CITATION:	*The King v Kerinauia* [2024] NTSC 57
PARTIES:	THE KING
	v
	KERINAUIA, Keith
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22308695
DELIVERED:	4 July 2024
HEARING DATES:	6 June 2024
JUDGMENT OF:	Hiley J

CATCHWORDS:

CRIMINAL PROCEDURE – Trial – Jury – Challenge for cause – On basis that potential juror may not be indifferent as between the Crown and the accused – Require sufficient foundation of fact before challenge can be determined – Involvement of members of jury panel in activities in support of the victim – Sufficient foundation of fact likely – Suggested directions to jury panel pre-empanelment – Procedure under s 356 *Criminal Code 1983* (NT) for jurors to determine whether the person is or is not indifferent

Bail Act 1982 (NT)
Criminal Code 1983 (NT) s 354, s 355, s 356
Criminal Code 1899 (QLD) s 610, s 611, s 612
Criminal Procedure Act 2004 (WA) s 104
Juries Act 1967 (ACT) s 36A
Juries Act 2003 (TAS) s 36
Juries Act 1962 (NT) s 42, s 43, s 44
Juries Act 1967 (VIC) s 38

Juries Act 1927 (SA) s 68
Jury Act 1977 (NSW) s 46
Jury Act 1967 (QLD) s 43

Bush v The Queen (1993) 69 A Crim 416; *Murphy v The Queen* [1989] 167 CLR 94; *R v Manson* [1974] Qd R 191; *R v Sills* [1995] QWN 53; *R v Stuart and Finch* [1974] Qd R 297, referred to

REPRESENTATION:

Counsel:

Crown:	M Aust
Accused:	J Tippett KC and P Maley

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Maleys Barristers & Solicitors

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Kerinauia [2024] NTSC 57
No. 22308695

BETWEEN:

THE KING
Crown

AND:

KEITH KERINAUIA
Accused

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 4 July 2024)

Introduction

[1] This is an expanded version of a ruling which I made the day before the empanelment of the jury in this case. I am publishing this in case it will be of assistance in future cases of the kind contemplated in ss 354 to 356 of the *Criminal Code 1983* (NT) (***Criminal Code***).

[2] Counsel for the accused sought permission to challenge some potential jurors for cause. Such challenges are contemplated by s 354(1) of the *Criminal Code.*

[3] This case had undergone extensive coverage in the press, as a result of which many potential jurors would already know about parts of it - primarily that the 20-year-old victim, Declan Laverty, died as a result of being stabbed by the accused. That in itself would rarely be sufficient basis for allowing a challenge for cause.[1]

[4] Additional circumstances relied upon here were the fact that some potential jurors or members of their family may have:

(a) signed a petition in favour of or concerning the death of Declan Laverty;

(b) attended a demonstration or protest related to the death of Declan Laverty;

(c) attended a ”Walk for Declan” event or another event related to the death of Declan Laverty; or

(d) voiced or expressed support for what has become known as “Declan’s law”[2].

Relevant law and procedure

[5] The main provisions are ss 354 to 356 of the *Criminal Code*.[3] It seems that these sections were included in the *Criminal Code* when it was enacted in

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1 See for example *R v Stuart and Finch* [1974] Qd R 297 at 328 per Douglas J and observations of Mason CJ and Toohey J in *Murphy v The Queen* [1989] 167 CLR 94 at 99-104.

2 On 29 March 2023, the Northern Territory Government amended the *Bail Act 1982* (NT) to provide for people charged with serious violent offences involving the use or threatened use of a prohibited or controlled weapon to be subject to a presumption against bail. Some have referred to this as “Declan's law”.

1983. They are similar to ss 610 to 612 of the *Criminal Code 1899* (Qld) (***Criminal Code (Qld)***). Those provisions were repealed in 1997.

[6] Section 354(1) of the *Criminal Code* provides that:

> (1) The Crown or an accused person may object to a particular juror on the ground:
>
> (a) that the juror is not qualified by law to act as a juror; or
>
> (b) that the juror is not indifferent as between the Crown and the accused person.
>
> (2) Such objections are in addition to any peremptory challenges that are allowed.

[7] Section 355 provides that:

> An objection to a juror, either by way of a peremptory challenge or by way of challenge for cause, may be made at any time before the officer has begun to recite the words of the oath to the juror, but not afterwards.

[8] Section 356 provides a somewhat cumbersome mechanism for "the truth of any matter alleged as cause for challenge" to be tried and determined by those jurors who have already been sworn in as jurors.

[9] Section 356 provides as follows:

> (1) If at any time it becomes necessary to ascertain the truth of any matter alleged as cause for challenge the fact shall be tried by the jurors who have already taken the oath as jurors if more than one, or if one juror has taken the oath as a juror, by such juror together with some indifferent person chosen by the court from the panel of jurors or, if not juror has taken the oath as a juror, by 2 indifferent persons chosen by the court from such a panel.

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3 Note however that ss 42 to 44 of the *Juries Act 1962* (NT) also deal with rights of challenge and to stand aside.

(2) The persons so appointed are to take an oath to try the cause for challenge and their decision on the fact is final and conclusive.

(3) If the persons so appointed cannot agree the court may discharge them from giving a decision and may appoint 2 other persons to try the fact to be chosen as in the case where no juror has taken the oath as a juror.

[10] Elsewhere in Australia, the challenge for cause is heard and determined by the trial judge, not by jurors.[4]

[11] In the present case, the matter alleged as cause for challenge is whether "the juror is not indifferent as between the Crown and the accused person".[5]

[12] It is well-established that before counsel is permitted to challenge a juror for cause, leading to the s 356 procedure being invoked, a proper foundation must be shown against the particular juror called.

[13] Sections 610 and 612 of the *Criminal Code (Qld)* have been considered by the Queensland Court of Criminal Appeal in *R v Manson*[6] and *R v Stuart and Finch*.[7]

[14] In *R v Manson*, Wanstall SPJ (with the other judges agreeing) said at p 201:

> [Section 612] is concerned wholly with matters of procedure. It does not alter the substance of the long-standing procedure for determining challenges, but simply codifies it. The words of contingency with which it opens seem to acknowledge the ancient discretion of the judge to pass upon the validity or *prima facie* sufficiency of the allegation

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4 Section 46 of the *Jury Act 1977* (NSW); s 38 of the *Juries Act 1967* (Vic); s 68 of the *Juries Act 1927* (SA); s 43 of the *Jury Act 1899* (Qld); s 36A of the *Juries Act 1967* (ACT); s 104 of the *Criminal Procedure Act 2004* (WA); s 36 of the *Juries Act 2003* (Tas).

5 Section 354(1)(b).

6 [1974] Qd R 191 at 198-202.

7 [1974] Qd R 297 at 303-304, 325-328 and 368-369.

> before appointing triers. Certainly they contemplate an allegation of some matter as cause for challenge, followed by a judicial decision which may either dispose of the allegation or make it necessary for triers to ascertain its truth.

[15] The need for challenging counsel to establish a *prima facie* case before a challenge to cause is tried, and the exceptional nature of the process in Australia, was reaffirmed by the High Court in *Murphy v The Queen*, albeit dealing with a different statutory context, namely the *Jury Act 1977* (NSW) under which the judge (not two jurors or prospective jurors) tries a challenge for cause.

[16] At pp 103-104, Mason CJ and Toohey J observed:

> It is beyond question that some foundation must be laid before an application to challenge for cause will succeed. Ordinarily this will take the form, at least initially, of an affidavit relating to the disposition of a particular juror or jurors. There may be cases where a reading by the trial judge of the offending material, where it has been published in circumstances that justify an inference that members of the jury are likely to have read it and to have been influenced against the accused, will be enough to justify acceding to an application to question potential jurors. But they are exceptional cases. There is still a need to provide a sufficient foundation of fact to justify acceding to the application.

[17] See too *Bush v The Queen*[8] per Drummond J (Davies and Miles JJ agreeing) at p 421:

> A precondition to the grant of an application to challenge for cause is the establishment of a "proper foundation against the particular juryman called."[9]

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8 (1993) 69 A Crim 416.

9 Quoting from *R v Stuart and Finch* [1974] Qd R 297 at 369.

[18] As I have noted, elsewhere in Australia, the challenge for cause is heard and determined by the trial judge, not by jurors.[10] Professor McCrimmon summarised the procedures (as they were in 2000) in his article, "Challenging a Potential Juror for Cause: Resuscitation or Requiem?" at p 135:

> A challenge for cause can be made after a potential juror has been called and before that juror is sworn by the clerk of the court. The challenge can be made before or after the rights of peremptory challenge have been exhausted and is tried by the presiding judge at the trial. Once a prima facie case is established, the potential juror is sworn and questioned under oath on a *voir dire*. If, on the balance of probabilities, disqualification or bias is established, the judge will remove the juror from the panel.

[19] Presumably, the same procedure would be followed under s 356 as was followed in Queensland. If the Judge finds that there is a *prima facie* case for the challenge, the triers are then sworn. The form of oath is: "You shall well and truly try whether AB one of the jurors stands indifferently to try the prisoner at the bar and give a true verdict according to the evidence, so help me God."[11] Obviously, this would need to be altered if a trier wished to take an affirmation, as would the wording of the oath or affirmation if the ground was that the juror was not qualified.

[20] Once the triers have been sworn, the party making the challenge calls his or her witnesses, if any, and the juror challenged may be examined and cross-

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10 Section 46 of the *Jury Act* 1977 (NSW); s 38 of the *Juries Act* 1967 (Vic); s 68 of the *Juries Act 1927* (SA); s 43 of the *Jury Act 1899* (Qld); s 36A of the *Juries Act 1967* (ACT); s 104 of the *Criminal Procedure Act 2004* (WA); s 36 of the *Juries Act 2003* (Tas).

11 See *R v Sills* [1955] QWN 53.

examined. Each party is then entitled to address the jury.[12] The burden of proof rests on the party making the challenge.[13] Presumably, the Judge will sum up if it is necessary to do so. The triers' decision is final and cannot be appealed.[14]

[21] One aspect that arises is whether or not this process should take place in the presence of the rest of the jury panel.

[22] In his article, "Challenging a Potential Juror for Cause: Resuscitation or Requiem?" Professor McCrimmon outlines the procedure in Canada which was similar to that in s 356. At p 139, he states (references omitted):

> The party making the challenge calls the proposed juror as a witness. Both sides are entitled to question the witness, provided the questioning is relevant, succinct and fair. It must not be or become a fishing expedition. While counsel generally is permitted to ask the questions, the scope, content and number of questions is strictly controlled by the presiding judge.
>
> To assist the presiding judge in the exercise of her or his discretion, a number of limiting principles can be distilled from the case law. First, the process is not to be used to find out what kind of juror the person is likely to be. It is not a procedure for wide-ranging personalised disclosure. Second, the process is not to be used to attempt to secure a favourable jury. Third, the process should not be used deliberately as an aid to counsel in deciding whether to exercise the right of peremptory challenge, although indirectly a proper challenge in the trial of its truth may have that effect. Fourth, the process is not to be used to indoctrinate the jury to the challenger's theory of the case. Finally, the process is not to be used to over or under represent a certain class in society.

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12 *R v Sills* [1955] QWN 53.

13 *R v Savage* (1824) 1 Mood 51.

14 Section 356 (2).

This matter

[23] As I have observed, significant coverage in the press, including references to matters prejudicial to the accused or to an important witness, will not usually constitute a sufficient foundation.

[24] The affidavits of Brooke Houen dated 4 June 2024 refer to each of the four matters listed in [4] above. More than 27,000 people signed the Petition. At that time Greater Darwin had a population of approximately 150,736 people. About seven of the people listed on the jury list for this trial, and thus potential jurors, had signed the petition.

[25] In my view that in itself would provide a sufficient foundation of fact for those seven people to be challenged for cause.

[26] I also think it likely that there would be a sufficient foundation of facts for some or all of the potential jurors that fall within the other three categories identified in [4] above to be challenged for cause. However, this might depend upon the circumstances underlying their participation in such events.

[27] In all cases, a person who has put his or her name to a petition, or participated in one of the relevant events, might potentially have some difficulty being emotionally detached as a juror. Also, the accused, and other members of the community, might have a perception that such a person was not in fact impartial.

Proposal and procedure

[28] In the course of empanelling the jury, I propose to refer to the Petition and the other three categories, and request any member of the panel who falls within one or other of those categories to:

(a) Consider whether he or she can "act with complete impartiality, detachment and without letting matters of sympathy, prejudice, sentiment or emotion play any part in his or her judgement" if selected as a juror, and if not, to ask to be excused from sitting on this jury; and

(b) in any event to disclose that fact, namely that he or she did sign the petition or participate in any of the other events.

[29] In the latter case I would probably ask the juror for more detail about his or her involvement in the particular event or events, and whether he or she on reflection considers that he or she could act impartially.

[30] I would then leave it to both counsel to consider whether or not that particular juror should be stood aside or challenged. It may be that the Crown will stand aside those who signed the petition. I am aware of the fact that the Crown only has six opportunities to stand aside a potential juror and both parties have only 12 opportunities to challenge without cause. If there still remains concern about a potential juror who has not been stood aside or challenged, I would hear further from counsel, particularly defence counsel, as to whether there is a sufficient foundation of fact to cause me to embark upon the process required by s 356.

[31] If that occurs consideration will have to be taken as to whether the s 356 trial takes place in the presence or absence of the rest of the panel. I would also endeavour to ensure that the exercise does not become some kind of fishing expedition and that the other limiting principles identified by Professor McCrimmon at p 139 of his article, “Challenging a Potential Juror for Cause: Resuscitation or Requiem?” are observed.

Postscript

[32] As matters transpired, I was able to empanel a jury of 12 plus three reserves, despite the Crown having exhausted its stand aside rights and the accused his challenges, without embarking on the challenge for cause exercise.
