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| CITATION: | *The Queen v Rolfe (No 6)* [2021] NTSC 65 |
| PARTIES: | THE QUEEN<br><br>v<br><br>ROLFE, Zachary |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT exercising Territory jurisdiction |
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**CATCHWORDS:**

CRIMINAL LAW – Application for stay of proceedings – Interlocutory rulings in criminal matters – Crown application for stay pending determination of application for special leave to appeal to the High Court – Factors to be considered in whether or not a stay should be granted – Exceptional circumstances must be shown – Where lies the balance of convenience – *Held:* Application for stay refused

*Criminal Code Act 1983* s 336(2)

*Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681; *Mellifont v The Attorney-General (Qld)* (1991) 173 CLR 289; *R v Elliott* (1996) 185 CLR 250; *Sewell v The Queen* [2001] HCA 529, considered

**REPRESENTATION:**

*Counsel:*

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| Crown: | P. Strickland SC and J. Poole |
| Accused: | D. Edwardson QC and A. Allen QC |

*Solicitors:*

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

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*The Queen v Rolfe (No 6)* [2021] NTSC 65
No. 21942050

BETWEEN:

**THE QUEEN**

AND:

**ZACHARY ROLFE**

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered ex tempore 19 August 2021)

**Introduction**

[1] This is an application for a stay pending an application for special leave to the High Court from the decision of the Full Court of the Supreme Court of the Northern Territory in *The Queen v Rolfe (No. 5)* [2021] NTSCFC 6. In this case, Zachary Rolfe ('the Accused') has been arraigned and the trial has already commenced; see s 336(2) of the *Criminal Code Act 1983* ('the Code').

**Procedural history**

[2] On 13 November 2019, the Accused was arrested by police for the alleged murder of Charles Arnold ("Kumanjayi") Walker ('the Deceased'). The

Accused was granted bail on the same day by Local Court Judge Birch and has remained on bail ever since.

[3] On 19 November 2019, an Information was laid charging the Accused with the murder of the Deceased on 9 November 2019 at Yuendumu in the Northern Territory, contrary to s 156 of the Code. A committal hearing was conducted from 1 September to 3 September 2020 in the Alice Springs Local Court before Judge Birch. On 26 October 2020, Judge Birch found that there was a case to answer and committed the Accused to stand trial in the Supreme Court in Alice Springs.

[4] An Indictment was laid charging the Accused with murder on 26 October 2020. On 25 November 2020, the trial was set for 5 weeks to commence on 19 July 2021 before me. The first week of the trial was set aside for a *voir dire* hearing.

[5] In December 2020, the Accused filed an application for the proceedings to be transferred from the Supreme Court in Alice Springs to the Supreme Court in Darwin. That application was granted. On 17 December 2020, I delivered my decision in relation to that application. There were a number of interlocutory applications relating to other various pre-trial matters in February, March, May, June and July of 2021.

[6] On 25 June 2021, a fresh Indictment was filed adding alternative counts to the charge of murder. Namely, the Accused was charged with engaging in a violent act which caused the death the Deceased contrary to s 161A(1) of the

Code, and manslaughter contrary to s 160 of the Code. The Accused has pleaded not guilty to all of those charges. The *voir dire* commenced on Monday, 19 July 2021 and ran until Thursday, 22 July 2021. Part of the *voir dire* concerned the operation of s 148B of the *Police Administration Act 1978* ('the PAA').

[7] On 20 July 2021, due to a COVID-19 Delta variant outbreak in Sydney and the surrounding area, the Northern Territory's Chief Health Officer refused the border restriction exemption application of Senior Counsel, Mr Strickland SC and Ms Callan SC. The effect of that refusal was that if counsel wanted to enter the Northern Territory, they would have been required to undertake supervised quarantine at the Howard Springs Centre for National Resilience for 14 days from the last day they were in a designated hotspot. Counsel, nevertheless, appeared by video link.

[8] On 22 July 2021, I referred three questions to the Full Court under s 22 of the *Supreme Court Act 1979*, and the trial, scheduled to commence on Monday, 26 July, was formally vacated to be relisted on a date to be fixed. The Full Court hearing was listed for Wednesday, 28 July 2021. On Monday, 26 July 2021, I referred a fourth question to the Full Court. Attached to the questions was a set of assumed facts, together with annexures.

[9] On Wednesday, 28 July 2021, the Full Court heard oral arguments in relation to the referred questions. Mr Strickland SC and Ms Callan SC

appeared by audio-visual link on behalf of the Crown. After hearing legal argument, the Full Court reserved its decision.

[10] On Friday, 30 July 2021 the trial was re-listed to commence on Wednesday, 18 August 2021 and was scheduled to run for three weeks.

[11] On Monday, 2 August 2021 Mr Strickland SC arrived in Darwin from New South Wales where he commenced 14 days quarantine at Howard Springs. In the meantime, Ms Poole had been briefed by the Crown as well. She was not subject to any border restrictions at that time.

[12] On Monday, 9 August 2021 additional border controls were introduced by the Northern Territory Government. The effect of those border controls was that should counsel return to their home states, and if they had been in a declared COVID-19 hotspot or public exposure site 14 days prior to arrival, they would not be permitted to re-enter the Northern Territory unless they had received prior approval from the Chief Health Officer.

[13] On Friday, 13 August 2021 the Full Court handed down its decision on the four questions referred.

[14] On Sunday, 15 August 2021, Mr Strickland SC notified the Court that the Crown was considering the Full Court's judgment, and asked that the jury empanelment be delayed by one day to allow the Crown further time to consider the prospects of an application for special leave to appeal. That application was not opposed, and, in any event, the trial was, because of a

COVID-19 outbreak in Darwin, then postponed to commence on Monday, 23 August 2021.

[15] On Tuesday, 17 August 2021, Mr Strickland SC notified the Court that the Crown intended to file an application for special leave to appeal as well as an application for an expedited hearing, and advised the Court that the Crown would be seeking a stay of the trial pending the outcome of the special leave application. The defence indicated that the application would be opposed. I then listed Crown's application for a stay at 2pm on Thursday, 19 August 2021.

[16] The Crown has lodged its application for special leave to appeal against the judgment. The subject of the special leave application is the Full Court's amendment and disposition of referred question 3, which, effectively, challenges whether s 148B of the PAA is available as a potential defence to the Accused in this case.

[17] Section 148B of the PAA is headed “Protection from liability”. Subsection (1) provides “A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act”.

[18] Subsection (2) further provides “Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission”.

[19] Subsection (3) reads, “In this section: exercise of a power includes the purported exercise of the power. Performance of a function includes the purported performance of a function”.

[20] Question 3 was ultimately re-drafted as follows:

> “Based upon the assumed facts, at the time the Accused fired the second and third shots resulting in the Deceased's death, would it be open to the jury to find that the Accused was acting in the exercise or purported exercise, of a power or performance or purported performance of a function under the Police Administration Act, such that s 148B of the Act arises for the jury's consideration?”

Though there were differences between how the two judgments of the Court (i.e. Southwood J's and mine, as opposed to the majority judgment of Kelly and Blokland JJ and Hiley AJ) answered that particular question, the answer, effectively, was that the defence could rely upon s 148B at the trial. It is that part of the judgment that the Crown seeks to challenge in the High Court.

[21] In order to challenge this matter, the Crown will need to seek special leave to appeal and in order to ensure that there is a possibility that the High Court will grant special leave, the Crown is seeking a stay pending the determination of the special leave application. If the stay is granted it will mean that the trial will not be able to proceed until such time as the High Court has decided whether or not to grant special leave. No doubt, if special leave is granted, the High Court will itself grant a stay of the trial. Although the High Court could grant a stay if it wanted to, it is well

established that when an application for special leave to appeal is made to the High Court, it is to the court below that the application for a stay should first be made. That is not in dispute.

[22] Reference has been made by both parties to the decision of Brennan J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* ('*Jennings*'),[1] where his Honour set out some of the factors to be considered in whether or not a stay should be granted. In *Jennings*, his Honour held that exceptional circumstances must be shown before the jurisdiction to grant a stay is exercised. His Honour further held that if it is put that a stay is necessary to preserve the subject matter of an appeal, the factors relevant to an assessment of whether a stay should be granted include whether there is a substantial prospect of special leave being granted, whether the applicant has failed to take whatever steps are necessary to seek a stay from the court in which the matter is pending, whether the grant of the stay will cause loss to the respondent and where the balance of convenience lies.

[23] In *Sewell v The Queen*,[2] McHugh J stated that the four factors Brennan J had identified, applied to both civil and criminal proceedings.

[24] I want to first just mention the statutory provisions relating to rights of appeal. The matter that the Full Court ruled on was initially referred to me for an advanced ruling under s 192A of the *Evidence (National Uniform Legislation) Act 2011* ('ENULA'). That provision enables the Court to

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**1** (1986) 161 CLR 681.

**2** [2001] HCATrans 529.

make rulings on matters of law prior to the jury being empanelled. However, it is now well established that interlocutory rulings which are made under s 192A in criminal proceedings are not appealable by the Crown until the trial is over. All that the Crown has a right to under s 414(2) of the Code is to seek a reference on a point of law to the Court of Criminal Appeal after the trial, where there has been an acquittal. A reference under s 414(2) does not affect the verdict of acquittal, even if a point is successfully argued by the Crown in the Court of Criminal Appeal. If the argument by the Crown is unsuccessful in the Court of Criminal Appeal, an appeal by special leave to the High Court is open.[3]

[25] So far as an advanced ruling is concerned, s 408(1) of the Code permits an advance ruling at the request of the Accused before a verdict. Where there is no similar power under the Code open to the Crown, s 410 permits the Accused to appeal to the Court of Criminal Appeal against conviction. The Crown cannot appeal against an acquittal.

[26] Section 414(1) of the Code permits the Crown, after verdict, to appeal against sentence. There is also a limited right of appeal in some other cases, not relevant here. Generally, there is no right of appeal against an interlocutory decision in criminal cases. Appeals in criminal cases go to the Court of Criminal Appeal. There is no right of appeal to the Court of Appeal or to the Court of Criminal Appeal from the Full Court. So far as

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**3** See *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289.

the Court of Appeal is concerned, that is governed by s 51(1) of the *Supreme Court Act 1979*. So far as the Court of Criminal Appeal is concerned, there is simply no provision.

[27] The decision which the Crown wishes to seek leave to appeal is a decision of the Full Court of the Supreme Court following the reference by me under s 21 of the *Supreme Court Act 1979*. Such a ruling is, in effect, the same as a pre-trial ruling by a single judge. No appeal from it lies by the Crown to the Court of Criminal Appeal.

[28] It is well established that the High Court does not generally grant special leave in relation to interlocutory rulings in criminal matters, because this is contrary to the policy of the legislation. It seems to me that the policy of the legislation here is the same. The matter was considered by the High Court in the case of *R v Elliot*.[4] In the joint judgment of Brennan CJ and Gummow and Kirby JJ, their Honours said (at page 257):

> It is understandable that the ordinary course of criminal procedure in Victoria requires that interlocutory rulings of a trial judge be accepted for the purposes of the trial, whether those rulings be right or wrong. If the rulings are wrong, then, upon conviction, an Accused person is entitled to challenge the ruling on appeal. But the prosecution has no such right. If the ruling results in an acquittal, the ruling, albeit erroneous, can be canvassed on appeal, but only to correct the ruling, not to impeach the acquittal.

That is exactly the same here, and I continue the quote:

> Obviously, two considerations are in competition here. On the one hand the prosecution is entitled no less than the defence to a trial according to correct rulings on questions of law. On the other,

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**4** (1996) 185 CLR 250.

> interlocutory appeals in criminal trials delay the trial and are likely to produce miscarriages of justice in ways unrelated to the ruling. The personal and financial stress of criminal trials, the dimming of witnesses' memories and the sheer delay between criminal conduct and the administration of condign punishment are factors which weigh heavily in favour of expediting the process of the criminal trial even though incorrect rulings have to be accepted by the prosecution in order to achieve that object, subject to s 450A.

Which is the equivalent of s 414(2) in our Code.

> The legislative scheme gives greater weight to the despatch of criminal trials than it has given to protecting the prosecution's ability to appeal against rulings which it thinks to be incorrect. It follows that a grant of special leave in the present case would significantly frustrate the process of the criminal trial as prescribed by the Victorian Parliament. This Court has long been extremely reluctant to intervene in criminal trials by granting special leave to appeal against interlocutory decisions. The present case, though it raises important questions for consideration, does not warrant a departure from the practice of this Court and the policy that is manifest in the Crimes Act of Victoria.

[29] It seems to me that that is a very high hurdle for the application by the Crown in this case. Nevertheless, it is important to consider all of the matters that the Crown wishes to put on its behalf.

[30] First of all, the special leave application, they say, raises questions of public importance. The width of the immunity in s 148B of the PAA is clearly a matter of public importance sufficient to attract the interest, they say, of the High Court for the purposes of special leave.

[31] It is put that s 148B protects a person, which includes a member of a police force, from criminal liability for the use of deadly force simply on the basis that the member was acting in good faith to prevent an offence or maintain social order or protect life, as set out in s 5(2) of the PAA. The careful

protection the law offers citizens against excessive police force would be emasculated.

[32] It was put that the fact that the matter was heard by five Judges of this Court is a strong indicator of the importance of s 148B, not only to the proceedings at hand, but more generally. I accept that the s 148B question is an important one. It has the potential to make life rather difficult for the Crown if the application for special leave is ultimately refused. Notwithstanding that, it is not my view that that necessarily would result in the Crown not being able to proceed with the trial.

[33] The Crown contends that the Full Court erred in its approach to the construction of s 148B of the PAA, and it has articulated that in the special leave application, which I have read. I am not going to go into that, except to say that I have read it, and that I cannot say that I agree with it. I think that it is unlikely to be successful, but I cannot say that the Crown has no chance at all. It is not unusual for courts, even Full Courts, to come to wrong decisions, which are corrected later by the High Court.

[34] I do not accept, however, that the matter is of national importance. It may have some importance to South Australia, and it certainly has importance to the Northern Territory. But, beyond that, I do not think that the question is the sort of question which, because of its wider application to other States, would attract the High Court in an application for special leave.

[35] As counsel for the Accused has pointed out, there are no contrary decisions as required under s 35A of the *Judiciary Act 1903* (Cth), and we are looking here at a decision of five Judges of this Court who were all in unanimity.

[36] The second factor is whether the applicant has failed to take whatever steps are necessary to seek the stay. I accept that the applicant has acted without delay and has sought an expedited hearing. It has done all it can, at this stage, to get the matter on before the High Court as quickly as possible. On the basis of the material before me, it may be that the High Court would be able to hear the matter as early as 9 September 2021. On the other hand, it may not. And it is entirely speculative, as far as I can see, what will happen after that.

[37] As I pointed out in argument with Mr Strickland SC, there are a number of different possibilities. One is that the High Court hears the application and refuses special leave. Another is that it hears the application, grants special leave and hears the appeal *instanter*. Another is that it grants special leave, but the hearing of the appeal may not take place until months later. The judgment may be reserved; the decision itself may take some time.

[38] At this stage, it is quite impossible for me to know when this trial, if it were to be put off, would be likely to resume. I am aware, from having dealt with both counsel during the course of hearings earlier this month and late last month, that both counsel have other part-heard matters that they are obliged to deal with. If a new date is to be fixed, it would require a consideration,

not only of the Court's availability and the availability of witnesses, but also the availability of counsel. In this uncertain age of COVID-19 restrictions, we are likely to find getting a trial date this year quite difficult. Once we go into next year, I think we are probably not looking at a new trial date before April or May, at the earliest.

[39] The third factor is whether the grant of a stay would cause loss to the Accused and, as the parties acknowledge, any delay in the trial process and the ensuing uncertainty causes harm to the Accused. The extent of the delay would depend on the factors as to when the special leave application would be heard and whether special leave is granted. In the meantime, the Accused is on bail, but he is not the only one who will be inconvenienced. It takes a great deal of organisation to get a criminal trial up and running. It is not only a matter of getting the counsel here and getting the Accused here; it is also a matter of getting all the witnesses here. It is also a matter of whether we have a court room available, because we have quite a number of Judges and only four criminal court rooms, and this Court regularly sits in crime.

[40] Then there is the question of empanelling the jury. What we have done in this case is rather unusual. It was because of the very short period of time that elapsed between the last time the matter was given a trial date and now that I organised for a new jury panel to be summonsed. Because of the shortness of time, that required the Court to arrange for personal service of the summonses. That created a big flurry of activity for a few days while that took place, and, of course, great expense. If I grant a stay, then, of

course, that panel will have to be excused, and it will mean starting all over again with another jury panel, and that usually takes a long time. It is not something that can be done overnight. Then you have got to serve them, and usually that is done by post, but service by post in these COVID-19 days is very slow. So, in order to comply with the requirements of the *Juries Act 1962*, it may be necessary again to send out bailiffs to serve a jury panel. Suffice it to say, that could not be done in less than two or three weeks.

[41] It was submitted that a stay of the proceedings, pending the determination of the application for special leave, may result in some delay to the trial. But, if the special leave application is granted expedition and special leave is refused, there may not be any significant disruption to the trial. I do not accept that. I think there would be significant disruption because of the pure impracticalities of getting everybody here, and assembling another jury panel. As the Crown acknowledges, the trial is due to commence in four days. The continued uncertainty created by COVID-19 about when the trial could recommence with interstate counsel remains a question which would need to be dealt with.

[42] There is uncertainty which would be caused to the respondent by any delay in the commencement of the criminal trial. I accept that the deterioration of witnesses' memories is not of as great concern in this case as in many other criminal trials.

[43] Somehow or other I have to come to a decision as to where the balance of convenience lies. As the submissions which are made by counsel for the Accused say, the Accused has now had the spectre of the most serious charge known to the law threatening his liberty for almost two years. At the same time, approximately 50 witnesses have endured the uncertainty of their requirement to give evidence. In the case of police witnesses, the deleterious impact of the burden of giving evidence in relation to the actions of a colleague is self-evident. In the case of civilian witnesses from the community of Yuendumu, it could be fairly said that the burden is equally, if not more, intolerable. Then of course there are the resources required to attend to the proper presentation of a trial again, and they are likely to be substantial in terms of cost and time.

[44] All in all, I think the balance of convenience remains with the Accused, and the trial should go ahead. I think that the likelihood of the High Court granting special leave to appeal is limited. It is not evident to me that the application has anything other than weak prospects of success, especially as this is an application for leave to appeal in a criminal proceeding against an interlocutory ruling in circumstances where the legislation does not encourage or contemplate such a process. I accept that the matter sought to be raised is a matter of significance and importance, but in my view it does not raise a point of law that is likely to have importance beyond the Northern Territory and South Australia. As I pointed out during oral argument, if the Crown so wishes, it can still seek a reference to the Court

of Criminal Appeal under s 414(2) of the Code. Although it may be thought that the Court of Criminal Appeal is unlikely to disagree with the Full Court, it is not bound by the Full Court's decision. The Crown could say to the Court of Criminal Appeal something to the effect of, "We are not going to argue the matter very much. We feel as though, as a matter of comity, you ought to follow the Full Court, but we are obliged to go through this process in order to seek leave to appeal to the High Court". That, I think, is open to the Crown in accordance with *Mellifont v Attorney-General of Queensland*,[5] and, although it will not be of much comfort for the Crown in this case, it will at least resolve the question of law for the future, should the High Court decide to grant special leave.

[45] As I have said previously above, granting a stay would disrupt the trial, which has already been disrupted by the COVID-19 crisis. It is important that criminal trials are dealt with expeditiously and in accordance with the policy underpinning the Code. The balance of convenience lies with the trial proceeding. Accordingly, the application for a stay is refused.[6]

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**5** (1991) 173 CLR 289.

**6** On 23 August 2021, the High Court (Gleeson J) granted an application for a stay of the trial to 4.00 pm on 10 September 2021 or until further order. See *R v Rolfe* [2021] HCATrans 137 (23 August 2021).