SUPREME COURT OF QUEENSLAND

CITATION:	*R v Patel (No 4)* [2013] QSC 62
PARTIES:	**THE QUEEN** **v** **JAYANT MUKUNDRAY PATEL** **(Defendant)**
FILE NO/S:	Indictment No 387 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	3-6 February 2013
JUDGE:	Fryberg J
ORDERS:	**Order that the questioning of persons selected to serve as jurors and reserve jurors when the Court reaches the final stage of the jury selection process be authorised.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – JURIES – STRIKING AND EMPANELLING – GENERALLY – Selection of jury – *Jury Act* 1995 (Qld), s 47 – Questioning of persons selected to serve as jurors and reserve jurors at the final stage of the jury selection process – Determination as to impartiality – Prejudicial pre-trial publicity CRIMINAL LAW – PROCEDURE – JURIES – STRIKING AND EMPANELLING – CHALLENGES – FOR CAUSE – Procedure – Application by the accused – *Jury Act* 1995 (Qld), s 47 – Special procedure for challenge for cause – Determination as to impartiality – Prejudicial pre-trial publicity *Criminal Code* 1899 (Qld), s 597C *Jury Act* 1995 (Qld), s 43, s 47 *Murphy v The Queen* (1989) 167 CLR 94; [1989] HCA 28, considered *Patel v The Queen* [2012] HCA 29, considered *R v Chandler (No 2)* [1964] 2 QB 322, cited

R v D'Arcy [2001] QCA 325, considered
R v D'Arcy [2003] QCA 124, considered
R v D'Arcy [2005] QCA 292, considered
R v Dowling (1848) 7 St Tr NS 381, considered
R v Ferguson; ex parte A-G (Qld) [2008] QCA 227, considered
R v Lewis [1994] 1 Qd R 613, cited
R v Manson [1974] Qd R 191, considered
R v Mason [1981] 1 QB 881, considered
R v Patel [2012] QSC 419, considered
R v Stuart and Finch [1974] Qd R 297, considered

COUNSEL: P Davis SC with D Meredith for the Crown
K Fleming QC with P Smith and K Hillard for the defendant

SOLICITORS: Director of Public Prosecutions (Qld) for the Crown
Raniga Lawyers for the defendant

[1] **FRYBERG J:** On 3 February 2013 the accused applied to the Court for the authorisation of questioning of jurors at the final stage of jury selection for his retrial on one count of manslaughter. The application was brought pursuant to s 47 of the *Jury Act* 1995. There was no challenge for cause pursuant to s 43 of that Act. The application was not opposed by the Crown. After hearing the parties I ordered that the questioning of persons selected to serve as jurors and reserve jurors when the Court reaches the final stage of the jury selection process be authorised and announced I would deliver my reasons later. What immediately follows are those reasons. In view of the novelty of the matter I shall supplement them with some of the subsequent history of the matter, including my reasons for the procedures adopted to implement the order.

[2] Section 47 of the *Jury Act* relevantly provides:

> "**47 Special procedure for challenge for cause in certain cases**
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> (1) If a judge who is to preside at a civil or criminal trial is satisfied, on an application by a party under this section, that there are special reasons for inquiry under this section, the judge may authorise the questioning of persons selected to serve as jurors and reserve jurors when the court reaches the final stage of the jury selection process.
> *Example—*
> Prejudicial pre-trial publicity may be a special reason for questioning persons selected as jurors or reserve jurors in the final stage of the jury selection process.
>
> (2) The application must be made to the judge at least 3 days before the date fixed for the trial to start unless the judge, for special reasons, dispenses with the requirement.
>
> (3) On the application, the applicant may suggest, and the judge may decide, questions that are to be put to persons selected to serve as jurors or reserve jurors for the trial.
>
> …

> (6) When a person has answered the questions put under this section and any further examination allowed by the judge has finished, a party may make a challenge for cause against the person on the ground that the person is not impartial."

I was the judge listed to preside at the trial.

Timing of the application

[3] A preliminary issue was whether the application had been made in accordance with the time fixed by s 47(2). The proceedings in this Court were commenced by an indictment presented on 24 April 2009. The *Criminal Code* 1899 provides:

> "**597C Accused person to be called on to plead to indictment**
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> (1) On the presentation of the indictment or at any later time, the accused person is to be informed in open court of the offence with which he or she is charged, as set forth in the indictment, and is to be called upon to plead to the indictment, and to say whether he or she is guilty or not guilty of the charge.
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> …
>
> (3) The trial is deemed to begin and the accused person is deemed to be brought to trial when the person is so called upon."

If the expression "date fixed for the trial to start" refers to the date determined under s 597C of the Code, the application was well out of time.

[4] Because the Crown expressly did not submit that the application should be treated as being made out of time, it was unnecessary for me formally to make a dispensation order under s 47(2) of the *Jury Act*. Having now considered the matter, I have reached the conclusion that no dispensation order was necessary in any event, because the application was filed in time.

[5] It must be said at once that the question of when a trial begins for the purposes of the *Jury Act* does not appear to have been in the forefront of the minds of those who drafted the Act. Sometimes the Act refers to the time when the trial is to "start"[1]; on other occasions to when it is to "begin".[2] Despite the employment of different language, there does not seem to have been an intention to evoke a different meaning. Nonetheless, the lack of consistency is disturbing.

[6] There are two reasons why the *Jury Act* should not be construed to match the *Criminal Code*. First, the Act deals with juries for both civil and criminal matters. Sections 56 and 57 of the Act are examples of provisions covering both types of cases. One should seek internal consistency of meaning if consistency be possible. Second, s 56 envisages the discharge of a juror after he or she has been sworn but before the trial begins. Arraignment[3] in a criminal trial occurs before the selection

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1 *Jury Act* 1995, ss 27(3), 34(3), 47(2).

2 *Jury Act* 1995, ss 13(c), 36(1), 56(2), 57(1), 79(3).

3 The process commanded by s 597C of the *Criminal Code* 1899.

of the jury. If the meaning in the Code be applied, s 56(2) would have no scope for operation – it would be a nonsense.[4]

Section 47 of the *Jury Act*

[7] Section 47 of the *Jury Act* has no counterpart elsewhere in Australia.[5] However, a right to question jurors as an incident of a challenge for cause has long been recognised by the common law.[6] It was a right which was more apparent than real because it could be exercised only after some reason was shown for believing that a particular juror could properly be challenged.[7] Thus, Lord Parker CJ said in 1964:

> "Be that as it may, the fact of the matter is that, before any right to cross-examine the juror arose, the defendant would have had to lay a foundation of fact in support of his ground of challenge. It is no good his saying, 'I think this man is antagonistic,' or calling somebody to say, 'I do not think he likes processions, he thinks they are unreasonable.' There must be a foundation of fact creating a prima facie case before the juror can be cross-examined."[8]

That decision was applied by the Court of Criminal Appeal in *R v Manson*[9], where it was also held that the common law had effect in Queensland in relation to the selection of juries save to the extent otherwise specified in the *Criminal Code*; and in *R v Stuart and Finch*[10]. The latter case was commonly understood to have decided that widespread publicity about a case and an accused was insufficient by itself to create the necessary *prima facie* case. The right to challenge for cause was on this approach a useless right, for an accused would seldom, if ever, be able to demonstrate what the law required.

[8] The traditional Australian view was expressed by Brennan J in the High Court in 1989:

> "[Challenge for cause] has more attraction in theory than in practice. In theory, one might think that bias can be detected by questioning jurors and disqualifying those who admit bias. In practice, the efficacy of the procedure in detecting bias is doubtful. If the procedure is adopted, it may lead the jurors to think that the community's confidence in their impartiality and sense of responsibility is heavily qualified. A juror who would not voluntarily seek to be excused because of bias would not readily confess that bias under questioning if he were challenged for cause. Though the procedure is available, the practice of Australian courts

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4 I acknowledge the assistance I have obtained from an unpublished memorandum by Mr A Trotter, Associate to Atkinson J, dated 28 November 2012 on the subject "Reserve jurors and the start of the trial".

5 *Review of Jury Selection*, Queensland Law Reform Commission, Report No. 68, at [10.94].

6 *Bacons Abridgement*, 7th ed, Volume 4, at 574, cited in *R v Stuart and Finch* [1974] Qd R 297 at 303.

7 *R v Dowling* (1848) 7 St Tr NS 381 at 385 per Erle CJ.

8 *R v Chandler (No 2)* [1964] 2 QB 322 at 338.

9 [1974] Qd R 191.

10 [1974] Qd R 297; see also *R v Lewis* [1994] 1 Qd R 613 at 630-631.

> has been against its adoption. In the Australian community of today, I think that approach is generally right."[11]

[9] The genesis of s 47 of the *Jury Act* can be traced to a report in March 1991 of the then Criminal Justice Commission into matters arising out of the trials of George Herscu and Brian Austin in late 1990. That report recommended the establishment of a committee to consider the need for and extent of reform of the law, including that relating to enquiries which can be made in respect of prospective jurors. The government of the day adopted that recommendation and appointed what became known (after its chairman) as the Nolan Committee. The Committee's report (from which the foregoing is taken) was delivered to the Minister for Justice and Corrective Services in January 1992.[12]

[10] It is unnecessary, and probably inappropriate, here to canvass the various views regarding such enquiries. Those views involved conflict and the balancing of different social interests. So far as is relevant, the Committee unanimously recommended:

> "That judges be statutorily required to question prospective jurors en bloc prior to empanelment about bias and conflict of interest after apprising them of the nature of the case and the allegations made as part of it."[13]

[11] Unfortunately, the Committee's unanimity on this point did not extend to other aspects of its report, which was not adopted by the government of the day. However the Minister for Justice and Corrective Services promptly referred the report to the Litigation Reform Commission for consideration. The reference was expanded by his successor in March 1993. The report of the Criminal Procedure Division of the Commission was approved by that Commission with immaterial qualifications in November 1993.[14]

[12] Under the heading "Challenges for Cause" the report considered the Nolan Committee recommendation referred to above.[15] It expressed the view "that the present rather empty right to challenge for cause should be given some substance."[16] It proposed a different solution from that of the Nolan Committee:

> "In most cases such questioning would be unnecessary, and the occasions when such a procedure would be necessary should be subject to a judicial discretion. The problem would be best overcome by permitting a pre-trial application to be made in any matter where there has been extensive publicity or in which the accused is so well known that there is a real cause for concern that jury members may not be impartial; or where for special reason it is desirable that special questions be addressed to the members of the jury before the membership of the jury is finally determined. Upon

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11 *Murphy v The Queen* [1989] HCA 28; (1989) 167 CLR 94 at 123-124.

12 *Report of the Committee to Review Certain Aspects of the Jury Act*, Nolan Committee, January 1992.

13 *Ibid*, at 11.

14 *Reform of the Jury System in Queensland*, Report of the Criminal Procedure Division of the Litigation Reform Commission, August 1993.

15 *Ibid*, at [5.19]-[5.25].

16 *Ibid*, at [5.20].

> such an application, counsel should suggest to the judge a list of questions which he or she submits should be addressed to each juror. The questions will be settled by the judge, whose decision will not be subject to any interlocutory appeal.
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> The exercise of any challenge for cause should be postponed until the conclusion of the questioning of each juror in turn. If, upon hearing the answers of a particular juror to the settled questions, there is reason to think that further enquiry is justified, the judge should grant leave to counsel to cross-examine the juror for the purpose of ascertaining whether that juror is able to give an impartial verdict in the matter."[17]

That recommendation was implemented in s 47 of the *Jury Act*.

[13] In the meantime the High Court had in *Murphy* revisited the right to question jurors or potential jurors at common law:

> "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 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. And the trial judge must still have regard to the other considerations mentioned earlier in these reasons; a decision to refuse an application will not be lightly interfered with."[18]

[14] That decision was not referred to in the Commission's report. Perhaps that is surprising, for the words emphasised seem implicitly to overrule what had been perceived as the *ratio decidendi* of the Queensland cases. More probably, the Commission accepted the High Court's reading of the judgments in *Stuart and Finch*; that the Court of Criminal Appeal "upheld the trial judge's ruling because an insufficient foundation of fact had been laid to justify the examination of prospective jurors"[19]. Whatever the reason, it is in my judgment clear that s 47(1) of the *Jury Act* was intended to confer a clearly expressed, stand-alone right, albeit one subject to considerable judicial discretion, available without having to mount a challenge for cause. It stands alone because it is exercised after the jurors have been selected and does not require a challenge for cause as a foundation for its exercise. The right of questioning which it confers is distinct from that permitted in cases of challenge for cause by s 43(4) of the Act.

[15] Although the Commission expressly did "not recommend adoption of the American system which involves a lengthy process of questioning of potential

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17 *Ibid*, at [5.23]-[5.24].

18 *Murphy v The Queen* [1989] HCA 28; (1989) 167 CLR 94 at 103-104 (emphasis added).

19 *Ibid*, at 103.

jurors together with associated delays and vexatious procedures"[20], the section in fact bears some similarity to the *voir dire* examination of potential jurors in the United States. It is not clear what the Commission was referring to as "the American system". There is considerable diversity among the different United States jurisdictions.[21] Some can fairly be said to involve processes such as those described by the Commission. Others, including federal trial courts, have procedures which are relatively restrained. However that may be, it is in my judgment apparent that the discretions conferred by this section should be exercised so as to avoid an unduly lengthy process of questioning and vexatious procedures.

[16] Section 47 of the *Jury Act* seems first to have come before the Court of Appeal in the first *D'Arcy* case.[22] At first instance the accused had formulated four specific leading questions for the jury for which he sought authorisation. The questions referred specifically to the issues which were the subject of substantial pre-trial publicity. None of them related directly to matters in issue at the trial. The primary judge concluded that raising these matters before the jury would only serve to remind them of the criticisms. Referring to that fact and to the irrelevance of the pre-trial publicity, the Court of Appeal held that the discretion under s 47 had not miscarried. The case was not material to the decision in the present case.

[17] Consideration was next given to the section in the second *D'Arcy* case.[23] The trial judge refused an application for authority to question because the publicity about the accused did not refer to the charges the subject of the trial and a substantial time had elapsed between at least the worst of the publicity and the commencement of the trial. Again the Court of Appeal held that no error had been demonstrated. Somewhat cryptically, Davies JA, with whom the other members of the court agreed, wrote:

> "There is no reason to think that what must be shown to justify an authorisation under s 47(1) is any less than what must be shown under the legislation considered by the High Court in *Murphy v The Queen*."[24]

[18] Mr. D'Arcy was again before the Court of Appeal in 2005 after his third conviction for similar offending. The circumstances of the case were indistinguishable from the first two cases and unsurprisingly, the outcome was the same. Keane JA, with whom McMurdo P and Dutney J agreed, wrote:

> "As this Court has made clear in its previous decisions involving this appellant, a sufficiently exceptional case is not made out simply by pointing to adverse comments made in the media and suggesting that such comments have a general tendency to lead jurors to develop prejudicial feelings against an accused. To go so far, and no further, does not establish the 'sufficient foundation of fact to justify acceding to the application'. To go only so far does

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20 *Reform of the Jury System in Queensland*, *op cit*, at [5.21].

21 Hans, V and Jehle, A, "Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection" (2003) 78 *Chi-Kent L Rev* 1179 at 1184-1186; Comiskey, M, "Does Voir Dire Serve as a Powerful Disinfectant or Pollutant? A Look at the Disparate Approaches to Jury Selection in the United States and Canada" (2011) 59 *Drake L Rev* 733 at 742.

22 *R v D'Arcy* [2001] QCA 325.

23 *R v D'Arcy* [2003] QCA 124.

24 *Ibid*, at [19].

> not establish a risk that individual jurors may not be 'impartial' in the sense that they may be actually biased against the accused, or unable or unwilling to comply with the directions of the trial judge to ignore prejudicial comments in the media about him."[25]

[19] Notwithstanding the quotations in that passage from *Murphy*, it is clear that in Queensland at least, the procedure under s 47 of the *Jury Act* may be invoked without making a challenge for cause under s 43 of that Act. In *R v Ferguson; ex parte A-G (Qld)*[26], the Court of Appeal allowed an appeal against an order staying proceedings against the respondent on the basis of widespread adverse pre-trial publicity relevant to the issue in the case. Among its reasons for doing so was the failure of the judge at first instance to consider whether the difficulties faced by the accused might be alleviated by the use of s 47. The court wrote:

> "These considerations of principle have two implications in relation to the determination of the present matter. The first is that the conclusion that the respondent **cannot** be convicted on the basis of a fair-minded verdict of a jury of his fellow citizens is, to say the least, premature before the processes made available by s 47 of the *Jury Act* have been implemented."[27]

It could hardly be otherwise having regard to the terms of s 47(6). It may be that the time is ripe for the Court of Appeal to reconsider the accuracy of Davies JA's cryptic dictum about *Murphy*.

[20] Finally in this section, I draw attention to the example given in s 47(1) of the *Jury Act*:

> "Prejudicial pre-trial publicity may be a special reason for questioning persons selected as jurors or reserve jurors in the final stage of the jury selection process."

In my judgment, that example makes it clear that prejudicial pre-trial publicity may, without more, amount to a special reason for allowing an application under the section. I note that examples form part of the Act[28] and may be interpreted as extending its meaning.[29] In that light, the section provides a basis for inferring possible prejudice somewhat more readily than was envisaged in *Murphy*. However it should also be observed that unlike s 43, s 47 does not classify the ground for the application any more precisely than is connoted by the words "special reasons". There is no explicit requirement to show that the prejudicial publicity produced, was likely to produce, or might have produced partiality among the jurors. It may be that the example shows a legislative intention to permit the court to make the order without having to consider the potential effect of the prejudicial publicity on prospective jurors. In the present case there was no need to consider that aspect of the interpretation of the section.

[21] In summary, I conclude that:

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25 *R v D'Arcy* [2005] QCA 292 at [24]. The quoted words were from *Murphy v The Queen* [1989] HCA 28; (1989) 167 CLR 94 at 104 – see [13] above.

26 [2008] QCA 227.

27 *Ibid*, at [55] (emphasis in original).

28 *Acts Interpretation Act* 1954, s 14(3).

29 *Acts Interpretation Act* 1954, s 14D(b).

- Section 47 of the *Jury Act* confers a stand-alone right on an accused, albeit one which is heavily subject to the trial judge's discretion.
- Prejudicial pre-trial publicity may without more justify an order under s 47(1).
- Considerations bearing upon the exercise of the discretion include:
  - the nature and quantity of the publicity;
  - the time which has elapsed since it occurred;
  - the extent to which it might be seen by jurors as relevant to the trial;
  - the extent to which evidence will be given at the trial to like effect as the publicity; and
  - the impact which judicial warnings may have in countering any possible prejudice.
- Any procedure adopted pursuant to s 47 should avoid an unduly lengthy or vexatious process of questioning.

The evidence

[22] Few criminal cases in Queensland's history have attracted the level of publicity and notoriety of this one. The publicity was described accurately by Heydon J in his concurring judgment in the High Court after the first trial:

> "The appellant's conduct had already been the subject of two commissions of inquiry. There were proceedings to extradite him from the United States of America. It is difficult to imagine that there could be many speakers of English living in Australia, even parts of Australia outside Queensland, in the years before the trial who had not been exposed to the massively unfavourable publicity that the appellant received during these events. It was inflammatory, derisive and bitter. Its effect must have been more intense, and therefore more damaging, in Queensland than elsewhere. The trial judge warned the jury not to be influenced by it. Counsel referred to it during the trial without contradiction. In his address to the jury, defence counsel spoke of 'a frenzied media storm' against the appellant over a five-year period. In Queensland, the appellant was seen as a hostis humani generis. The appellant's counsel informed this Court that if the appeal succeeded the appellant would be seeking a stay on that ground. It may be inferred from the pre-trial publicity that there was great pressure on the prosecution to put the case against the appellant on its widest possible basis.
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> > 'There is an accumulative Cruelty in a number of Men, though none in particular are ill-natured. The angry Buzz of a Multitude is one of the bloodiest Noises in the World.'"[30]

[23] The evidence on the application demonstrated this. Counsel for the accused summarised it thus:

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[30] *Patel v The Queen* [2012] HCA 29 at [166], citing George Savile, Marquis of Halifax, *A Character of King Charles II*, 1750, at 89.

"A brief Google search for Jayant Patel reveals that the Applicant:

(a) has a Wikipedia page dedicated to him, the inquiries, his trials in Australia and other allegations against him in the United States
(b) features on "YouTube" a number of times
(c) has had reported his trial and charges in international media coverage
(d) is referred to as "Dr Death" repeatedly in the media
(e) features in hundreds of articles, interviews and stories"

At least three books have been published about him. The publicity included allegations of causing death and grievous bodily harm to a number of other patients, as well as the death of the patient the subject of the present charge; the Commission of Inquiry found that he had caused the deaths of 13 patients. It also included allegations of malpractice in the United States and fraud in obtaining registration as a medical practitioner in Queensland. At least one of the reports contained an overtone of racism insofar as it referred to the accused as an Indian-trained surgeon. That was wrong. The accused was born in India but received his training in surgery in the United States.

[24] The publicity faded somewhat after 1 July 2010, when the accused was sentenced to imprisonment following his conviction at his first trial. It was reinvigorated after the High Court ordered a retrial on 24 August 2012[31], when he was again referred to as Dr Death. Moreover the High Court judgment itself, which is readily available on the Internet, refers to much evidence inadmissible in the retrial.

[25] It is unnecessary to describe the publicity in further detail. A fuller description can be found in the reasons for judgment of Douglas J who, on 27 November 2012, dismissed an application by the accused for a no jury order pursuant to s 614 of the *Criminal Code*.[32]

[26] I found that:

- Since 2005 and continuing to relatively recent times, there has been a massive amount of prejudicial publicity given to the accused on radio, in television, on the Internet, in newspapers and in books.
- The materials published would in many cases be seen by members of the public as relevant to the issues to be determined in the pending trial, though much of them would involve materials inadmissible as evidence in the trial.
- In the circumstances there was a considerable risk that the members of the public summoned for jury service would include persons who have read or heard the publicity and who had formed strong adverse opinions of the accused.
- That risk in turn gave rise to a significant risk that, even with appropriate judicial warnings to the jury, the accused would not receive a fair trial.

[27] The decision of Douglas J also bears on the present application. One of the factors taken into account by his Honour in exercising his discretion to refuse a no jury trial was the availability of the s 47 procedure.[33]

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31 *Ibid*, at [131], [263].
32 *R v Patel* [2012] QSC 419.
33 Following *R v Ferguson; ex parte A-G (Qld)* [2008] QCA 227.

[28] On 20 December 2012 I dismissed an application by the accused for a stay of proceedings. The ground of the application was that a fair trial was impossible by reason of the adverse publicity. I agreed with a statement of Douglas J:

> "The law recognises that juries are capable of handling issues of prejudice arising from the pre-trial publicity that has occurred here. While I recognise the severity of the criticism of Dr Patel in the pre-trial publicity, and that it may affect jury deliberations, I am not persuaded that a properly directed jury will have difficulty in ignoring it in favour of the evidence that is led before it. In other words, I believe that a fair trial can proceed before a jury in spite of the publicity."[34]

[29] Obviously, that does not mean that provisions which are available to promote a fair jury trial should be ignored. As Mason CJ and Toohey J wrote (Brennan, Deane and Dawson JJ concurring on this point) in *Murphy*:

> "It is fundamental that, for an accused to have a fair trial, the jury should reach its verdict by reference only to the evidence admitted at trial and not by reference to facts or alleged facts gathered from the media or some outside source. However, the might of media publicity in 'sensational' cases makes such a pristine approach virtually impossible. Recognizing this, the courts have used various remedies such as adjournment, change of venue, severance of the trial of one co-accused from that of the others, express directions to the jury to exclude from their minds anything they may have heard outside the courtroom and the machinery of challenge for cause.
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> It may be that in a particular case none of these remedies will be fully effective. But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury."[35]

[30] For those reasons I found that there were special reasons for enquiry under s 47 of the *Jury Act* and made an order authorising the questioning of persons selected to serve as jurors and reserve jurors when the court reaches the final stage of the jury selection process. The further hearing of the application was then adjourned.

[31] I record that the Crown made no submissions as to the manner in which I should exercise the discretion under s 47.

Implementation

[32] The hearing of the application resumed on 5 February 2013. Having regard to the expected duration of the trial and its public importance, I directed that three reserve jurors be sworn. The accused had proposed five questions to be put to the persons selected to serve as jurors or reserve jurors. It was necessary to decide what questions should be put and in what way.[36] It was also necessary to integrate the

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34 *R v Patel* [2012] QSC 419, at [46].

35 *Murphy v The Queen* [1989] HCA 28; (1989) 167 CLR 94 at 98-99.

36 *Jury Act* 1995, ss 47(3) and 47(4).

questions with the process of self-assessment for impartiality which is conventional in Queensland.[37] To facilitate submissions on those matters I had prepared a draft introduction to the jury and circulated it to counsel. That formed the framework for the submissions on these questions.

[33] The introduction as delivered to the jury is included in Annexure A to these reasons. For ease of reference I have inserted paragraph numbers and divided it into sections to reflect the stages[38] in which the empanelment process was carried out. It will be observed that the first two stages did not arise under s 47 of the *Jury Act*, although the fact that questions were going to be asked under that section influenced some of the content of the first two stages.

First stage

[34] The first stage comprised some introductory remarks, an outline of the process which was to be followed, the reading of the names of possible witnesses and the enquiry of the jurors conventionally made at that point. It was in my judgment important that the jurors should know in advance what was to happen. The self-assessment process was split over two stages because of the large number of witnesses. The first stage was the part of the process relating to association with witnesses or parties and the second, that relating to bias and competence. Counsel made no submissions about the first stage.

Second stage

[35] It has long been my practice to expand the enquiry made in the *Queensland Supreme and District Courts Benchbook* to include competence as well as impartiality. On this occasion the importance of the trial and the large amount of medical evidence to be given suggested that what was to be said about both qualities in the second stage should be rather more extensive and emphatic than usual. There was no objection to the references to competence, nor to the other personal considerations mentioned in the second stage of the process.

[36] Counsel for the Crown submitted that inviting the jury at this stage to consider whether they were impartial might tend to negate the effect of the later questioning, because the jurors might later feel locked-in to a position if they had not come forward at this stage. It will be observed that the matters raised at stage two were framed in very general terms. To defer those matters to stage three would have lengthened that process and created handling problems with the jury panel. On the other hand, there was some force in the suggestion by the Crown that the matter be dealt with by including words indicating that the second stage involved preliminary questions and was conducted with the assent of counsel for the accused. That suggestion was adopted.

[37] Concern has been expressed in the United States that inviting jurors as a group to identify their own potential biases and come forward may be ineffective:

> "[J]ury duty is often stressful for jurors and they may be too shy or nervous to come forward even if they have a pertinent experience to

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37 *Queensland Supreme and District Courts Benchbook*, Pt.5B.3, at [12]-[13]; *Jury Act* 1995, ss 46(1) and 56(1)(a).

38 This is not to be confused with Div 7 of Pt 5 of the *Jury Act* 1995.

> discuss. A criminal trial might involve drugs, sexual behaviour, violent victimisation, or other issues that are difficult for prospective jurors to discuss, especially if they have had similar experiences. … Even if prospective jurors are willing to reveal all, they may be unaware of their own biases. Psychological research documents that many people are not conscious of some of the significant factors that shape their behaviour."[39]

[38] No doubt it is correct that on some occasions an invitation extended to a jury in terms similar to those used in stage two may not be effective to bring every biased or incompetent juror into the open. A person who is dishonest or unconscious of his or her own shortcomings may not respond. That is part of the purpose for s 47 of the *Jury Act*. It does not follow that the stage should be discarded. As it turned out, the process was well worthwhile.

Third stage

[39] The third stage proposed a written questionnaire, a proposal to which both parties agreed. This was the first time questioning had been authorised under s 47, and considerable publicity had been given to that fact. Counsel for the Crown submitted that I should consider whether the jury's knowledge of this fact might somehow lead a juror to question why this was being done for this accused and perhaps to draw an inference adverse to him as a result. The instructions regarding special circumstances were included, with the concurrence of the defence.

[40] I decided without opposition from either party that the jurors should swear or affirm the truth of their answers to the questionnaire. The form of oath to be used was:

> "I swear by Almighty God that the answers I have given in this questionnaire are the truth, the whole truth and nothing but the truth. So help me God."

With the benefit of hindsight it would have been better also to have settled a form of affirmation, which might have been:

> "I solemnly, sincerely and truly affirm and declare that the answers I have given in this questionnaire are the truth, the whole truth and nothing but the truth."

[41] After the court adjourned I devised a running sheet for the bailiff to use during the swearing in. It contained all the steps in the agreed procedure as well as the terms of the oath and affirmation. It would be desirable in advance to prepare sufficient copies of the oath and affirmation to give one to each juror, and to have Bibles available for those jurors needing them.

[42] As to the questionnaire itself, two issues arose. The first was whether jurors should be identified by name or by number. I ruled that names should be used. This was not a case where there was any risk to jurors and no other reason was advanced for not using the jurors' names. In my view the use of names is a far more polite procedure than addressing jurors as numbers.

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39 Hans and Jehle, *loc cit*, at 1196.

[43] The second issue was the wording of the questions. The questions proposed by the defence were discussed at length and a number of variations were agreed between the parties and the Court. The final form of the questionnaire appears as Annexure B to these reasons. By the end of the discussion both parties agreed on all but one of the questions. The contentious question was that numbered "6(b)". Its presence was opposed by the Crown on the ground of irrelevance. The defence pressed for it on the basis that the answer could well be illuminating in deciding whether to allow cross-examination, particularly since the question did not require the juror to make any value judgment as to the impact of any experience on his or her state of mind. I accepted the defence submission and allowed the question.

Fourth stage

[44] The fourth stage was also planned during this hearing, although of course it could not be known whether the fourth stage would actually take place.

[45] The prosecution submitted that any cross-examination should not be in open court, on the ground that full and frank answers would more likely to be given in closed court. It submitted that the example appended to s 47(4) of the *Jury Act* implied a power to close the court. The defence agreed that the Court should be closed. Assuming I had the power to order the closure of the Court, I was not prepared to make a blanket order at that stage of proceedings. I held that whether such an order should be made could depend upon the answers given to the questionnaire by the particular juror and the intended scope of the cross-examination. I ruled that any application to close the Court should be made in the context of the particular juror after the line of questioning had been disclosed to the Court in the absence of the juror. In the event, when the jury was empanelled no application was made, so it was never necessary to decide whether there was power to carry out cross-examination under s 47(5) of the Act in closed court.

[46] I informed the parties that I would tell the jury that their answers to the questionnaire would not be made public without their first being consulted. In the meantime the answers were to be kept in a sealed envelope. I ruled that I would make a determination about disclosure of the answers only if there were an application for that to happen.[40] In the event no such application was made.

[47] The explanation given to the jury about stage four is included in Annexure A.

[48] The procedure adopted for challenging under s 47(6) of the *Jury Act* was for any challenge to be made to a particular juror immediately after the conclusion of his or her cross-examination (in the event that cross-examination was permitted), and in the juror's absence. Each juror cross-examined was to be asked not to discuss his evidence with the other jurors and a second bailiff was to remain with the jury while submissions on the challenge were made. In the unlikely event that either party should wish to challenge a juror who was not cross-examined[41], any such challenge was to be made after other challenges were dealt with. Any juror

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[40] The Sheriff's Office had arranged for the distribution to the media representatives at the trial of a document outlining the Court's procedures and requirements regarding applications for access to trial exhibits.

[41] Section 47(6) of the *Jury Act* permits a challenge for cause against any person who has answered questions put under the section, not just a person who has been cross-examined.

successfully challenged was to be brought back into court, where I would explain what had happened and discharge the juror.

[49] The logical final issue was the procedure to be adopted for replacing a juror in the event of a successful challenge for cause. Section 47(9) provides that in that event "another person must be selected *from the jury panel* to fill a vacancy" (emphasis added). The wording is similar to the wording of s 46(3), which would apply in the event of a juror being discharged for doubtful impartiality at the end of the second stage. There is an apparent conflict between these provisions and s 34(3), which provides that if a juror is discharged after the trial starts and a reserve juror is available, *the reserve juror* must take the vacant place on the jury. The difficulty is the result of the confusion in the *Jury Act* about when a trial starts.[42] I ruled that s 47(9) would be applied if this situation arose.

A digression

[50] The last matter resolved at the hearing was the form in which the Crown would make any peremptory challenges. Section 42 of the *Jury Act* conferred on the Crown a right to make 10 such challenges. The Crown Prosecutor informed the court that it was his intention, if he exercised that right, to do so by using the words "Stand by". That raised the question whether such a call would have that effect. Answering that question required an excursus into legal history. Fortunately, the hard work has been done in England.[43]

[51] In 1964, Lord Parker CJ, delivering the judgment of the Court of Criminal Appeal in *R v Chandler (No 2)* said:

> "The history of the matter so far as the Crown itself is concerned is that prior to 1305 the Crown had an unlimited right of peremptory challenge. It is interesting that as early as 1305 it was felt that this was unfair to the subject, and that it might be abused by the Crown of the day, who might instruct his Attorney to challenge everybody, thus in effect keeping a prisoner in prison without trial.
>
> Accordingly, by the statute of 33 Edward I Chapter 2 peremptory challenges by the Crown were abolished, and the Crown could thereafter only challenge for cause. But then, whether as a matter of construction of that statute or as a matter of practice, it was found convenient that before the Crown should show cause, they should be entitled to go through the panel, stand by, as it was called, the Jurors in order to see whether an acceptable Jury could be sworn without having to challenge for cause. If the panel having been gone through, the Crown had not allowed twelve Jurors to be sworn but had stood them by, then it became necessary to recall the prospective jurors and challenge them for cause. That, as it is quite clear from the old cases, became not merely a rule of practice but a right in law."[44]

[52] In *R v Mason*, the Court of Appeal wrote:

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42 See [3]-[6] above.

43 Also in Canada, see *Bain v R* [1992] 1 SCR 91 at [50]-[52].

44 [1964] 2 QB 322 at 328.

> "Before 1305 the Crown at common law had the right to challenge peremptorily an unlimited number of jurors. This led to abuse in that by exhausting the panel with peremptory challenges the Crown was able to ensure that the defendant was kept without trial and in custody until the next sessions. This abuse was put to an end by the Ordinance for Inquests (33 Edw 1 Stat 4) 1305, the material parts of which are as follows:
>
> > '…but if they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause certain, and the Truth of the same Challenge shall be inquired of according to the Custom of the Court; …'
>
> That statute was repealed by section 62 of the *Jury's Act 1825* and replaced by section 29 of that Act. …
>
> This section had to be construed in *Mansell v The Queen*, 8 E & B 54. …
>
> In our judgment, *Mansell v The Queen*, 8 E & B 54 established beyond argument that prosecuting counsel have a right to request that a member of the jury panel shall stand by, and that this right can be exercised without there being a provable valid objection, until such time as the panel is exhausted; and when it is, if the Crown still wants to exclude a member of the jury from the panel, a valid objection must be shown."[45]

[53] New South Wales inherited the common law jury system by means of a number of Imperial and Colonial Acts from 1823 to 1839.[46] The right of the Crown to stand by jurors (or to use the Victorian and Canadian expression, to stand them aside) must have come with that legislation. It continued in Queensland after separation in 1859. Neither party suggested it had ever been modified in any way, by statute or by judicial decision.

[54] I ruled that if the Crown wished to challenge under s 42 of the *Jury Act*, it would have to do so by using the term "Challenge". Use of the term "stand by" would be taken to mean a deferred challenge for cause. Although I made no ruling at the time, it would have followed that the Crown would have had an unlimited number of such challenges, as distinct from the challenges for cause to which it was entitled under s 43 of that Act. It may be that such an outcome would have been incorrect. That would be so if s 43 or one of its predecessors[47] impliedly repealed the common law right to stand by. It is unnecessary to consider that question. In any event the Crown challenged peremptorily fewer than 10 times.

Postscript

[55] It is perhaps as well to record what subsequently happened.

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45 [1981] 1 QB 881 at 888-891. The section quoted was replaced by s 29 of the *Juries Act* 1825, but the new provision contained no material differences.

46 Barker, I, *Sorely Tried: Democracy and Trial by Jury in New South Wales*, *Francis Forbes Society for Australian Legal History*, Dreamweaver Publishing, 2002, at 58 ff; Windeyer, WJV, *Lectures on Legal History*, 2nd ed, Law Book Company of Australasia, 1957, at 312; McPherson, BH, *The Supreme Court of Queensland 1859-1960*, Butterworths, Brisbane, 1989, at 115-116.

47 Compare *Criminal Code* 1901, s 610.

[56] After stage one, one juror came forward and disclosed a connection with a witness. He was excused from the trial and replaced from the jury panel. The replacement juror had no stage one problems.

[57] After stage two, eight jurors came forward and disclosed a variety of matters concerning them in relation to impartiality or competence. I ruled that six should be excused or discharged and two should remain on the jury. Six replacement jurors were empanelled. One of those six came forward when asked, and was discharged from the jury. That juror was duly replaced, and the replacement juror told the court there were no difficulties in relation to the matters discussed.

[58] After considering the answers to the questionnaire in stage three the prosecution made no application to cross-examine any of the jurors. The defence applied to cross-examine six of them. In two cases the application was refused. In four it was allowed. The prosecution was also allowed to question the jurors questioned by the defence, but it did not exercise that right in all cases.

[59] Although four jurors were cross-examined, only one was challenged for cause under s 47(6) of the *Jury Act*. That challenge was made by the defence and was based solely on the answers given in the questionnaire. It was not opposed by the prosecution. I upheld the challenge and discharged that juror. The explanation given to him is set out in Annexure A.

[60] That meant it was necessary to empanel one more juror. For their own comfort the jury panel had been allowed to move to the jury assembly area after they had attended all courts in which they were required. Moving them back to the fifth floor was a prolonged process in the relatively small jury lift.

[61] After the replacement juror was empanelled, it was necessary to go through all four stages with her. She had already heard the list of witnesses read and was able to respond promptly when asked if there was any difficulty. She had also heard my second stage remarks earlier in the day and could respond promptly in relation to issues of impartiality and competence. She was given the questionnaire and the introduction to it given at the third stage was repeated to her. She completed the questionnaire in a spare jury room.

[62] After the completed questionnaire was shown to counsel, the defence applied to cross-examine the juror. The application was not opposed and in the light of one of the answers cross-examination was allowed. It disclosed that the question had been misunderstood and no challenge was made to the juror. The jury was complete.

[63] Two days had been allowed for the empanelment process. It finished at 5:28pm on the first of those days. The prosecution opened its case on the next sitting day. The jury retired to consider its verdict on the twenty-third day of the trial. Two days later it returned a verdict of not guilty.

ANNEXURE A TO REASONS FOR JUDGMENT IN *R v PATEL (No 4)*

Stage 1

1. HIS HONOUR: Thank you, Mr Bailiff. Ladies and gentlemen of the jury and the jury panel, in any trial for a criminal offence, it is essential that every member of the jury be, and by all fair-minded people be seen to be, completely impartial as between the prosecution and the defendant and competent to decide the case. That is particularly important in a case such as the present.

2. I suppose few of you have not heard of Dr Patel. Happenings at Bundaberg Base Hospital at 2003 have been the subject of widespread publicity, intense political controversy, heartfelt and public displays of emotion, and wild and varied personal attacks on a number of people.

3. One of my tasks is to ensure that everything possible is done to select a jury in this case which is completely impartial and is seen by all fair-minded people to be completely impartial, and a jury of which the jurors are competent, intellectually, emotionally and physically, to carry out their task.

4. I cannot do this alone. I need your help and cooperation. If we work together, we can ensure that this jury is, and is publicly seen to be, completely impartial and competent. The task is not necessarily limited to those in the jury box. It may well involve others of the jury panel if you are selected to replace one of the 15 already here.

5. I, therefore, ask you all to listen to what I am about to say.

6. The process we shall go through to try to achieve the result will fall into at least three and possibly four stages. I shall outline them now and describe each in a little more detail before it begins.

7. First, we will find out if any of you knows or has been associated with any of the people involved in the case in such a way as to create partiality, or an appearance of lack of impartiality.

8. Second, I shall tell you a little about the case, the nature of the evidence, the stresses which are likely to arise, and the work which has to be done. Then I shall ask you to decide whether you feel you can be completely impartial and competent to decide the case, and be seen by any fair-minded observer to be so.

9. After each of those two stages, I shall invite each of you to consider your own position and, if necessary, to discuss quietly with me alone any matter which you might feel is problematical. If in my judgment the matter is such that you ought not to serve as a juror, I shall discharge you and you will be free to stay or leave as you choose.

10. If I think that you ought to serve as a juror but not in this trial, you will return to the jury panel.

11. If I decide that you are able to serve on this jury, you will return to the jury box.

12. The third and fourth stages will at first involve only the 15 people provisionally selected so far. For that reason, I will then allow the remainder of the jury panel to leave here. There is another trial which requires the panel and the judge is waiting for its availability. You will be escorted to that court.

13. After that jury is selected, the remainder of the panel will return to the jury assembly area until we know whether we require you to come back here.

14. For the third stage, the 15 people already selected will be given a questionnaire and asked to complete it. The process may take some time. After you have all completed the questionnaire, I shall let you go and have a cuppa. While you do so, I shall discuss your answers with counsel and make a decision whether any or all of you should be asked some further questions orally.

15. If I decide you should be, the fourth stage will come into action and those involved will be asked, one at a time, to come back into Court for that questioning.

16. If at any point during the third or fourth stages you realise that there might be some matter which is potentially problematical, please put your hand up and let me know, or write me a note, depending on the position you are in at the time. I shall invite you to discuss the matter with me and make a decision about whether you should serve as a juror on the basis of the discussion.

17. Apart from that, at the end of the fourth stage, I shall decide whether it would be better for you or for any of you not to be involved in the jury and I will give directions accordingly.

18. So, everyone, the first stage. Let's begin that process. Please listen to the list of names of people who might be witnesses. If you know, or are related to, or have had any dealings with, or you know something about any of them, and you feel that by reason of that knowledge or association you might not be or be seen to be completely impartial, please tell me so when I ask you after the names are read.

19. Ladies and gentlemen of the jury panel, would you also please listen carefully as if any of you were selected as a replacement juror. It is important that you, too, have no problem in this regard.

20. Mr Davis?

21. MR DAVIS: Thank you, your Honour.

22. Ladies and gentlemen, the Crown will or may call the following witnesses in this case:

23. [The prosecutor then read out the names, occupations and towns of residence of possible witnesses.]

24. They are the witnesses who may be called, your Honour.

25. HIS HONOUR: Thank you, Mr Davis. Mr Fleming, are there any persons who might be called as witnesses from the defence?

26. MR FLEMING: Yes, thank you, your Honour.

27. *[Counsel then read out similar information in relation to defence witnesses.]*

28. HIS HONOUR: Thank you, Mr Fleming.

29. MR FLEMING: Thank you, your Honour.

30. HIS HONOUR: Now, ladies and gentlemen, you heard that rather long list of names of people. Does any of you have any knowledge of or association with any of those people such that you feel you might not be or be seen to be completely impartial as between the Crown and the defence?

31. Yes, would you come forward, please?

32. …

33. Gentlemen, juror number 13, Mr H, is excused from this trial by reason of some knowledge and association, and will go back to the jury panel.

34. MR DAVIS: Thank you.

35. HIS HONOUR: Empanel one more reserve juror.

36. REPLACEMENT JUROR EMPANELLED

37. HIS HONOUR: Now, Ms P, you also would have heard the list of names read out. Do you have any problem by reason of knowledge or association of any of those people?

38. REPLACEMENT JUROR 13: No, I don't.

39. HIS HONOUR: Thank you.

Stage 2

40. HIS HONOUR: Thank you. Well, ladies and gentlemen, that brings us to the second stage of the process. I want at this stage to tell you about a number of matters which might affect a person's impartiality, or the appearance of impartiality, or the person's capacity to act as juror.

41. This is, in a sense, a preliminary to the third stage where you will be given a more focussed questionnaire.

42. Sometimes a juror knows the defendant or a relative of the defendant, or an associate of the defendant, or knows or believes something about him or about what he is alleged to have done, and on that account the juror may feel that he or she cannot be, or be seen to be, completely impartial.

43. In the present case, such knowledge or belief might not come directly from the defendant. It might come from the media, the Internet, or simply from talking to your friends. It might come from a book you have read or a documentary that you have watched. A juror might have a friend or a relative who is or was employed by the Queensland Department of Health and might feel, for that reason, that he or she

cannot be, or be seen to be, completely impartial. The possibilities are endless. I ask each of you to examine your own position carefully.

44. There may also be reasons personal to you which may cause you to wonder whether you can be completely impartial in this case or in a case of this nature. This is a case about alleged medical negligence. Sometimes a juror might feel that because of events in his or her own life, he or she might not be able to be, or might not be seen to be, completely impartial and fair.

45. To give you some extreme examples, a person who has been involved in litigation against a doctor, or a hospital, or has been involved in patient support groups might not be seen to be impartial. You might simply have followed the story of Bundaberg Base Hospital and have developed strong feelings which you cannot put aside, or which might cause anyone who knows of your feelings to doubt your impartiality.

46. Sometimes a juror may have an illness or a disability, or a limitation due to education or personal background such that he or she might not be able to perform all the duties of a juror fairly, or might not be seen to be doing so.

47. Being a juror can be a very stressful experience, particularly in a high profile case such as this. Some people may be psychologically sensitive to talk or photographs of blood and body parts. Some people may feel that their level of education or knowledge of English is insufficient for a trial where some complex language can be anticipated, even allowing for the best efforts of the parties to simplify the words used. Some people may lack the ability to sit, listen and watch witnesses talk about a case for hours on end, day after day without losing concentration. Some people may feel they are individualists who cannot work or make decisions in groups. There is an infinite number of matters capable of affecting a person's capacity to act as a juror.

48. This trial is expected to last for two to three weeks but it could take longer. It is expected to proceed every day without interruption save for weekends and possibly Friday afternoons. When the jury retires to consider its verdict it might be sequestered - that is, accommodated in secure hotel accommodation overnight rather than allowed to go home. Save in emergencies, we cannot adjourn for half a day to allow a juror to attend a scheduled medical appointment or a wedding, to care for a child or to carry out normal social activities, and this will continue until the conclusion of the trial even if it takes longer than expected. It will continue regardless of any overseas holiday which a juror may have booked and paid for.

49. I ask you now to consider whether you are confident that you can be and by all fair-minded people be seen to be completely fair and impartial and physically, mentally and intellectually capable of performing the duties of a juror fairly and impartially in the eyes of all fair-minded people. Consider your personal situation and obligations over the next several weeks as well. If for any reason whatsoever any one of you feels that you cannot be and by all fair-minded people be seen to be completely impartial and fair and capable of acting properly as a juror, please raise your hand now.

50. All right. We will start at the beginning. Could you come and talk to me, please.

51. …

52. Juror number 1, Ms L, is discharged.

53. …

54. Juror number 5, Mr B, is discharged ….

55. …

56. Juror number 6, Ms D, is discharged ….

57. …

58. Reserve juror number 14, Mr K, is also discharged ….

59. …

60. Mr F, number 8, will remain on the jury.

61. …

62. Juror number 9, Ms P, is discharged.

63. …

64. Reserve juror number 15, Mr S is discharged ….

65. …

66. Ms N, number 12, will continue on the jury.

67. Empanel six more jurors.

68. REPLACEMENT JURORS EMPANELLED

69. HIS HONOUR: May I address the six folk who have just joined the jury. You will have heard the names of the possible witnesses read out a little earlier. Does any of you have any difficulties by reason of some knowledge or association with any of those people?

70. No-one.

71. You would have also heard what I said a little while ago about the various ways in which one can be or be seen to be partial - to not be impartial. I ask each of you whether any of you feels that by reason of something in your own life or standing you may not be or be seen to be completely impartial and competent to act as a juror? Does anyone have any difficulty?

72. Could you come and talk to me, please?

73. Yes, juror number 5, Ms S is discharged from this trial and will return to the jury panel.

74. Empanel another juror.

75. REPLACEMENT JUROR EMPANELLED

76. HIS HONOUR: Mr W, I ask you the same questions. You have heard the list of names of people who might be witnesses. Do you have any knowledge of or association with any of them such as to cause any problems for you to sit on this jury?

77. REPLACEMENT JUROR NO. 5: No, I don't.

78. HIS HONOUR: You have also heard what I said about the need for impartiality and competence in all jurors. Is there anything in your life which makes you feel that you might not be, or be seen by fair-minded people to be, completely impartial and competent to decide the case as a juror?

79. REPLACEMENT JUROR NO.5: No, I don't think so.

80. HIS HONOUR: All right. Thank you. …

81. I now address the ladies and gentlemen of the jury panel. Would you please now go with the court officer for the other trial which is awaiting your attendance. I am sorry I cannot give you any reliable idea of whether or when we will require you back here but be assured we will keep you waiting for as short a time as possible. Thank you.

Stage 3

82. HIS HONOUR: Now, ladies and gentlemen, thank you for your patience. We now come to the third stage of the process. At this point the Bailiff will distribute some questionnaires to you. I will have one copy of the questionnaire marked "A" for identification and an electronic version will be added to the eTrial file in due course.

83. MARKED "A" FOR IDENTIFICATION

84. HIS HONOUR: One of the purposes of the questionnaire is to help you focus more precisely on matters relating to impartiality. You will recall that I said earlier that I need your help and cooperation. That need exists not only for the first two stages but also now. You may have heard through the media that this is the first time that this procedure has been used in Queensland and I think probably Australia. That is not surprising. It was introduced only in 1995 and it has no counterpart anywhere else in Australia. It applies only in special circumstances and this is the first time those circumstances have arisen. Those circumstances involve, of course, the massive and prejudicial publicity which the case has attracted, not the merits of the issues which this trial has to resolve. So you and I need to work together to make sure that the Act, the *Jury Act*, functions as Parliament intended.

85. I will shortly let you retire to the jury room to fill out your answers in private. That will not be a collaborative exercise. It is your own individual answers uninfluenced by the views of others in which we are interested. Therefore, please

do not discuss the questions or your answers with each other. Each of the Bailiffs is authorised to accompany you while you are writing your answers and to convey to me any messages or questions which you might have. The Bailiff will provide you with paper for that purpose if you need it and will notify me when everyone has finished his or her questionnaire.

86. You will see that we have allowed a full page for your answer to each question. That does not mean you are obliged to write a full page. You may answer a question with one word if that is appropriate. On the other hand, if you need more space than has been provided, additional paper can be furnished to you. If while you are filling in your answers anything occurs to you which gives rise to concern on your part about the propriety of your continuing as a juror, please complete the questionnaire and also make a note of your concern on a piece of paper and attach it to your questionnaire.

87. You may take as long as you like to write your answers. We have all day, if necessary, and tomorrow as well. If you need to explain something, please do so. It is imperative that you be frank and honest and withhold nothing. Do not feel pressured into giving less than a complete explanation by the fact that others have finished filling out the questionnaire.

88. Your answers must state the truth, the whole truth, and nothing but the truth, and when you come back into this Court, I shall ask you to swear or affirm that this is so. The completed questionnaires will be shown to the lawyers but will not be made publicly available unless I order this to be done. I will not make such an order without first consulting you.

89. I invite you to read through the questionnaire now. When you have done so, I will take any questions that you have about it.

90. Does anyone have any questions on the questionnaire, so to speak? No-one? All right. Thanks, ladies and gentlemen. Please go to the jury room now and complete your questionnaires.

91. THE JURY RETIRED AT 11.41 A.M.

92. THE JURY RETURNED AT 1.06 P.M.

93. HIS HONOUR: Now, ladies and gentlemen, what I am going to do now is ask the Bailiff to read and would you - when this happens you can all stand but sit for the moment. I am going to ask the Bailiff to read aloud to you the terms of the oath and the affirmation which we are going to ask you to take. After both of them have been read would you respond by saying, "So help me God", or, "I do", as appropriate. Mr Bailiff.

94. JURORS SWORN AS TO TRUTH OF QUESTIONNAIRE

95. HIS HONOUR: Thank you, Mr Bailiff. Be seated, ladies and gentlemen. Now, it is lunchtime and I am sure you are ready for lunch. I know I am. I will consider your answers, which have been given to me, over lunch. I will discuss it with counsel when we resume at 2.30 and you can come back after we have had those discussions. …

96. HIS HONOUR: I will provide [Counsel] with copies of the answers over the break. Adjourn the Court.

Stage four: beginning

97. HIS HONOUR: Thank you, Mr Bailiff. Thank you for your patience, ladies and gentlemen. I have discussed your responses to the questionnaire with counsel and after hearing their submissions I have decided that some of you should be asked some further questions.

98. These will mainly be in the nature of seeking some explanation of some of the things that you have said in your answers. We will do this one person at a time. The remainder of you can wait outside and have a cup of coffee while that is happening. And so there are - I think we have about five people to whom we want to ask some more questions. The first one is juror number 5, Mr W. If you would remain here, and the other ladies and gentlemen please retire, and we will start the process.

99. Please do not discuss the questions that you were asked in the questionnaire or their answers with each other while you are in the jury room.

100. Would you mind coming down, please, Mr W, and sitting where the microphone is because the Court Reporters are a bit concerned you may not be able to be heard back there. Thanks very much.

101. MR W CALLED AND CROSS-EXAMINED ON VOIR DIRE

Stage four: later

102. HIS HONOUR: Yes, ask Mr W to come back, please, Mr Bailiff.

103. MR W RECALLED

104. HIS HONOUR: Mr W, a challenge has been made to your selection. I have considered the answers which you have given today in your written questionnaire and your answers just now and the submissions of both sides in the case.

105. I have decided that it would be best, in the interests of justice, for you not to sit on the jury. This in no way casts any reflection on you. As I explained earlier, I have to give very careful attention to the appearance of justice being done and your answers display a degree of uncertainty and in the whole picture, I have to make an assessment of how people think and how the appearance of justice will be in our community.

106. In that context, I have decided to allow the challenge.

107. Consequently, I order that the challenge be upheld and that juror number 5 be discharged.

108. Thank you for coming in today and giving your time to the community. You are free to stay or leave as you choose. Thank you.

109. If you have anything in the jury room, you may go and get it now.

110. JUROR NO 5 DISCHARGED

ANNEXURE B TO REASONS FOR JUDGMENT IN *R v PATEL (No 4)*

Name: …….. Juror No:…….

R v Patel
Questionnaire for Jurors

1. Have you heard anything adverse about Jayant Mukundray Patel? If so, what have you heard and from what source have you heard it?

2. What is your opinion of Jayant Mukundray Patel?

3. If there is a conflict between the evidence called by the Crown and the evidence called or given by Jayant Mukundray Patel will:
   a. any adverse information; or
   b. any opinion you have formed;
   affect your decision about which evidence to accept? Why?

4. Would it be difficult for you to decide that Jayant Mukundray Patel is not guilty? If so, why?

5. Would it be difficult for you to decide that Jayant Mukundray Patel is guilty? If so, why?

6. Jayant Mukundray Patel has Indian ancestry:
   a. do you have any attitude towards Indians that might prevent you from giving him a fair trial?
   b. have you had any experience with a member of any race, creed or colour other than your own which resulted in any kind of confrontation?
   c. do you feel you have any feelings about persons of another race, colour or creed that might affect your decision in this case? Why?

[NOTE: In the questionnaire as distributed, each sub-question was printed on a separate page.]