurors and no particular treatment of any foreperson.

14 The considerations which led to the conclusion adverse to the applicant in *Ng* apply with equal, if not greater, force to the Territory legislation.

15 Similar legislation in Western Australia, s 18 of the *Juries Act* 1957 (WA), was considered in *Ah Poh Wai v The Queen*[5]. Section 18 establishes a system of reserve jurors which resembles that under Northern Territory law. One difference, of little present significance, is that, whilst in Western Australia reserve jurors replace retiring jurors in the order in which the reserve jurors are called (s 18(5)), in the Northern Territory the order of replacement is determined by lot (Juries Act, s 37A(3)). In *Ah Poh Wai* it was held, with detailed reasons given by Malcolm CJ and Pidgeon J (Steytler J concurring), that there was no failure to observe the requirements of s 80 of the Constitution where s 18 was

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5 (1995) 15 WAR 404.

applied at a trial on indictment in the District Court of an offence against the *Customs Act* 1901 (Cth).

16 Even if the applicant could surmount the other obstacles to him showing that s 80 applied in respect of his trial, there is no prospect of success in demonstrating that he was denied a trial "by jury" within the meaning of s 80.

17 For these reasons we supported the order that the application be dismissed.

18 McHUGH J. I joined in the order dismissing the application for special leave in this matter because an appeal by the applicant would have had no prospects of success. The reserve juror provisions of the *Juries Act* 1962 (NT) ("the Juries Act") – if they are a "law of the Commonwealth" – are not in conflict with s 80 of the Constitution, as the applicant claims.

19 Trial "by jury" in s 80 refers to the essential features of a criminal trial by jury, as understood at federation[6]. At that time, unanimity of opinion "at the time the verdict is pronounced" was one essential feature of a criminal trial by jury[7]. But it was not an essential feature of trial by jury in a criminal case at federation that the unanimous verdict should be that of 12 jurors. Accordingly in *Brownlee v The Queen*[8], this Court held that s 80 was not breached by a State law that permitted the number of jurors to be reduced to 10 members by reason of the death or incapacity of one or more of the selected jurors. Nor would the direction in s 80 of the Constitution be infringed by a jury comprising more than 12 persons. The applicant did not suggest that it would.

20 In the present case, 12 jurors were selected in accordance with s 6 of the Juries Act. Two additional or reserve jurors were chosen in accordance with s 37A of that Act. One reserve juror was discharged before the Crown opening. The other was discharged in accordance with s 37A(5) before the jury retired to consider its verdict. Twelve jurors – being the same 12 selected under s 6 of the Act – convicted the accused. Their verdict was unanimous. Section 80 required nothing more.

21 It is impossible to read into s 80 an implication that there cannot be a trial by jury where reserve jurors are selected in addition to 12 jurors. Nor is it possible to read into the section an implication that the institution of trial by jury would be undermined if reserve jurors, later discharged, have or might have discussed the evidence with the jurors who give the verdict. It is of course fundamentally important that juries decide cases impartially on the evidence and in accordance with the trial judge's directions. But that requirement is not undermined if a reserve juror has or might have discussed the evidence with the other jurors before the jury retires. No doubt if a reserve juror has expounded his or her view of the evidence, the remaining jurors may remember it. But if they act on it, it will or ought to be because they are convinced of its validity. The institution of trial by jury, as understood at federation, is no more undermined by

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6 *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

7 *Cheatle v The Queen* (1993) 177 CLR 541 at 548.

8 (2001) 207 CLR 278.

such a discussion than it is by a discussion with a juror who is subsequently discharged by reason of death or illness[9].

22 There was a time – not long ago – when juries were sequestered in all capital and many serious criminal cases. That may suggest that, at federation, it was an essential attribute of trial by jury in a serious criminal case that once empanelled a criminal jury could not discuss the evidence with anyone except other jurors. But the jury system has been evolving for centuries. Today, the ordinary rule is that, at the end of each day's hearing, jurors are free to resume their usual activities. Usually they are given a warning not to discuss the case with outsiders. If the trial judge learns that a juror has discussed the case with an outsider, the judge may discharge the juror and sometimes the jury itself. But it is a matter for the discretion of the judge who will consider what justice and the appearance of justice require. Discharge of the jury or the juror is not automatic although ordinarily the judge will discharge the juror. When the purpose of s 80 is kept in mind, it cannot be read as declaring that it is an essential feature of trial by jury that the jurors have not discussed the evidence with persons who were to be, but ultimately are not, the jurors who decide the case.

23 The purpose of s 80 is to protect the citizen from the executive and judicial power of the Commonwealth by ensuring that trials on indictment will be determined by representatives of the community who are unanimous in their verdicts. That purpose is not undermined by the presence of reserve jurors in the jury box and jury room during the trial even if the reserve jurors from time to time express views about the evidence in the case to the jurors who deliver the verdict of the jury.

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9 cf *Brownlee v The Queen* (2001) 207 CLR 278.

24 KIRBY J. These reasons arise out of an application for special leave to appeal brought by Mr Peter Fittock ("the applicant"). The application was referred into the Full Court and heard together with the application by Mr Philip Ng[10]. Both applications were said to concern the requirements of s 80 of the Constitution governing the trial on indictment of offences against a law of the Commonwealth.

25 At the close of argument the Court announced that special leave was refused. It reserved its reasons. I now state my reasons for joining in that order.

The facts

26 The applicant was charged on an indictment alleging two counts, respectively of murder and attempted murder, contrary to the *Criminal Code* (NT)[11]. Pursuant to the *Juries Act* 1962 (NT)[12] twelve jurors were empanelled for his trial. In accordance with that Act[13], an additional two persons were selected as "reserve" jurors. In the event, one such reserve juror was discharged before the prosecution opened its case. Following the final summing up, and before the jury originally chosen were asked to consider their verdict, the judge discharged the remaining "reserve" juror[14]. After deliberation, the jury returned a verdict of guilty on both counts. The applicant was convicted. Upon his conviction of murder, he was sentenced to imprisonment for life.

27 The applicant appealed to the Court of Criminal Appeal of the Northern Territory. Amongst his grounds of appeal were challenges to the constitutional validity of the Territory law providing for reserve jurors. That law had been enacted after self-government was granted to the Northern Territory by legislation of the Federal Parliament[15].

28 The Court of Criminal Appeal rejected the applicant's challenges. So far as the constitutional grounds were concerned, the Court did so on the basis that, in order to reach them, it would be necessary to overcome decisions of this

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10 *Ng v The Queen* [2003] HCA 20.

11 ss 162, 165.

12 s 37.

13 s 37A.

14 Pursuant to s 37A(5) of the *Juries Act*.

15 *Northern Territory (Self-Government) Act* 1978 (Cth). See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513.

Court, binding on the Court of Criminal Appeal, commencing with *R v Bernasconi*[16]. Those decisions concern the status of Territory law and the application of Ch III to it and to the courts of the Territory.

Two threshold questions

29 In this Court the applicant accepted that there were two threshold questions standing in the way of success in his argument based on s 80 of the Constitution. The first was whether the law creating the "offences" with which he had been charged, namely the *Criminal Code*, was a "law of the Commonwealth" as that phrase is used in s 80 of the Constitution. The second, assuming the first question was answered in his favour, was whether the legislative power conferred on the Federal Parliament by s 122 of the Constitution was qualified by the requirements of s 80, making the latter provision applicable to the *Juries Act* as it provides for "reserve" jurors.

30 Each of these questions presents legal issues of controversy and difficulty. Although the resolution of those questions might logically be thought to come first, it is convenient to assume that the applicant could overcome these hurdles. But it must be acknowledged that, in his path, lies a substantial barrier of much authority. Several judges of this Court, over the years, have questioned the correctness of that authority[17], including recently[18].

31 For myself, respectfully, I am unconvinced that the two impediments mentioned would ultimately have proved fatal to the applicant's arguments. The notion that the Territories of the Commonwealth are disjoined from the one federal union created by the Constitution is unpersuasive to me. The idea that a self-governing Territory, without accomplishing the journey to Statehood provided by the Constitution[19], can make laws that are not "law[s] of the Commonwealth" is likewise unattractive. So is the contention that the courts of

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16 (1915) 19 CLR 629. See *Fittock v The Queen* (2001) 11 NTLR 52.

17 See eg *Ffrost v Stevenson* (1937) 58 CLR 528 at 592-593; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580-584; *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 598; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 198-202; *Gould v Brown* (1998) 193 CLR 346.

18 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 380-383 [149]-[154]; cf *Northern Territory v GPAO* (1999) 196 CLR 553 at 650 [252].

19 Constitution, s 121.

the Territories are somehow disjoined from full participation in Ch III of the Constitution, in which is found s 80 relied on in this case.

32 One day these constitutional questions will need to be dealt with. But this is not the occasion. There was a more direct path to the order in this application. It was suggested by the resolution of the common issues dealt with in disposing of Mr Ng's application.

33 It was therefore appropriate to consider, as the Court did during argument, the common and separate issues of principle raised by the applicant concerning the "reserve" jurors provided by the Northern Territory *Juries Act*. Those issues arose on contentions similar to those advanced by Mr Ng in his application. They were that the provisions of Northern Territory law for "reserve" jurors were invalid for inconsistency with the requirements of s 80 of the Constitution. If such contentions were to be decided against the applicant the larger constitutional questions would become immaterial.

The relevant legislation

34 By s 37A of the *Juries Act* provision is made for "reserve" jurors in criminal trials. That section provides, relevantly:

> "(1) The Court in which a criminal trial is to be held may direct that, in addition to the 12 persons required under section 37(1) to be the jury to try the issues on that trial, not more than 3 jurors summoned in accordance with section 30 shall be chosen and returned as reserve jurors in respect of that trial.
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> (2) A reserve juror -
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> (a) shall have the same qualifications;
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> (b) shall be called and empanelled in the same manner;
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> (c) shall be subject to the same challenges and liability to be stood by and to be discharged;
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> (d) shall take the same oath; and
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> (e) shall have the same functions, powers, facilities and privileges,
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> as a juror, and for that purpose the law in respect of jurors shall apply to and in relation to a reserve juror with such modifications as are required by this section.

(3) A juror at a criminal trial who, prior to the time the jury retires to consider its verdict, dies or becomes disqualified from or is discharged from performing his duties as a juror shall be replaced by a reserve juror, if any, who, if there is more than one reserve juror available at that trial, shall then be determined by lot in such manner as the Court determines.

(4) Where a reserve juror who has not replaced a juror dies or becomes disqualified from or discharged from performing his duties as a juror, the trial in respect of which he is a reserve juror shall not be affected by that death, disqualification or discharge.

(5) Immediately before the jury retires to consider its verdict, a reserve juror who has not replaced a juror shall be discharged."

35 The provisions of the Northern Territory Act differ in several respects from those of the Victorian Act considered in Mr Ng's application. There is no equivalent provision in relation to the foreperson. The primacy of the twelve jurors first selected is maintained. The supplementary jurors are truly held in "reserve". They only replace one of the twelve jurors first selected in specified circumstances. No ballot is taken that can remove any of the first chosen jurors. The only ballot that occurs is one to select from amongst the "reserve" jurors that juror, or those jurors, who, where necessary, will replace the juror or jurors first chosen.

36 Despite the foregoing differences, there are similarities between the two Australian legislative models instanced in this application and that of Mr Ng. In each case it is the judge of trial who decides whether supplementary jurors should be chosen. In practice, as here, that would normally be done in consultation with the parties. In each case, up to three such jurors may be selected. When chosen, the "reserve" jurors sit with the other jurors. During the trial until the close of the summing up, they retire and, by inference, deliberate with the other jurors. In each case, the removal of jurors in excess of twelve takes place immediately before the jury are required to retire to consider their verdict.

The provision for reserve jurors conforms to s 80

37 In my reasons on the application by Mr Ng I have set out the course of the decisional history in this Court concerning the requirements of s 80 of the Constitution; the resulting features of jury trial that may be described as essential and inessential; the functional criterion for the validity of a trial conforming to s 80 that has been adopted by this Court in preference to a purely historical one; and the issues that arise from challenges to the Australian legislation providing

for supplementary jurors[20]. I will not repeat any of this detail. I incorporate it by reference.

38 Making due allowance for the differences between the provisions for "reserve" jurors under the Northern Territory Act and the provisions for "additional" jurors under the Victorian Act, the complaints of the applicant largely mirrored those advanced by Mr Ng. The applicant submitted that the first three objections voiced by Mr Ng applied equally to his case. The only difference of substance in his argument (apart from that addressed to the threshold questions) was that the applicant did not have available to him the additional (fourth) argument advanced by Mr Ng concerning the special status accorded under Victorian law to the jury foreperson.

39 Assuming that the applicant could make good his contention that s 80 of the Constitution applied to trial by jury under the Northern Territory Act, and specifically to his trial, for the reasons expressed in *Ng v The Queen*[21], the objections to the validity and applicability of that law fail. So far as it is necessary for it to do so, the Northern Territory Act, like its Victorian counterpart, conforms in all relevant respects to the postulates of trial by jury in s 80 of the Constitution. The applicant's constitutional objections on that ground were therefore without substance.

Order

40 Upon the assumptions adopted for convenience as I have explained, the application for special leave to appeal was rightly dismissed. I therefore joined in the order of the Court pronounced on 13 February 2003.

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20 *Ng v The Queen* [2003] HCA 20 at [29]-[49].

21 [2003] HCA 20.