



IN THE HIGH COURT OF AUSTRALIA

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Office of the Registry
Sydney No S110 of 2001

Between -

JOHN WILSON

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Applicant

and

STATE OF NEW SOUTH WALES

-

Respondent

Application for special leave to appeal

McHUGH J
CALLINAN J

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TRANSCRIPT OF PROCEEDINGS

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AT SYDNEY ON FRIDAY, 23 NOVEMBER 2001, AT 12.30 PM

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MR J. WILSON appeared in person.

MS C.A. WEBSTER: May it please the Court, I appear for the respondent. (instructed by Crown Solicitor for New South Wales)

McHUGH J: Yes, Mr Wilson.

MR WILSON: I just have to get organised. Have you read the application book?

McHUGH J: I have read the application book, yes.

MR WILSON: Good. This is an appeal against an interlocutory application by Justice Sully, that he alone constituted the court.

McHUGH J: Strictly speaking, it is an application for leave against the order of the Court of Appeal refusing leave to appeal from Justice Sully's judgment.

MR WILSON: Yes, and it all started from the Supreme Court, where Justice Sully said that he would decide the issue of jurisdiction, and I said, no, he cannot, that jurisdiction must be decided by a jury. Anyway, he said, no, that he would decide jurisdiction and as far as he is concerned he is the court and the court does not consist of a judge and a jury, and this is where he is wrong.

McHUGH J: Yes.

MR WILSON: My motion against the Crown is a fight for the right to trial by jury, is the fight against tyranny, because trial by jury is the bulwark of liberty.

McHUGH J: Mr Wilson, courts have always controlled juries, as you no doubt are aware from your reading. You refer to *Penn's Case*. Until 1670 judges attainted, imprisoned or fined jurors for refusing to follow their directions. Then after *Penn's Case*, after Chief Justice Vaughan let the jurors out on habeas corpus, the courts then controlled juries in other ways. By the writ of error and bills of exceptions, they would

MR WILSON: The court is made of a judge and a jury. You are saying the court is a judge.

McHUGH J: Historically, the court was always the court sitting at Westminster, the court en banc, the court of common pleas, the court of King's Bench, and the matter was assigned to a judge to sit on circuit with a jury and even when a jury gave a verdict on circuit, judgment was entered by the Full Court of the court.

MR WILSON: If it is trial by a jury, it is trial by jury.

McHUGH J: Well, if it is trial by jury, but the question is whether or not there is any evidence to go to the jury in the first place.

MR WILSON: Any action – the [Supreme Court Procedure Act 1900](#) makes it quite clear

McHUGH J: Well, that has been repealed.

MR WILSON: Pardon?

McHUGH J: That has been repealed.

MR WILSON: It does not matter if it has been repealed or not, the right remains.

McHUGH J: No, it does not.

MR WILSON: You are saying that the *Interpretation Act* is wrong?

McHUGH J: No, I am not saying that at all. It just does not apply. You do not understand, with respect.

MR WILSON: I understand, and I am entitled to a trial by jury.

McHUGH J: Mr Wilson, just a moment. When the *Interpretation Act* talks about an accrued right, it means a right that has been already obtained, a concrete right.

MR WILSON: Yes, the right to trial by jury.

McHUGH J: No, it does not.

MR WILSON: Are you saying there is no right to trial by jury?

McHUGH J: Of course there is a right to trial by jury, in certain circumstances

MR WILSON: That is what I am claiming. I am claiming the right to trial by jury.

McHUGH J: but not under the *Supreme Court Procedure Act*, which has been repealed.

MR WILSON: Yes, it is. In any action – in any action by consent of both parties, the whole – you know it – the whole or any one

McHUGH J: Yes. It is referred to in your submissions.

MR WILSON:without a jury, so

McHUGH J: But that Act has been repealed. It is not in existence.

MR WILSON: And the *Interpretations Act* says, quite clearly that – section 30 of the *Interpretations Act* 1987:

(i) The amendment or repeal of an Act or statutory rule, does not . . .

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule –

So, in other words, if the right has already been granted, it cannot be taken away.

McHUGH J: That is not what the *Interpretation Act* means, Mr Wilson.

MR WILSON: That is what it says. It says saving of the rights.

McHUGH J: Yes, but if your argument was right, then Parliament could never repeal any Act that gave a right. The right would still exist. That is not the way it operates.

MR WILSON: But Parliament cannot take away the rights of the people. You are quite right, they cannot.

McHUGH J: Well, Parliament takes away rights of people every day, I am afraid.

MR WILSON: But that is what we have got the courts for. That is what we have got a jury for, because the jury has sovereignty.

McHUGH J: No, the jury does not have sovereignty.

MR WILSON: Yes, it does. The jury

McHUGH J: The jury has always been controlled by judges. Even when there was evidence

MR WILSON: No, it has not always been controlled – when you have trial by jury, you have trial by jury. The judge is there just as a manager, or to ensure a fair trial.

McHUGH J: No, it is more than that. The court would set aside a jury's verdict on the ground it was against the weight of the evidence. That has been the case since 1670.

MR WILSON: But initially you must have trial by jury. You must have a jury giving a verdict.

McHUGH J: No, not if there is not evidence to go to the jury, Mr Wilson, and in this

MR WILSON: Decided by who?

McHUGH J: Decided by a judge. That has been

MR WILSON: But if the judge has got no jurisdiction, he cannot decide.

McHUGH J: The judge has had that jurisdiction since

MR WILSON: They do not have the jurisdiction.

McHUGH J: for 300 years.

MR WILSON: No, this is a challenge

McHUGH J: For 300 years judges have been taking away cases from the jury, on the ground that there is no evidence upon which the jury could reasonably find for the plaintiff.

MR WILSON: But that is denying a person the right to trial by jury, and you cannot do that. We are talking about

McHUGH J: Well, judges have been doing it for 300 years in England, before this country was even brought into existence.

MR WILSON: There have been wars and murders and robberies for the last 10,000 years. It does not make it right. This is about vindicating men's rights and enforcing just causes. This is a just cause, because I am fighting for justice. Justice is, as I said, the protection and establishment and the vindication of men's rights, the right to trial by jury. There is no more important institution, in a democratic society, than a jury trial. This is the most important thing, because a jury nullifies bad laws – do you deny that?

McHUGH J: Yes, I do.

MR WILSON: Well, you are wrong.

McHUGH J: Well, Lord Mansfield once said that the jury have got the power, but not the right, to do wrong, and that is absolutely right. He said that in the

MR WILSON: They are not doing wrong if they overthrow bad laws. They are doing right.

McHUGH J: Well, if you live under the rule of law, you are. Otherwise, every jury becomes a judge of what is good for the community.

MR WILSON: Exactly right. They do and they are.

McHUGH J: Well, I do not think many people would agree with that.

MR WILSON: Well, the Attorney-General does. They put out a video which says, "Our jury, our values".

McHUGH J: Yes.

MR WILSON: This is the purpose of a jury.

McHUGH J: Yes.

MR WILSON: The jury is the conscience and the voice of the people, and that the people in a democracy rule. That is what democracy means.

McHUGH J: Well, you have – yes.

MR WILSON: Anyway, I would like to take you back to the first issue, which is Justice Sully

McHUGH J: Well, he says that your statement of claim does not disclose a cause of action and he struck it out.

MR WILSON: But I say he has got no jurisdiction to make anything like that.

McHUGH J: Well, judges have been doing that for a very long period of time.

MR WILSON: Well, in Halsbury's Laws of Australia – you have got that in the recent lot of authorities on file.

McHUGH J: Yes, here it is. It is the first matter, yes.

MR WILSON: Clear as day. It says that:

Special pleas Instead of pleading not guilty to the general issue, the accused may raise a special plea as to the jurisdiction of the court.

McHUGH J: Yes.

MR WILSON: Right, and that plea is determined by a jury. It says quite clearly that a jury determine the jurisdiction of the court.

McHUGH J: Where does it say that? Because if it says that, it is wrong.

MR WILSON: Yes. Now, it says here, going down further, **No 5** – it starts with **No 5** :

Where the issue is to be determined by a jury, the normal procedure is that a jury is empanelled to determine the special plea –

Do you see that?

McHUGH J:

and if found against the accused.

But a special plea may be a question, for example, about whether you are fit to plead, and that would be

MR WILSON: It is about jurisdiction. It says “jurisdiction”, the second line, “as to the jurisdiction of the court”.

McHUGH J: Yes:

the accused may raise a special plea as to the jurisdiction of the court.

MR WILSON: Well, the jurisdiction of the court is that if there is no jury there is no court.

McHUGH J: But a plea of pardon

CALLINAN J: Mr Wilson, if you look at the reference, the footnotes

MR WILSON: You have already denied the right to trial by jury.

CALLINAN J: I was just going to point out something to you in Halsbury.

MR WILSON: Okay.

CALLINAN J: If you look at the footnotes, you will see that they are references all to criminal cases and they are talking about – the authors are talking about “autrefois convict” or “autrefois acquit”, which is a jury issue and which goes to the jury. They are not talking generally about jurisdiction.

MR WILSON: My case does demand a jury, because it is about false imprisonment, and that is covered by the *Supreme Court Act*, section 86, I think it is. I will just get that one out. I have marked it No 12 in my list of authorities:

Common law claim – fraud, defamation etc

Proceedings on a common law claim in which there are issues of fact –

go to No (b):

on a claim in respect of defamation, malicious prosecution, false imprisonment . . .

shall be tried with a jury.

So therefore

McHUGH J: Yes, but there are other sections – I just have not found the one you refer to – but there are other sections, 88 if I remember rightly, in New South Wales, or 89 or 89(a) that give the court power to dispense with the juries even in those cases.

MR WILSON: That is no law.

McHUGH J: Well, it is a law of the Parliament.

MR WILSON: There is no law. Parliament cannot make a law to take away the rights of the people. This is clearly explained in Quick and Garran in their Annotated Constitution of the Commonwealth of Australia. I have put that in also as an applicant's authority.

McHUGH J: Well, Quick and Garran are talking about the Australian Constitution, and there is no doubt that Parliament cannot pass a law which is beyond the enumerated powers conferred on it by the [Constitution](#).

MR WILSON: Yes, yes.

McHUGH J: But Parliament takes away rights every day.

MR WILSON: They have got no right to take away rights. This is why we have courts.

McHUGH J: No, we do not have

MR WILSON: This is why we have juries. This is why we have ordinary people deciding the welfare of the community. This is what the point of the jury is. We cannot leave our democracy in the hands of an elite. That is called an "oligarchy". This is not democracy. In a democracy, it is ruled by the people. The people have sovereignty, and the people, represented by a jury, can nullify any bad law, and it is a bad law that takes away the rights of the people.

McHUGH J: Yes.

MR WILSON: And any part of it that takes away the rights of the people, they are not representing the people. They are the enemy of the people.

McHUGH J: Well, the accepted theory, Mr Wilson, is that you must change the composition of the members of Parliament but

MR WILSON: No, you do not, because this is why you have juries.

McHUGH J: No.

MR WILSON: The jury nullify bad laws. This is a bad law.

McHUGH J: I am sure that somewhere you would be able to find some writing by some writer which would support what you have just said, but that is not the accepted theory.

MR WILSON: It is the accepted reality and it is the accepted justice, and this is what a court is here to do, is to vindicate men's rights

McHUGH J: No, it is to do justice according to law. We are bound by the law

MR WILSON: No, it is not according to the law. No, it is not according to the law. I was in the Court of Appeal last week and a judge in the Court of Appeal said, "according to law", and I said, "No, that's not what your oath says. Your oath says after the law". In other words, you give consideration to the law and, if that law is a bad law, that is nullified by the courts. After, not according to – do you know your own oath of allegiance and oath of office?

McHUGH J: Well, my oath is probably slightly different from

MR WILSON: It still says that you have sworn allegiance to Her Majesty Queen Elizabeth II of England.

McHUGH J: That is right.

MR WILSON: And that entails that you will respect and enforce the concepts of the Coronation.

McHUGH J: No. The oath in the [Constitution](#) says:

I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. SO HELP ME GOD!

MR WILSON: Did you say Queen Victoria or Queen Elizabeth?

McHUGH J: No, Queen Victoria is what is in the schedule.

MR WILSON: Yes, what did you say?

McHUGH J: I cannot recollect.

MR WILSON: You cannot recollect what you said?

McHUGH J: Thirteen years later, no, I cannot. I cannot remember the precise terms of the commission.

MR WILSON: It would have stuck in your mind, if you say, "I am swearing allegiance to a dead Queen". Would that not register in your mind?

McHUGH J: No, "Her heirs and successors".

MR WILSON: Yes.

McHUGH J: Well, Queen Elizabeth is an heir and successor.

MR WILSON: That is right. So, therefore, you are swearing allegiance to Queen Elizabeth II. This is where the Coronation comes into force, because the whole principle of the Coronation is to enforce royal law and that the Queen would exercise law and justice in all her judgments. She has accepted, as part of the Coronation, the Holy Bible which is – you have got it under No 19 – “This is the royal Law”, and “the royal Law”, when it is referred back to the Bible, is very clear. It is made up of two commandments. One is to “love the Lord your God” and the other one is to “Love your neighbour as yourself”, and on that, all law hangs.

McHUGH J: But the Queen herself is subject to law.

MR WILSON: That is right, and so are you, and so am I, and so is everybody in Australia.

McHUGH J: Yes, yes.

MR WILSON: Yes.

McHUGH J: And under the theory of our [Constitution](#), the law is laid down by Parliament subject to what is in the Australian Constitution.

MR WILSON: That is right, and if a Parliament laid down a law which exceeds their authority, that is no law, and this is what the courts are there to declare.

McHUGH J: Well, we can accept that, but that does not mean that Parliament, such as the Parliament of New South Wales, which has reserve powers under section [106](#) and [107](#) of the [Constitution](#), cannot make laws, if it wants to, abolishing juries. They can even abolish trial by jury in criminal cases if they want to.

MR WILSON: No, they cannot.

McHUGH J: Well, you assert that but

MR WILSON: Well, it is in the [Constitution](#) . It is in both Constitutions.

McHUGH J: No, it is not in the [Constitution](#) at all.

MR WILSON: It is in the New South Wales Constitution. I will just find that – No 13, you will find No 13.

McHUGH J: That is just a general:

Power to make laws for the peace, welfare, and good government of New South Wales –

is it not?

MR WILSON: No 13 it is from, yes. If you look up the top of the page:

“The Legislature” means His Majesty the King

McHUGH J: Yes.

MR WILSON: Right. So it is the King who makes the laws. In other words, the King shall:

subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases –

So, in other words, the King cannot make laws to take away the rights of the people. There is no provision in any [Constitution](#) , either New South Wales or the federal [Constitution](#) , that says, “Yes, the Parliament can take away the rights of the people.”

McHUGH J: But section 5 says:

The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

MR WILSON: Yes.

McHUGH J: And that includes abolition of trial by jury in civil cases, which it has done.

MR WILSON: No, it does not. It says, “subject to the provisions”

McHUGH J: Of the Australian Constitution.

MR WILSON: And where are the provisions that say that they can do that?

McHUGH J: No, but there is nothing in the Australian Constitution which prohibits the New South Wales Parliament from doing it.

MR WILSON: There is nothing that says it can. This is what Quick and Garran says.

McHUGH J: Quick and Garran is dealing with generalities and it is talking about the Parliament of the Commonwealth.

MR WILSON: Yes, and that is what they – the power of the Commonwealth applies to the States, because it says here that the legislature – the power of the legislature in New South Wales makes laws according to the provisions of the Commonwealth of Australia. So, if the Commonwealth Constitution does not grant powers to a Parliament to make laws, then neither can the State. In Quick and Garran – this is page 346. I think I put that in as an authority.

McHUGH J: Yes, that is No 22 on your list.

MR WILSON: 22, is it? Yes, there it is. It says:

A law in excess of the authority, conferred by the **Constitution**, is no law

McHUGH J: Well, that is right.

MR WILSON: Well, there is no law that says a person has no right to a trial by jury.

McHUGH J: Yes, but Parliament of New South Wales is given general power under its **Constitution** and was given by the constating statutes back in 1855, 1856, and then under sections 106 and 107 of the Constitution:

Every power of the Parliament . . . unless it is by this **Constitution** exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth

MR WILSON: And then section 109 of the Commonwealth Constitution says:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

McHUGH J: Yes, but there is no relevant law of the Commonwealth here.

MR WILSON: There is no provision in the **Constitution** that says the federal Parliament can make that law.

McHUGH J: Yes.

MR WILSON: Okay. So there is no provision, there is no allowance for the New South Wales Parliament to make a law taking away the right to trial by jury.

McHUGH J: Mr Wilson, their power is continued by sections 106 and 107 of the Constitution. I am afraid your time is up. Thank you.

MR WILSON: Pardon?

McHUGH J: Your time is up, thank you.

MR WILSON: That is the end of my appeal? There is an awful lot more.

McHUGH J: That is the end of the time allotted for you.

MR WILSON: Can I have an extension?

McHUGH J: No, Mr Wilson.

MR WILSON: You are denying a person to argue for their right to trial by jury?

McHUGH J: Mr Wilson, I am denying you the right to extend your argument any longer than it is. Now, look, I have read your arguments and I

CALLINAN J: I agree with everything that Justice McHugh is saying.

MR WILSON: But you have already denied the right to trial by jury in a previous case.

CALLINAN J: Mr Wilson, you are wasting our time. You have had your allotted

MR WILSON: Because I am up against elite judges

CALLINAN J: Would you please not interrupt me.

MR WILSON: who have got no consideration of the people

CALLINAN J: Please do not interrupt me.

MR WILSON: These judges are the enemy of the people, because they are denying the people their inalienable rights, their constitutional rights. Their rights they have had since Magna Carta and rights that have been enshrined

CALLINAN J: Mr Wilson, your time is up.

McHUGH J: Mr Wilson, your time is up. Would you mind resuming your seat, please.

MR WILSON: But I would refer just to one little

McHUGH J: Mr Wilson, your time is up.

MR WILSON: My time was up before I even got into the Court, because you have already pre-judged this case.

McHUGH J: No, Mr Wilson.

MR WILSON: You have been arguing against the right to trial by jury. You have been arguing

McHUGH J: Mr Wilson, I have been putting matters to you. Now, there are other litigants waiting to be heard. Would you please resume your seat, please.

MR WILSON: Do you accept that you have been arguing against the right to trial by jury?

McHUGH J: Mr Wilson, would you please – I want to give our reasons, which will be very short reasons, for dismissing this application. Would you please resume your seat.

MR WILSON: Could you explain one point of procedure to me?

McHUGH J: Mr Wilson, please resume your seat.

MR WILSON: No, this is not the argument.

McHUGH J: No, Mr Wilson, there are times allotted for argument. There are a large number of cases in the list we have to get through.

MR WILSON: And this is the most fundamental, the most important, and this is a fight

McHUGH J: Mr Wilson, please.

The Court has considered the submissions and the argument of Mr Wilson in this case. The Court is of the view that there is no ground for thinking that the decision of the Court of Appeal is wrong. The application is dismissed.

AT 12.55 PM THE MATTER WAS CONCLUDED