

RSB:SND

966/10
REVISEDIN THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION

JUDGE C ARMITAGE

PARRAMATTA: MONDAY 24 MAY 2010

2009/59266001 - R v John WILSON**JUDGMENT** - Notice of Motion to set aside subpoena for Harrison J; see transcript p 29

HIS HONOUR: This Notice of Motion has been filed in court today by the Crown Solicitor, seeking to have set aside a subpoena to Joanne Ruth Harrison, an associate justice of the Supreme Court of New South Wales, to give evidence at the trial today.

It is fair to say that the accused, Mr Wilson, challenges the jurisdiction of this court to hear and decide a Notice of Motion as to the validity or otherwise of a subpoena to Associate Justice Harrison to give evidence at this trial. His contention is that a jury must decide the admissibility or otherwise of any evidence, and hence any Notice of Motion to set aside a subpoena, because a judge of this court, and for that matter any judge, has no jurisdiction to do so. He maintains that the right to trial by jury derived from Magna Carta is such that no question in any proceeding concerning a criminal charge, or as I understand him, nor any civil right, may be decided by any person other than a jury. I have listened to Mr Wilson's argument and have attempted to give it as much careful consideration as is possible.

Section 16 of the **Evidence Act** 1995 reads as follows:

"(1) A person who is a judge or juror in a proceeding is not competent to give evidence in that proceeding. However, a jury is competent to give evidence in the proceeding about matters affecting conduct of the proceeding.

(2) A person or is or was a judge in an Australian or overseas proceeding is not compellable to give evidence about that proceeding unless the court gives leave.”

As I understand it, the accused says that he wishes to call Justice Harrison to give evidence concerning an action in the Supreme Court in which his possession or otherwise of his home was in question.

That is a matter covered in my opinion by s 16(2) in the sense that Justice Harrison was a judge in an Australian proceeding, namely the proceeding just referred to, and she is not compellable to give evidence about that proceeding unless the court gives leave.

The grounds upon which I should give leave were not agitated by Mr Wilson, but I must examine them nonetheless. Section 192 of the **Evidence Act** sets out grounds upon which any leave, permission or direction may be given on terms. Subsection (1) of course provides that a court may give any leave, permission or direction on such terms as the court thinks fit.

Subsection (2) provides that without limiting the matters that a court may take into account in deciding whether to give any leave, permission or direction, the court may take into account the extent to which to do so would be likely to add unduly to or to shorten the length of the hearing, and the extent to which to do so would be unfair to a party or a witness, or the importance of the evidence in relation to which the leave, permission or direction is sought, and the nature of the proceeding, and the power, if any, of the court to adjourn the hearing or to make another order, or to give a direction in relation to the evidence.

In this trial the accused faces three charges. The first is under s 112(1)(a) of the **Crimes Act** 1900 and it is that he broke and entered the dwelling house of a particular person and there committed a serious indictable

offence, namely intentional or reckless damage of property belonging to that person.

The second charge is pursuant to s 199(1)(a) of the **Crimes Act** and it charges that on a particular date without lawful excuse the accused made a threat to Andrew Scipione, who I think I may know is the Commissioner of Police in this State, with the intent of causing Mr Scipione to fear that property, namely certain premises belonging to a particular person, would be damaged or destroyed.

The third charge is that on a particular date the accused used a carriage service by sending an email in the way that reasonable persons would regard as menacing, harassing or affixing.

The accused has not sought to show how the evidence of Ms Harrison in relation to the proceedings before her, which as I say, although their precise nature was not defined by the accused, apparently related to the possession of his house, could be relevant to the charges which he faces.

When I approach s 192 I cannot see that I should give the leave the accused seeks to subpoena Ms Harrison to give evidence. I do not think that the question of adding unduly to or shortening the length of the hearing is relevant here, and it is hard to judge the extent to which setting aside the subpoena would be unfair to the accused in circumstances where I do not know, because he will not tell me, the precise relevance of the evidence of Ms Harrison. For the same reason I do not know the importance of the evidence in relation to which the accused seeks leave to issue the subpoena against Ms Harrison. I note that the nature of the proceedings is that this is a criminal trial, and as to the power of the court to adjourn any hearing or make another order or give a direction, I cannot see that there is any adjournment,

other order or direction which would assist in this particular case.

In all of the circumstances, having regard to s 192, it is my view that I should not give leave to the accused to call Ms Harrison to give evidence, and it is appropriate therefore to set aside the subpoena against her and I do so.

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