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PARTICIPATION IN SOCIAL MEDIA BY POTENTIAL JURORS

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This article examines the issue of media publicity in a criminal trial context, given the unprecedented reach of pre-trial commentary on social media platforms such as Facebook and Twitter today. The paper considers how courts have responded to these phenomena, with reference to a particular criminal trial in New South Wales in 2014. In this case, a well-known actor was subjected to an extraordinary level of media attention following his arrest for sexual offences. Relevant to this and other high profile cases is whether jurors can act impartially in the face of relentless pre-trial commentary and publicity, and whether courts should simply rely on selected jurors to remove themselves from participation in the trial if their impartiality is compromised. The question is posed as to whether it is timely to consider allowing the prosecution and defence to investigate juror participation in pre-trial social media commentary during the jury selection process.

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I INTRODUCTION

In April 2014, Robert Lindsay Hughes, the former actor who had a lead role in the well-known Australian television sitcom *Hey Dad…!* was convicted of sexual offences against four female victims who were all under the age of 16. Hughes was sentenced to jail for 10 years and 9 months, with a non-parole period of six years.[1] The media interest in Hughes' case had been intense throughout the four-year period leading up to the conviction. It began with an article published in the *Woman's Day* in March 2010 which contained allegations of sexual abuse against a young female cast member, Sarah Monahan. Ms Monahan was subsequently interviewed on a nationally broadcasted television program, *A Current Affair.* Days later, further allegations of sexual abuse from other former *Hey Dad…!* cast members were aired.

At the time, Hughes was living in Singapore. His confrontation with the media about the allegations raised against him received widespread coverage in Australia. In August 2012, Hughes was arrested and extradited to Australia following a police investigation whereupon he continued to receive ongoing and widespread media attention until his eventual conviction at trial in 2014.

II ISSUES RAISED BY PRE-TRIAL PUBLICITY

The sensational headlines of a well-known star facing sexual assault allegations created great feasting fodder for the public at large, and no doubt delivered a profitable boon in ratings and revenue for the media outlets. It also raised serious points of contention for the ensuing trial in 2014.

In the pre-trial hearings in the New South Wales District Court, Zahra DCJ outlined some of the vast mainstream (print and electronic) media coverage that had permeated the public domain leading up to the trial, which he described as 'substantial and extensive' and 'intense and widespread'.[2] He recounted another *A Current Affair* program which aired in 2012 (two years after the story first broke), claiming that the *Hey Dad…!* story was '… one of the biggest scandals in Australian television history'.[3] The story continued

[1] *Hughes v The Queen* [2015] NSWCCA 330, [5] ('*Hughes*').
[2] *Hughes v The Queen* [2015] NSWCCA 330, [15]–[17].
[3] Ibid.

to re-surface throughout 2013 when former TV presenter and then Senator for Victoria, Derryn Hinch, invited viewers to sign a petition advocating a published convicted sex-offenders list. During Hinch's commentary, publicity photographs of Sarah Monahan sitting on Hughes' lap were shown. Published ratings for that particular program demonstrated that it was watched by 1.2 million viewers.[4]

Zahra DCJ noted that 'the extensive media reporting led to commentators, including lawyers associations, questioning whether Hughes would obtain a fair trial as the reporting was said to amount to a "trial by media".[5] His Honour also considered what had been published on social media platforms such as Facebook, Twitter and YouTube and noted that the material on the social media sites was 'not constrained', containing derogatory views and comments from mostly anonymous contributors that vilified the accused.[6] He cited entries from the Channel 9 News Facebook page posted at the time of Hughes' committal for trial in July 2013, which included comments such as '*Hang the pedo'* and *'Lock him up so he can't ruin any more lives'.* Tracking data showed the website had 228,376 likes. Further data was also tendered that revealed there were between 700,000 to 800,000 views of social media sites containing disparaging mock satirical videos portraying Hughes as a paedophile and sexual predator.[7] Though no application was made during the trial for takedown orders in relation to prejudicial material, ongoing concerns about media coverage throughout the trial were raised by both the Crown and applicant, which included an order under the *Court Suppression and Non-Publication Orders Act 2010* (NSW) made specifically in relation to what had been published on the website mamamia.com.au.[8]

III APPEAL RE PERMANENT STAY APPLICATION

Following his conviction and sentence, Hughes lodged an appeal on several grounds including 'whether his Honour erred in refusing to permanently stay the indictment due to adverse publicity' against him.[9] The *NSW Criminal Trial Courts Bench Book* provides

[4] Ibid [19].
[5] *R v Hughes* (Unreported, District Court (NSW), Zahra DCJ, 14 February 2014) quoted in *Hughes v The Queen* [2015] NSWCCA 330, [18].
[6] *Hughes v The Queen* [2015] NSWCCA 330, [20].
[7] Ibid [21].
[8] Ibid [27].
[9] Ibid 4.

that a stay of the prosecution can be granted due to adverse publicity in the media and on the Internet, but will only be granted if the court is unable to take action to overcome any unfairness that may result from the publicity while taking into account the public interest served by the trial proceeding.[10]

Hughes applied for a permanent stay in the case, claiming that the extraordinary level of adverse publicity over the preceding four-year period had moved beyond objective reporting and was directed towards the key issue at trial — namely, the accused's guilt of the charges laid against him — thereby compromising his entitlement to a fair trial. In particular, it was argued that no jury, not even one properly instructed, could remain impartial when prospective jurors had been exposed before the trial to an overwhelming and unrelenting media that were bent on portraying Hughes as a 'vile, despicable human being'. This exposure was likely to have caused jurors to have pre-judged the outcome. This material continued to be available to jurors throughout the trial via the Internet.[11] The stay application contended that the circumstances of Hughes' case was similar to those discussed by the High Court in *R v Glennon* [1992] in which Deane, Gaudron and McHugh JJ considered that an 'extreme' or 'singular' case could arise in which a permanent stay might be granted if the effect of a prolonged media campaign of vilification and potential prejudice and prejudgment against an accused might render a conviction a miscarriage of justice.[12]

The stay application was supported by a report from a psychologist, Professor Thomson, who had researched jurors' capacity to reach a verdict on trial evidence after being exposed to pre-trial publicity,[13] and found that jurors apply a 'confirmatory bias'. According to Professor Thomson, confirmatory bias can affect results as jurors will seek out information based on established beliefs and overlook inconsistent information.[14]

In an Australian study of 41 high-profile criminal trials conducted in New South Wales between 1997 and 2000, empanelled jurors were interviewed following completion of the

[10] Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2007), [1-450] <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/the_jury.html>.
[11] *Hughes v The Queen* [2015] NSWCCA 330, [36]–[40].
[12] *R v Glennon* [1992] HCA 16; 173 CLR 592, 623–4 (Deane, Gaudron and McHugh JJ).
[13] Jill Hunter, Dorne Boniface and Donald Thomson, 'What Jurors Search For and What They Don't Get' (UNSW Pilot Jury Study, Law & Justice Foundation, Sydney, 2010).
[14] *Hughes v The Queen* [2015] NSWCCA 330, [39].

trial. The authors found that jurors were more likely to recall pre-trial publicity about an accused if that person was independently well-known in the community,[15] and that approximately eight per cent of the verdicts delivered were likely to have been driven by publicity associated with the trial rather than based on evidence adduced.[16]

In the *Hughes* case, the Crown opposed Hughes' permanent stay application contending that the circumstances of Hughes' case did not fall into an exceptional class of cases and that the applicant could receive a fair trial if the jury were properly instructed.[17]

IV APPEAL JUDGEMENT

The NSW Court of Criminal Appeal (Beazley P; Schmidt and Button JJ) ('Appeal Court') held that his Honour did not err in refusing to grant the stay application. Zahra DCJ had stated that a fair trial could be achieved, despite the pre-trial publicity, by adhering to a number of steps, including:

- providing members of the jury panel with directions to be excused if there was a risk they could not act impartially as result of the pre-trial publicity prior to empanelling; and
- providing the jurors with careful directions during the trial and in summing up to focus their attentions and minds on the evidence led in trial and to ignore any publicity they might have been exposed to.[18]

Directions such as these are expressly provided for in the *NSW Criminal Trial Courts Bench Book,*[19] and include a requirement that empanelled jurors be issued with written directions at the opening of a trial.[20] The written directions include information explaining that it is a criminal offence for a juror to make enquiries about the accused or any other matters during the course of trial,[21] which includes conducting any research on the Internet.[22]

[15] Michael Chesterman, Janet Chan and Shelley Hampton, 'An empirical study of criminal jury trials in New South Wales' (Research Report, Law and Justice Foundation of New South Wales, February 2001).
[16] Ibid 9.
[17] *Hughes v The Queen* [2015] NSWCCA 330, [42].
[18] Ibid [55].
[19] Judicial Commission of New South Wales, above n 10, [1–450].
[20] Ibid [1–480].
[21] *Jury Act 1977* (NSW) s 68C.
[22] Judicial Commission of New South Wales, above n 10, [1–480].

Juror compliance with these directions would, however, require active monitoring and reporting by the courts administrators. In the Australian study mentioned above,[23] jurors revealed that they had discovered pre-trial publicity material *during* the trial, which was later shared with other jurors before or during deliberations.[24] This raised concerns for the authors about the accessibility of prejudicial material that resides and endures on the Internet, and may also suggest that judges and counsel underestimate the nature and degree of contact that jurors may have with prejudicial publicity.[25]

Burd and Horan highlight the emergence and growing recognition amongst some judges and academics of the "Googling Juror" who now has ready access to a wealth of prejudicial information on Internet sites within mere seconds. Unless jurors are sequestered, there is no way of monitoring or restraining jurors from conducting their own research into aspects of the trial from the privacy of their own homes.[26] Consequently, the true extent and incidence of the "Googling Juror" is unknown.[27]

The Appeal Court in the *Hughes* case stated:

> For centuries now, courts have had confidence that juries will decide the cases which they are called on to judge, on the basis of the evidence and that they will adhere to the directions which they are given by the presiding trial judges. Experience, including that revealed by this trial, demonstrates that despite fast-moving technological advances which have provided people with enhanced means of communication, jurors still approach their tasks conscientiously.[28]

They endorsed the steps taken by Zahra DCJ in his communications and directions at all stages before, during, and at the end of trial in summing up. The Appeal Court also highlighted the number of questions raised by the jury throughout the trial and in particular, those questions in relation to publicity during summing up.[29] When coupled

[23] See Chesterman et al, above n 15.
[24] Chesterman et al, above n 15, 81.
[25] Ibid.
[26] Roxanne Burd and Jacqueline Horan, 'Protecting the right to a fair trial in the 21st century — has trial by jury been caught in the world wide web?' (2012) 36 *Criminal Law Journal* 103, 112–115.
[27] Ibid.
[28] *Hughes v The Queen* [2015] NSWCCA 330, [70].
[29] Ibid, [74]: The jury asked his Honour to clarify his directions about tendency evidence submitted, and whether or not the evidence showed contamination and collusion of the complainants' witness evidence as a result of the details published in the media in light of earlier directions from his Honour to ignore all media report details as 'not evidence' or facts to be judged by the jurors in the trial, at [74].

with the fact that the jury reached its verdicts on the 10 counts in a staged manner, and could not reach a unanimous verdict in relation to one count, the Appeal Court concluded that it was undoubtedly a jury which attended to his Honour's directions and decided the case on the evidence.[30]

In a majority decision handed down in June 2017, the High Court of Australia dismissed an appeal by Hughes against the decision by the Appeal Court in relation to the issue of tendency evidence.[31] The issue regarding pre-trial publicity was not raised in argument.

V PUBLIC POLICY AND FAITH IN JURORS

The reasoning of the trial judge and Court of Criminal Appeal in *Hughes* is underpinned by a belief that a permanent stay of proceedings in the context of a criminal trial ought not to be granted except in the most exceptional or extreme of cases.[32]

In *Dupas v The Queen*,[33] the High Court noted the imperatives that necessitate such a view being taken of permanent stay applications based on publicity. The Court observed:

> There is nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases, such as those involving heinous acts. That a trial is conducted against such a background does not of itself render a case extreme, in the sense that the unfair consequences of any prejudice thereby created can never be relieved against by the judge during the course of the trial.[34]

The Court also stated:

> [there is] the need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial, the "social imperative" as Nettle JA called it, as a permanent stay is tantamount to a continuing immunity from prosecution. Because of this public interest, fairness to the accused is not the only consideration bearing on a court's decision as to whether a trial should proceed.[35]

[30] Ibid [79]–[80].
[31] *Hughes v The Queen* [2017] HCA 20 (14 June 2017).
[32] *Glennon v The Queen* (1992) 173 CLR 592, 605.
[33] [2010] 241 CLR 237 ('*Dupas*').
[34] Ibid 237 [36].
[35] Ibid 237 [37].

As noted above, in the case of Robert Hughes, the New South Wales Court of Criminal Appeal approved the court's position that fairness will not be undermined due to pre-trial publicity, provided that 'members of the jury panel, prior to empanelling, [receive] directions to be excused if … they could not act impartially as result of the pre-trial publicity'.[36] This process is commonly used in criminal trials, and particularly where the subject matter and/or the pre-trial publicity are of such a nature that prospective jurors are highly likely to have prior knowledge of the case. It is incumbent on the potential juror to apply to be excused if he or she, in considering the trial judge's direction, considers him or herself unable to be impartial.[37]

The opportunity for the defence or prosecution to question members of the jury about impartiality in cases like that of Robert Hughes is severely limited. In *R v Ronen,*[38] whilst considering the issue of whether the defence could have access to the names and addresses of jurors, Ipp JA spoke of the possibility of intimidation of jurors as the primary reason for the restrictive right to challenge and stated:

> [I]t is self-evident that the institution of trial by jury requires the protection of jury members from threats and intimidation. It would be a disaster for the institution if jurors were to be susceptible to intimidation that could influence their findings. For the jury to remain "the community's guarantee of sound administration of criminal justice", it must be protected from outside intimidatory influences.[39]

His Honour acknowledged 'a conflict between the need to protect jurors from intimidation and the desire of accused persons to learn the names and occupations of potential jurors for the purposes of exercising their right of challenge',[40] but said a prohibition on obtaining such information about jurors is necessary to 'protect an essential feature of the jury system, namely, "that the jury should deliberate upon its verdict uninfluenced by an outsider to the trial process"'.[41] These provisions 'protect the very integrity of the system'.[42]

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[36] *Hughes v The Queen* [2015] NSWCCA 330, [55].
[37] In New South Wales the procedure for excuse is set out in s 38 of the *Jury Act 1977* (NSW).
[38] *R v Ronen* [2004] NSWCCA 176 ('*Ronen*').
[39] Ibid 176 [95].
[40] Ibid 176 [96].
[41] (2001) 207 CLR 278 , 302 [67] ('*Brownlee*') (Gaudron, Gummow and Hayne JJ)
[42] *Ronen* 176 [97].

In *Brownlee v The Queen,* Gleeson CJ and McHugh J observed:

> One aspect of the jury system that must be capable of changing, and adapting to the circumstances of the time, is the measures that are taken to guard against the danger of jurors being subjected to improper outside influence. That is because the danger itself changes with varying social conditions and methods of communication.[43]

What has changed in the past two decades in Australia is the capacity for potential jurors to express their views on any topic by way of online media. Online editions of newspapers provide the capacity for readers to comment on stories. More relevantly, Facebook has become a particularly popular forum for individuals to publish their views and opinions on criminal justice matters.[44]

Social media commentary on accused persons can be problematic. As one report puts it:

> While it is possible to isolate a particular newspaper article or a specific television or radio program and find that it is prejudicial, the effect of prejudicial publicity on social media is more likely to be cumulative. That is, it will often be the collective effect of commentary on a case that will constitute the prejudice, rather than any individual comment.[45]

There is another aspect of social media which could be utilised to ensure greater transparency of selection of juries: the ability of counsel for the prosecution and defence in a criminal trial to be able to know the names of prospective jurors and search social media to ascertain if prospective jurors have posted comments on the particular case that they may be selected to adjudicate upon. For example, in relation to the case of Robert Hughes, there were numerous comments made on Facebook, news sites, and other online fora expressing views about Mr Hughes and the allegations published against him. Yet in selecting a jury for the trial of Robert Hughes, there was no capacity for the court to know if those selected as jurors had authored any of that commentary.

Is it good enough that the court simply relied on assurances from those selected for the jury in the initial Hughes case, when asked by the trial judge, that they saw no reason to remove themselves from participation in the trial? In other words, should the court have

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[43] *Brownlee* 278 [27].

[44] Justice Stephen Estcourt, 'Around the Nation: Tasmania, Social Media and Sentencing' (2017) 91 *Australian Law Journal* 266, 266–7.

[45] Jane Johnston et al, 'Juries and Social Media: A Report Prepared for the Victorian Department of Justice'(Research Report, Melbourne: Standing Council on Law and Justice, 2013) 6.

complete reliance on the honesty and memory of each juror? Similar types of questions can arise in criminal trials involving allegations of breaches of anti-terror laws. Should a court know if a prospective juror has expressed views on social media about the defendants and their backgrounds or about the application of anti-terror laws on offenders?

VI IS IT TIME TO DEVELOP A PROCESS FOR INQUIRY INTO JUROR PARTIALITY?

The courts consider the right to challenge a juror on the basis of their partiality to be the most appropriate mechanism to deal with a potential juror who might have expressed views about a case, or been influenced by media. Mason CJ and Toohey J in *Murphy v The Queen* said:

> 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. Recognising 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.[46]

Such a procedure has merit in that it provides a greater level of scrutiny in high profile cases, or cases dealing with subject matter such as terrorism or institutional abuse, than a judge simply asking jurors if there is any reason why they cannot judge a case fairly. However, the idea of prospective jurors being subject to the American voir dire process has not found favour with Australian courts. The New South Wales Court of Criminal Appeal in *Murphy* observed:

> [i]t is not appropriate for this jurisdiction to adopt the practice followed in some other countries of permitting in effect a fishing expedition with each prospective juror. There must be a sound basis made out on a prima facie footing to anticipate the probability or [sic] prejudice on the part of an individual juror. The fortuitous circumstances that one such juror disclosed a concern on her part in conjunction with the media publicity falls short of carrying the case to the point where it can be said that the judge no longer had

[46] *Murphy v The Queen* [1989] HCA 28; (1989) 167 CLR 94, 98–99 (Mason CJ and Toohey J) ('*Murphy*').

> any discretion to exercise in this field and that the only proper decision for him to have made would have been that contended by the appellant [to grant a challenge for cause of each prospective juror].[47]

Dr. Jayant Patel, a doctor accused of serious medical malpractice and incompetence, was the subject of sensational and adverse nation and international publicity prior to his Queensland trial. In this case, the trial judge, Fryberg J, adopted a procedure involving a questionnaire for jurors and some capacity to question jurors on those answers.[48]

VII CONCLUSION

The case of Robert Hughes raised important issues about the impact of extensive pre-trial publicity within traditional and social media on the capacity of jurors to deliberate in accordance with the trial judge's directions. This is not an isolated case. At the time of writing, the laying of criminal charges against Cardinal Archbishop, George Pell, by Victoria Police has again raised these sorts of questions about trial fairness and publicity.[49]

The "game-changing" nature of social media and the traditional media's embrace of its tools allow the comments and attitudes of prospective jurors to be accessed more readily. Given the circumstances, and the importance of an impartial jury as required by the law, it is time for a change. Australian courts may need to be allowed to assess jurors where there has been publicity of any magnitude due to the nature of the alleged crime and the background of the accused. It is one thing for courts to argue that a potential juror can put adverse publicity out of their mind, but quite another to believe they can undertake the same mental exercise if they have actively participated in commentary or publication.

[47] *Murphy v The Queen* (1987) 37 A Crim R 118, 126.
[48] *R v Patel* (No 4) [2013] QSC 62.
[49] See, eg, C Merritt, 'Doubts George Pell can get fair trial due to damaging publicity', *The Australian* (online), 1 July 2017 <http://www.theaustralian.com.au/news/inquirer/doubts-george-pell-can-get-fair-trial-due-to-damaging-publicity/news-story/84fa3f0e51e12d4d7071808e3be44c5e>.

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