CITATION:	*The Queen v Rolfe (No 1)* [2020] NTSC 80
PARTIES:	THE QUEEN
	v
	ROLFE, Zachary
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21942050
DELIVERED:	17 December 2020
HEARING DATE:	11 December 2020
JUDGMENT OF:	Mildren AJ

CATCHWORDS:

CRIMINAL PROCEDURE – Practice and procedure – application for change of venue - whether there are grounds on which to conclude that there is a reasonable possibility that the Accused will not have a fair and impartial trial in the locality where the alleged crime was committed

Supreme Court Act 1979 (NT), s 83(2)
Criminal Code (NT), s 297

Wood and Williams v R [2010] NTSC 36, *ACH* [2002] NTSC 32; 130 A Crim R 40, *Webb* (1992) 64 A Crim R 38, *R v Iaria and Panozzo* [2004] VSC 96, *R v Lange* (1987) 25 A Crim R 139, *DPP v Cicolini* [2008] 2 Qd R 313, *Johnson v The Queen* [2002] WASC 78, *R v Pepperill & Ors* (1981) 54 FLR 327, referred to

REPRESENTATION:

Counsel:

Crown:	S Callan SC
Accused:	D Edwardson QC

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Tindall Gask Bentley

Judgment category classification:	A
Judgment ID Number:	Mil20566
Number of pages:	14

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Rolfe (No.1) [2020] NTSC 80
No. 21942050

BETWEEN:

THE QUEEN

AND:

ZACHARY ROLFE

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 17 December 2020)

Introduction

[1] The Accused, Zachary Rolfe, is charged on indictment with one count of murder in relation to the shooting of the Deceased, Charles Arnold ("Kumanjayi") Walker at Yuendumu on 9 November 2019.

[2] In short summary, the Crown case against the Accused is that the Deceased was a 19 year old male residing in Yuendumu community. The Deceased had previously been convicted and sentenced to 16 months imprisonment suspended (with conditions) after 8 months in relation to an aggravated assault and other offences. After his release from gaol the Deceased was required to abide by a curfew and other conditions including the wearing of

an Electronic Monitoring Device and remaining at a nominated residence, namely Central Australian Aboriginal Alcohol Program Unit (CAAPU) in Alice Springs. Subsequently the Deceased removed the Electronic Monitoring Device and could not be located. Police efforts to locate the Deceased were unsuccessful and on 5 November 2019 a warrant was issued for his arrest.

[3] On 6 November 2019, police at Yuendumu attempted to arrest the Deceased at House 577, Yuendumu. The Deceased threatened police with a small axe and then fled. On 7 November 2019, the Accused, a police Constable, along with other police attempted to locate the Deceased with a view to arresting him. The Accused and other police had viewed Body Worn Video (BWV) of the attempt to arrest the Deceased the previous day. Over the next two days police, including the Accused, made extensive enquiries in Yuendumu in an attempt to locate the Deceased without success. This included searching House 577 on 9 November 2019. Information was received that the Deceased may have been at his mother's house which was either House 511 or House 518. Police arrived at House 518 and following information received from people they spoke to at that location, the Accused instructed an officer to check House 518 whilst another officer went to House 511. Following further enquiries the Accused and Constable Eberl asked permission from the occupants of House 511 to search it. Constable Eberl entered first, holding a torch. He found the Deceased in a room and asked him to confirm who he was. The Deceased provided a false name. The

Deceased was then guided to a position where he was placed with his back to a wall whilst the Accused attempted to identify him by holding a photo of the Deceased on the Accused's mobile phone next to the Deceased's face. This occurred at about 7:21pm. The Deceased continued to deny that the person in the photo was himself. A struggle then ensued as Constable Eberl and the Accused attempted to restrain the Deceased. During that struggle, the Deceased stabbed the Accused once to his left shoulder with a small pair of medical scissors. The Accused stepped back, drew his firearm and as Constable Eberl and the Deceased continued to struggle, the Accused shot the Deceased once to the middle right region of his back. Constable Eberl took the Deceased to the ground on top of a mattress on the opposite side of the room, said to be a bedroom. As the Deceased lay on his right side with his right arm holding the scissors beneath him, Constable Eberl was partially on top of him. Constable Eberl had pinned the Deceased's left leg and had his right arm around the Deceased's neck in order to control him. The Accused moved forward toward Constable Eberl and the Deceased, placed his left hand on Constable Eberl's back then fired a second shot, 2.6 seconds after the first shot, followed by a third shot fired 0.53seconds after the second shot. Both shots were fired at point black range less than 5cm from the left chest area. One of those shots was the fatal shot. The Accused then holstered his gun and assisted Constable Eberl in attempting to handcuff the Deceased who was still struggling and who was still holding the scissors in his right hand. The Accused was handcuffed and taken to a police vehicle

outside House 511 where he was transported to the Yuendumu Police Station where first aid was administered. As there were no medical staff at the community at the time, medical staff were dispatched from Yuelamu Community to assist. The Deceased was declared dead at 9:28pm.

[4] The Accused was arrested on 13 November 2019 and was subsequently granted bail. For various reasons the Crown says that shots two and three were unjustifiable as they were unreasonable, unnecessary and disproportionate to the circumstances because the Accused had a range of less than lethal tactical alternatives open to him. Shots two and three were not in the exercise of any power or function under the *Police Administration Act 1978* (NT). Further, the Crown case is that at the time of firing the shots the Accused intended to cause serious harm to the Deceased.

[5] The shooting was captured by BWV worn by Constable Eberl and the Accused.

[6] A committal hearing took place before his Honour Judge Birch in the Alice Springs Local Court between 1 and 3 September 2020. On 26 October 2020 the Court found that there was a case to answer and committed the Accused to stand trial in the Supreme Court. A trial date has been fixed for five weeks commencing in Alice Springs on 19 July 2021.

[7] The defence case at trial will be that at all relevant times the Accused acted lawfully when he discharged his firearm in self-defence and in defence of Constable Eberl. It will be further contended that the Accused acted in good

faith in accordance with s 148B(1) of the *Police Administration Act 1978* (NT).

The application to change the venue

[8] The power to make an order to change the venue of the trial is contained in s 83 (2) of the *Supreme Court Act 1979* (NT):

> Where a person is required to appear before the Court, or has appeared before the Court, at a particular time and place in a criminal proceeding, the Court may, at any time, on good cause being shown:
>
> (a) Order that the proceeding be had or continued, or that a person appear for sentence, before the Court at another place; and
>
> (b) Make such further orders, including orders as to bail and recognizances, as it considers necessary in the circumstances.

[9] A similar power is contained in s 297 of the *Criminal Code (NT).*

[10] In a case such as the present, where the application is largely based upon inflammatory pre-trial publicity or antipathy, the test is whether there are grounds on which to conclude that there is a reasonable possibility that the Accused will not have a fair and impartial trial[1]. The discretion, though wide, will not be lightly exercised.[2] In considering this question, not only must the trial of the Accused be fair, but it is important to ensure that justice is seen to be done.[3]

---

1 *Wood and Williams v R* [2010] NTSC 36 per Blokland J at [7], citing *ACH* [2002] NTSC 32; 130 A Crim R 40 and *Webb* (1992) 64 A Crim R 38.

2 *ACH* [2002] NTSC 32; 130 A Crim R 40 at [17] per Martin CJ.

3 *R v Iaria and Panozzo* [2004] VSC 96 at [4]4-[5] per Nettle J; *R v Lange* (1987) 25 A Crim R 139 at 140 per de Jersey J; *Wood and Williams v The Queen* [2010] NTSC 36 at [7]-[8] per Blokland J.

[11] However that may be, as was said in *Director of Public Prosecutions v Cicolini*[4] the words "good cause" are very general in nature and are not confined to causes of any particular description. The circumstances under which applications under the provisions must be considered are extremely variable. It is essential that each case is determined on its own facts. That said, it is generally speaking in the interests of the community that an offence should ordinarily be tried in the locality in which it is alleged to have been committed[5]. Why this should be so has not been discussed in any of the authorities to which I have been referred. One might speculate that it is because of a combination of convenience for the witnesses who are likely to mostly come from the locality[6], and the local knowledge of the jurors in relation to background matters such as a knowledge of the locality where the crime was committed which might otherwise have to be proved by the calling of evidence; but there may also be other reasons. In the present case, the alleged crime was committed inside a house in Yuendumu, which is a community approximately 300 kilometres North West of Alice Springs. It is located on Aboriginal Land and is not generally accessible to the public without a permit. It is sufficiently remote from Alice Springs to provide only a weak claim to be in the locality where the crime was committed. The Alice Springs jury roll does not extend to Yuendumu. It is unlikely that any potential juror would have had reason to visit the area unless the potential

---

4 [2008] 2 Qd R 313 at [24]-[25].

5 *Woods and Williams v The Queen* [2010] NTSC 36 at [5] and cases therein cited.

6 *Johnson v The Queen* [2002] WASC 78 at [9].

juror was a police officer, nurse, relative of a resident, teacher or government worker or contractor. Some of these potential jurors would not be eligible to serve as a juror.

[12] So far as concerns the convenience of witnesses and family members from Yuendumu who will be required or at least interested in attending the trial, I am told that none of the witnesses are actual eye-witnesses. Counsel for the Accused has indicated that these witnesses are not important to the defence case. They could give evidence by audio-visual link if their evidence was not admitted pursuant to ss 184, 190 or 191 of the *Evidence (National Uniform Legislation) Act 2011* (NT). So far as the family and members of the Yuendumu and Alice Springs public are concerned, the Court could make arrangements for them to be present by audio-visual link to Darwin from a Courtroom in Alice Springs at no cost to the Court or the taxpayer.

[13] So far as the pre-trial publicity is concerned, I have been provided with four affidavits which attach articles from various websites. That this matter has attracted a great deal of publicity cannot be gainsaid. As of November 2019 there were approximately 1,029 publications on television and radio, 200 publications in the press and 135 publications on the internet. Some of the publications on the internet could be described as irresponsible and inflammatory; including allegations that the police shot the deceased whilst he was asleep in bed; making comparisons with police shootings of black Americans in the United States; reports of large gatherings outside of the Alice Springs Police Station shouting “Shame, shame, shame” interspersed

with shouts of “They say justice, we say murder”; claims that the justice system was failing Aboriginal people, especially in Alice Springs; claims that the shooting by a police officer “is shaping as a flashpoint over race, respect and the servicing of remote indigenous communities”; a claim by someone described as an eye-witness that the Deceased was unarmed; claims that this was an execution style assassination of a young man in his bed; claims that when the shooting occurred the Deceased was lying in his bed looking at photos on his mobile phone; claims that a leading politician told a public meeting at Yuendumu that “consequences will flow” as a result of the investigation into the matter; reports of protest meetings in Alice Springs and at Yuendumu; a call by an elder to bring back “pay-back” even for non-indigenous people; a demonstration in Darwin by protesters chanting “Justice for Walker’ and for police to “stop killing us.”; referring to the shooting as a death in police custody when the fact of the matter is that the shooting occurred when the Deceased was resisting arrest; photographs of Aboriginal people holding banners calling for “Justice for Walker”; reports of the ICAC Commissioner at a rally in Alice Springs addressing the crowd and stating that “black lives matter” and that “anyone who says contrary to that is guilty of corrupt behaviour”; that after the Accused had been bailed the Accused had “left the Territory due to death threats”; that the police dragged the Deceased by the leg after the shooting and “chucked him in the paddy wagon”; that Northern Territory police “have demonstrated a reprehensible failure to properly respect or protect First Australians”; “it is

outrageous and totally unacceptable that Mr Walker, a Warlpiri man, died in what should have been a routine encounter"; a suggestion that the Accused got special treatment when he was released on bail, comparing the situation with another case where the accused, an indigenous man who was charged with murder, was refused bail and eventually acquitted; "unrest has continued in several parts of the Northern Territory following the recent fatal police shooting of an indigenous teenager. A group of at least 30 youths left a trail of destruction in Alice Springs in the early hours of Friday, with police vehicles and at least six local businesses damaged" ; references to "institutional racism," the Black Lives matter movement, deaths in custody and police brutality all in one article; allegations of police racism in another article; suggestions in a recent interview with an Aboriginal elder from Yuendumu that soldiers who have served in Afghanistan should not be recruited to serve in remote communities as they may be suffering from PTSD "that may sort of trigger them"; and a very concerning article in a local Alice Springs community on-line news forum, which is circulated only to residents of Alice Springs, which published in late November 2020 that "the Federal Government is also investigating if Zach Rolfe murdered any civilians whilst he was an army officer serving in Afghanistan" followed by a later post which states "It is currently unknown if Zach Rolfe murdered any civilians whilst he was an army officer serving in Afghanistan". The evidence is that this post received 220 reactions, 115

comments and 340 shares. There is no evidence as to what the comments were.

[14] Counsel for the Accused characterised the publicity as the worst he had ever experienced and far worse than the pre-trial publicity in *The Queen v Pepperill and Others*[7] which led to Muirhead J granting an application to remove a trial of five Aboriginal defendants from Alice Springs to Darwin. I do not think that factual comparisons with other decisions are particularly helpful. A lot has changed since 1981 when *Pepperill* was decided, not the least of which is that the prosecution have BWV of the actual event in this case which I understand is likely to be the most important evidence at the trial. It is also the case that much of this publicity reached a wider audience than Alice Springs, so on one view of it the same could be said of the publicity and its effect on the trial regardless of where it is held. According to the reports, there were demonstrations not only in Alice Springs, but in Darwin, Melbourne and Sydney calling for justice for the Deceased. That said, some of the publicity, including the recent article in the local Alice Springs community on-line forum, is not likely to be so widely read beyond Alice Springs residents and the potential juror pool.

[15] Counsel for the prosecution submitted that it was inevitable that there would be conjecture, rumour and gossip about what had occurred which could be dealt with by appropriate directions to the jury. Having presided over many

---

7 (1981) 54 FLR 327.

criminal trials in Alice Springs over almost 30 years I accept that jurors in Alice Springs are just as likely as jurors in Darwin to do their best to comply with directions.

[16] So far as the "fade factor" is concerned, the real problem is the possibility that jurors may have in the back of their minds which have not faded, the demonstrations they have observed, the claims of racism, the claims of alleged police brutality and "black lives matter" slogans, the emotive allegation that this is just another death in custody which will result in no conviction, of the unrest in the town and the claim that the Accused is under suspicion for possible murders in Afghanistan and possibly trigger happy because of PTSD as a result of his service in the army, together with a local Aboriginal community expectation that there should be a conviction. There is little doubt in my mind that the jury will likely be intimidated by the subtle influence of the pressure of the outrage in the community and by the presence of a large gathering of indigenous people attending the trial to subconsciously be worried about the consequences of a not guilty verdict. Showing the BWV to an audience of family and community members is likely to be very distressing to them and one cannot discount the possibility of distressing and angry body language having an effect on the jury. I consider that the risk is likely to be lessened if the trial is held in Darwin because a Darwin jury will not be exposed to the same pressures to the same degree.

[17] Counsel for the Accused submitted that although the community members who attended the committal hearing were well-behaved and caused no trouble, the Accused was not required to be physically present on that occasion, whereas he will need to be physically present at his trial which gives rise to the potential for violence against him and his legal representatives. Counsel for the Crown submitted that this could be mitigated, if not prevented, by the presence of adequate security at the Courthouse. I am not convinced that there is a real likelihood of violence during the trial itself. I note that the Aboriginal elders from the community have, according to the reports in evidence, taken the lead to impress upon the community to remain calm and to allow the justice system to deal with the matter in accordance with law. However, the possibility of anger and violence cannot be so easily dismissed if there is a finding of not guilty. This may be so regardless of where the trial is held, but is less likely to threaten the Accused or his advisors, or for that matter, the jurors, if the trial is held in Darwin.

[18] A submission was made by counsel for the Accused that the jury pool in Alice Springs is much smaller than in Darwin with the result that there is a stronger likelihood that the jury pool in Alice Springs is much more likely to have come into contact with the police in Alice Springs, and depending on their reaction to their personal experiences, may be affected either for or against the Accused. I do not accept that submission. It is true that the Alice Springs Jury Roll has a smaller number of members than Darwin: 15,319 as

against 78,891. But the pool is sufficiently large to ensure that an impartial jury can be selected. There are nevertheless some problems with the Alice Springs pool due to the make-up of the community generally. A trial for four weeks will cause significant disruption to many people who are self-employed or who are engaged in specialised work and are therefore not easily replaceable. This is a major problem in small communities which often means, in my experience, that there are large numbers of the panel unable or unwilling to serve with the consequence that the pool is reduced in size and dominated by those who have retired, or are unemployed, or are stay-at-home parents or who are replaceable by their employers. This is less so in Darwin. However, I am not convinced that this is a sufficient reason to grant the application by itself.

[19] It was also submitted that there was a risk that a biased juror might find its way into the jury room because there was limited or no capacity for the Accused to trace the familial of people in the jury pool to determine which jurors are linked back to the Deceased. The jury panel does not include residents from Yuendumu, so the risk is limited to Alice Springs residents who might be related to the Deceased, either directly or through extended family members. For various reasons which are not necessary to consider here, the jury pool will be unlikely to have many people of Aboriginal descent amongst their numbers. In my experience, when an Aboriginal person is on trial, jury panel members who are connected with the Accused invariably seek to be excused. I expect that the same would apply when the

alleged victim is Aboriginal. Whilst I accept that in theory it is possible that someone related to the Deceased could find his or her way onto the jury, I consider that the chances of this happening are very remote.

Conclusions

[20] Whilst I have not accepted all of the Accused's counsel's arguments, overall, I am satisfied that there is a reasonable possibility that the Accused will not have a fair trial if the trial is held in Alice Springs and that that risk can be considerably reduced if the trial is held in Darwin. I also think that it is important that not only will justice be done if the trial is held in Darwin, but that it will be seen to be done in the minds of fair-minded persons who are appropriately informed of the facts and circumstances. Accordingly there will be an order that the trial of this matter be held in this Court in Darwin commencing on Monday, 19 July 2021. The Accused's bail is altered accordingly.
