

AUSTRALIA / JUDGMENT

Menon v R; Onley v R

[2025] NSWCCA 56

COURT

Court of Criminal Appeal

DECIDED

17 April 2025

BEFORE

Ward ACJ at [1];
Leeming JA at [2];
Harrison JA at [70]

CASE / FILE NUMBER

2017/148776; 2024/441558 (Menon)
2017/149208; 2024/464440 (Onley)

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Court of Criminal Appeal

Supreme Court

New South Wales

Amendment notes

Medium Neutral Citation: Menon v R; Onley v R [2025] NSWCCA 56

Hearing dates: 19 March 2025

Decision date: 17 April 2025

Before: Ward ACJ at [1];
Leeming JA at [2];
Harrison JA at [70]

Decision: In each of 2017/148776 and 2024/441558 brought by Mr Menon, and 2017/149208 and 2024/464440 brought by Mr Onley:

1. Dismiss the applications for leave to appeal from the decision of Sweeney J made on 14 November 2024.
2. Dismiss the application made in this Court for a request to the sheriff to conduct an investigation.
3. Vary the non-publication orders made on 19 March 2025 so as to extend to paragraphs 50-63 of these reasons.
4. Note that in the first instance, these reasons will be provided only to the parties and not published on CaseLaw.
5. Any application to vary the extent to which the non-publication order applies to these reasons to be made by notice of motion and supporting materials and submissions to be filed and served within 14 days of today, with any materials and submissions in response from any other party to be filed and served within 14 days thereafter, and any materials or submissions in reply to be filed and served within 7 days thereafter, with a view to any such application being determined on the papers.

Catchwords:

CRIME – application for request to sheriff for investigation of potential juror impropriety pursuant to s 73A of Jury Act 1977 (NSW) – application dismissed by judge – whether application could be renewed in appellate court on same basis – where judge who presided over trial had already investigated the matter – where previous investigation took place 18 months ago in immediate aftermath of incident – where previous investigation obtained evidence on oath – prospects of second investigation resulting in different evidence speculative – application refused
JURISDICTION – nature of decision by Supreme Court judge to refuse application for request for sheriff to conduct investigation – nature of purported appeal from refusal of such application – availability of appeal under s 5F or s 22 of Criminal Appeal Act 1912 (NSW) – whether right of appeal under s 101 of Supreme Court Act 1970 (NSW) excluded by s 17 – whether decision judicial or administrative – whether decision amenable to judicial review

Legislation Cited:

Civil Procedure Act 2005 (NSW), ss 56-60
Constitution, Ch III
Court Suppression and Non-publication Orders Act 2010 (NSW), s 8
Crimes (Appeal and Review) Act 2001 (NSW), s 78
Criminal Appeal Act 1912 (NSW), ss 5F, 22
Criminal Code Act 1995 (Cth), ss 11.5, 135.4, 400.3
Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)
Jury Act 1977 (NSW), ss 68, 73A, Sch 8
Jury Amendment Act 2024 (NSW)
Supreme Court Act 1970 (NSW), ss 17, 64, 69, 101

Cases Cited:

Attorney-General (Cth) v Huynh [2023] HCA 13; 408 ALR 684
Bajramovic v Calubaquib [2015] NSWCA 139; 71 MVR 15
Brimaud v Honeysett Instant Print Pty Ltd (1988) 217 ALR 44
George v Rockett (1991) 170 CLR 104; [1998] HCA 26
Hogan v Australian Crime Commission (2010) 240 CLR 651; [2010] HCA 21
Huynh v Attorney General (NSW) (2021) 107 NSWLR 75; [2021] NSWCA 297
Huynh v Attorney General (NSW) (2023) 112 NSWLR 149; [2023] NSWCA 190
Levy v Bablis [2012] NSWCA 128
Liu v The Age Company Ltd (2016) 92 NSWLR 679; [2016] NSWCA 115
Lodhi v Attorney-General (NSW) [2013] NSWCA 433; 241 A Crim R 477
Momcilovic v The Queen (2011) 245 CLR 1; [2011] HCA 34
Nominal Defendant v Manning (2000) 50 NSWLR 139; [2000] NSWCA 80
Ostojic v Trazmet Pty Ltd [2005] NSWCA 145
Petroulias v The Hon Justice McClellan [2013] NSWCA 434
Proietti v Proietti [2025] NSWCA 1
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
R v Bechalany [2021] NSWSC 1262
R v Cranston (No 29) [2023] NSWSC 211
R v Issakidis [2016] NSWSC 1102,
Sinkovich v Attorney General of New South Wales (2013) 85 NSWLR 783; [2013] NSWCA 383
WO v Director of Public Prosecutions (NSW) [2009] NSWCA 370

Category:

Principal judgment

Parties:

In 2017/148776 and 2024/441558: Dev Menon (Appellant in 2017/148776; Applicant in 2024/441558)
The Crown (Respondent)

In 2017/149208 and 2024/464440: Jason Onley (Appellant in 2017/149208; Applicant in 2024/464440)
The Crown (Respondent)

Representation:

Counsel: P R Boulten SC with G Antipas (Mr Menon)
R Johnson with A Schatz (Mr Onley)
S Callan SC with C Tran and E McGinness (Crown)

Solicitors: Hardin Law (Mr Menon)
Kingston Fox (Mr Onley)
Commonwealth Director of Public Prosecutions (Crown)

File Number(s): 2017/148776; 2024/441558 (Menon)
2017/149208; 2024/464440 (Onley)

Publication restriction: See order 3 above, and addendum below
Decision under appeal

Court or tribunal: Supreme Court of New South Wales

Jurisdiction: Common Law Division

Citation: [2024] NSWSC 1416

Date of Decision: 14 November 2024

Before: Sweeney J

File Number(s): 2017/148776; 2017/149208

JUDGMENT

WARD ACJ: I agree with Leeming JA.

LEEMING JA: This litigation is procedurally complex, and it concerns s 73A(1) of the Jury Act 1977 (NSW), a deceptively simple provision, which empowers the sheriff to investigate suspected improper conduct by a jury. However, the substance of the application is relatively straightforward. For the reasons which follow, I have concluded that the inquiry conducted by the trial judge in the immediate aftermath of the disclosure of the potential juror impropriety leads to the conclusion that the applications should be dismissed.

Parts of these reasons cannot be published because of the protection statute gives to jurors, reflected in s 68 of the Jury Act. However, it is desirable in the interests of the administration of justice for that part which does not infringe the anonymity and privacy of jurors to be published. Indeed, in my opinion the requirement under the Court Suppression and Non-publication Orders Act 2010 (NSW) for orders to be “necessary” for one or more of the purposes in s 8(1) carries with it an obligation to carve out from the order those parts of this Court’s reasons which do not

impinge upon jurors' anonymity and privacy, and confine it to the parts that do. After all, if part of this Court's reasons can be published without trespassing on jurors' entitlement to anonymity and privacy, then it cannot be "necessary" for that part of the reasons to be the subject of a non-publication order. "Necessary" in this context is a strong word: *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [30]. With that in mind, consideration of the factual aspects of the dispute has been deferred to the conclusion of these reasons. In the first instance, these reasons will only be made available to the parties, and initially a non-publication order will extend only to part of them, with the parties being given an opportunity to be heard whether any different order should be made.

Background

Mr Dev Menon and Mr Jason Onley were convicted, following a long trial by the Supreme Court constituted by judge (Payne JA) and jury, of offences under the Criminal Code Act 1995 (Cth) of conspiring dishonestly to cause loss to the Commonwealth (s 135.4(3)) and conspiring to deal with the proceeds of crime (ss 11.5(1) and 400.3(1)). Both men have filed appeals against their convictions.

Approximately 18 months after their convictions, Messrs Menon and Onley applied to the Supreme Court to request the sheriff, pursuant to s 73A of the Jury Act, to investigate the jury which convicted them. They made those applications for the same reasons. The relevant form of s 73A is the form it took prior to amendments made by the Jury Amendment Act 2024 (NSW), those amendments only applying if the jury was empanelled after the amendment commenced: Jury Act, Schedule 8, Pt 14, cl 23(2). In the applicable form, s 73A provided as follows:

73A Investigation by sheriff of jury irregularities

- (1) If there is reason (including a report under section 75C) to suspect that the verdict of a jury in a trial of any criminal proceedings may be, or may have been, affected because of improper conduct by a member or members of the jury, the sheriff may, with the consent of or at the request of the Supreme Court or District Court, investigate the matter and report to the court on the outcome of the investigation.

The applications, both made in September 2024, came on for hearing on 30 October 2024. The primary judge reserved, and refused the applications for reasons given on 14 November 2024. Her Honour's reasons are the subject of a non-publication order.

Each of Messrs Menon and Onley commenced separate proceedings in the Court of Criminal Appeal and in the Court of Appeal, doing so because of concerns as to which of those courts has jurisdiction, seeking to appeal from the refusal of their applications. For that reason, the Court was constituted simultaneously as the Court of Appeal and the Court of Criminal Appeal.

Procedural complexity

The procedural complexity has two sources. The first is jurisdictional. The second is forensic.

Jurisdictional complexity

The jurisdictional complexity arises in two distinct ways. The first turns on the characterisation of the application determined by Sweeney J. Is her Honour's decision to be regarded as connected to the criminal trial in which the concern about the jury occurred, or alternatively is it connected with the pending appeal against conviction? (I note that it may answer both of those descriptions.) The characterisation matters because statute provides different rights of appeal, to different courts, based on the nature of the order which is the subject of challenge. I shall outline the various permutations below, but only briefly, because as will become apparent the points were not the subject of oral argument and need not be determined.

If Sweeney J in fact constituted the Court of Criminal Appeal, exercising a power of that Court incidental to the pending appeals in that Court which was capable of being exercised by a single Judge of the Supreme Court pursuant to s 22 of the Criminal Appeal Act 1912 (NSW), then the application could be renewed before the Court of Criminal Appeal constituted by three judges: see s 22(2). However, while s 22(1) empowers that Court constituted by a single judge to order the production of a document and the examination of any person, those powers do not explicitly extend to a request to the sheriff to undertake an investigation. Moreover, so far as the Court's records disclose, Sweeney J was not constituted for that purpose pursuant to s 3 of the Act, and for what it is worth, the medium neutral citation given by her Honour to her reasons was "NSWSC" rather than "NSWCCA".

Alternatively, if Sweeney J constituted the Supreme Court, then there is a question whether the order is "an interlocutory judgment or order given or made in proceedings on indictment in the Supreme Court" by reference to the trial which took place in the Supreme Court constituted by Payne JA and a jury. If so, then s 17 of the Supreme Court Act 1970 (NSW), read with paragraph (a1) of the Third Schedule, applies, and no appeal to the Court of Appeal is available pursuant to s 101 of the Act: see *WO v Director of Public Prosecutions (NSW)* [2009] NSWCA 370 at [4]-[6]. However, at least arguably an appeal would lie to the Court of Criminal Appeal pursuant to s 5F(3) of the Criminal Appeal Act. Telling against this is the fact that the trial completed with the sentencing of the last co-offender, more than a year ago. The point of the inquiry sought by Messrs Menon and Onley is not to discharge a jury in a pending trial, but to obtain evidence in support of a ground of appeal to quash the jury's verdicts.

A third possibility is that Sweeney J's decision although made in proceedings on indictment in the Supreme Court was not an "interlocutory judgment or order" within the meaning of s 5F(3), in which case no appeal lies from it, in the same way that no appeal lies from many procedural or evidentiary rulings in a trial on indictment.

A fourth possibility is that Sweeney J was exercising an administrative power, not dissimilar to an application for an inquiry into a conviction pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 (NSW), considered in *Sinkovich v Attorney General of New South Wales* (2013) 85 NSWLR 783; [2013] NSWCA 383. If so, then no appeal would lie, but the decision would be subject to judicial review, and it would be open to treat the applications invoking the appellate

jurisdiction as applications seeking judicial review on the basis of error of law on the face of the record (perhaps with the further complexity concerning the applicability of the modification of the common law expanding the record for the purposes of judicial review effected by s 69(4) of the Supreme Court Act if s 17 applies). It will be seen below that I favour this being the correct characterisation of the decision of Sweeney J.

The second dimension of jurisdictional complexity is that the applicants were prosecuted under federal law. Thus the trial was determined, and the pending appeals are to be determined, in the exercise of federal jurisdiction. I shall pass over the considerations bearing upon whether the application for an investigation and its refusal is an aspect of the same “matter” for the purposes of Chapter III of the Commonwealth Constitution. The complexity thereby introduced is illustrated by the decisions in *Huynh v Attorney General (NSW)* (2021) 107 NSWLR 75; [2021] NSWCA 297 and *Attorney-General (Cth) v Huynh* [2023] HCA 13; 408 ALR 684; see also *Petroulias v The Hon Justice McClellan* [2013] NSWCA 434 at [15]-[16]. This complexity is acute if Sweeney J’s decision is administrative, because of the possibility that the provisions in the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) are engaged: see *Huynh v Attorney General (NSW)* (2023) 112 NSWLR 149; [2023] NSWCA 190.

The applicants’ forensic decisions

The Court did not receive full submissions on the complexities sketched above, and there were no oral submissions, following decisions made by the applicants at the commencement of the appeal. Those decisions may have been communicated to the Crown in advance, but no advance warning was given to the Court. They reflected the exchange of written submissions on jurisdiction prior to the hearing, which addressed aspects of the complexity summarised above.

At the outset of oral submissions, senior counsel for Mr Menon said:

BOULTEN: ... Although I maintain that the Court that should be dealing with this matter is the Court of Criminal Appeal, I am stepping back from the submission that this is an appeal under s 5F. That’s really because when you consider what proceedings for the prosecution of offenders on indictment in the Supreme Court means, I don’t think that what Sweeney J did can be described as part of proceedings within the meaning of s 5F(1)(a).

WARD ACJ: Yes.

BOULTEN: So that puts us much more in line, but not completely in line with the prosecution. I’m not 100% sure that the Court of Criminal Appeal can deal with the matter by way of an appeal under s 22 of the Criminal Appeal Act, but what is clear from the authorities is that the Court of Criminal Appeal can deal with this application as if it’s a fresh application from the get go, from the start, without even having to consider whether it is an appeal from the lower court or not.

WARD ACJ: And without having to consider whether there was any error on the part of the primary judge.

BOULTEN: That's correct. If that's the course that you take, then there is no need for anyone to establish a discrete error. That might be the case also if it is determined that s 22(2) can be utilised to review what happened in the Court below in front of Sweeney J.

Counsel for Mr Onley took the same approach. The Crown agreed:

WARD ACJ: So then, Ms Crown, it would appear that the position of the applicants is that this Court is being asked to exercise the power under s 73A afresh?

BOULTEN: As the Court of Criminal Appeal.

WARD ACJ: As the Court of Criminal Appeal.

CALLAN: Yes, your Honour, it appears certainly an available course for this Court to take and the Crown, whilst seeking to identify the various routes by which this Court might have jurisdiction, has, in the main in its written submissions, focused on the substance, which is this Court considering, as it were, by way of reconsideration under s 22 or a fresh application under 73A the question in 73A as to whether the applications ought be granted.

At the time I raised concerns about the course adopted by the parties:

LEEMING JA: I think just to clarify what was in my mind, I was thinking about some floodgates. I don't much like the notion of, in effect, being able to raise up to the Court of Appeal de novo without having any appeal, but this is unusual because you have a pending appeal.

The response was that "it has been done before" and "Courts of Criminal Appeal have ordered an inquiry where there has been an appeal ground like this". I understood that to be a reference to *Lodhi v Attorney-General (NSW)* [2013] NSWCA 433; 241 A Crim R 477. I shall return to this below. I do not think that the parties' joint position was correct.

The construction of s 73A

Section 73A(1) requires careful textual analysis. It is not drafted as clearly as it might be. It turns out that the critical words for present purposes are "or at the request of the Supreme Court", despite their being buried in a phrase towards the end of the sentence. That comes about in the following way.

Section 73A(1) comprises a single sentence. Its subject is "the sheriff". The section confers a discretionary power on the sheriff. It uses the orthodox language of "may" to do so. Its basic structure is "If [condition is satisfied] the sheriff may ... investigate the matter and report". The power is to conduct an investigation and make a report to the Court.

A precondition to the exercise of the power conferred upon the sheriff to conduct an investigation and make a report is the existence of a reason to suspect that the jury's verdict may be or may have been affected because of some improper conduct. This is found in the opening words of the sentence (the protasis or "if clause"). Perhaps because of the placement of the words imposing the precondition to the exercise of the power at the beginning of the sentence, they

were given prominence at the hearing. Perhaps it was also because the precondition is readily satisfied. The concept of “reason to suspect” is an undemanding test, as was said in *George v Rockett* (1990) 170 CLR 104 at 115-116; [1990] HCA 26. The facts which can reasonably ground a suspicion may be insufficient reasonably to ground a belief.

The touchstone of the provision is “improper conduct”. Thus for example in *R v Bechalany* [2021] NSWSC 1262 an application was dismissed because mental illness (or the potential of mental illness) on the part of a juror was not, without more, “improper conduct”. In this Court, argument proceeded on the basis that the subject matter of the proposed investigation might amount to improper conduct, and I shall proceed on that basis.

If the precondition to the sheriff’s power is satisfied, the sheriff is not obliged to conduct an inquiry. The power is discretionary. It follows that the sheriff is not obliged to seek the consent of the relevant court.

If the precondition to the sheriff’s power is satisfied and the sheriff is minded to conduct an inquiry, he or she remains unable to conduct any investigation until and unless the sheriff obtains the consent of the relevant court.

I have laboured the foregoing, which is straightforward, because it gives work for all of the words of the section to do, save for the critical words “or at the request of the Supreme Court”.

Applying the orthodox principle of construction that a court should strive to give meaning to all of the statutory words (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [71]), and consistently with the course taken in *Lodhi*, it follows that those words impliedly confer a separate power upon a different body (the Supreme Court or the District Court) to do something different, namely to request the sheriff to conduct an investigation and report upon it.

That is consistent with what occurred in *Lodhi* and *Petroulias*. There, the applications for judicial review of the decision of the Court not to consent, were dismissed. But in both decisions (which were delivered on the same day), the Court considered the application afresh, on the basis that the application for consent could also be treated as a request made to the Court of Appeal. The Court of Appeal acceded to the application for a request in *Lodhi*, but dismissed it in *Petroulias*.

The conclusion is that s 73A(1) authorises two distinct processes. Both lead to an investigation and report. However, one starts with the sheriff and requires the relevant court’s consent. The other starts with a request from the court. The applicants have sought to avail themselves of the latter.

Section 73A(1) leaves a deal of implication concerning the circumstances when the relevant court will make a request. To what constraints is the power subject?

The first question is whether a precondition of the implied power conferred upon the court is the reasonable suspicion that a verdict may have been affected because of improper conduct. All parties in this Court proceeded on the basis that those words were a necessary condition for the

exercise of power by the Supreme Court, although none sought to construe the provision in the manner indicated above. The parties' approach in this respect was correct. The grammatical structure of the provisions supports it. As a matter of ordinary parsing of the section, the initial conditional clause is apt to apply distributively, so as to qualify both the express conferral of power upon the sheriff and the implied conferral of power upon the Supreme Court. And there is no good reason to request the sheriff to investigate unless there is some reason to suspect there is something worth the effort of doing so.

The second question of construction is whether the existence of a reasonable suspicion is a sufficient condition to engage the power. Much of the submissions in this Court proceeded on the basis that all that was needed to be satisfied was that there be a reasonable suspicion and then the power would be exercised as of course. That may have been mere rhetoric, but in any event it seems to me to be wrong. For one thing, the section confers a power, rather than an obligation, upon the court to make a request. For another, there are many considerations which bear upon the exercise of the power. In particular, the consideration which is plain on the face of the section, and probably the reason for the compressed mode of drafting, is the possibility that the sheriff may choose not to conduct the investigation, in which case the offender might apply to the Supreme Court. Highly relevant to the exercise of the discretionary power on the Supreme Court is whether an application has already been made to the sheriff and if so, what was the result, and if it has been refused, what were the reasons for doing so. And highly relevant to the exercise of the discretionary power will also be whether there has already been an inquiry into the jury, whether by the sheriff or otherwise.

The applications for a request should be dismissed because they duplicate those previously made without any claim to error by the primary judge

Section 73A appears to proceed on the basis that in the ordinary course when a trial has concluded, application will be made to the sheriff. The sheriff is the subject of the provision, and power is conferred upon her to conduct the investigation. Although the sheriff cannot do so unilaterally, the fact that the sheriff may do so "with the consent" of the relevant court demonstrates that at least in some cases application should be made directly to the sheriff.

If actual or potential juror impropriety is observed by a party during a trial, then it would be natural for the judge presiding over that trial to be alerted, and a range of possibilities may be open, including requesting the sheriff to conduct an inquiry. It is also possible that the sheriff might notice a potential juror impropriety during a trial, in which case an investigation can only be conducted with the consent of the judge.

The significance of *Lodhi*

The significance of *Lodhi v Attorney-General (NSW)* was misunderstood by the parties to these proceedings, and in a variety of ways.

This Court was told that no application had been made to the sheriff by Messrs Menon and Onley. It was added on behalf of Mr Menon that he was unaware of any case where application had been made first to the sheriff, as opposed to a Court. But *Lodhi* was such a case. Another is *R v Issakidis* [2016] NSWSC 1102, see at [8].

There is nothing in the section which requires an application to be made first to the relevant court, and indeed, given the focus of the section on the sheriff, there is some textual support for the proposition that the provision primarily envisaged application first being made to the sheriff, with requests from the court being by way of alternative. In the present case, the applications were made some 18 months after the jury was discharged. I can see good reasons for it being preferable in such a case that it be made to the sheriff in the first instance. There is no longer a judge presiding over the trial. In a case like the present with multiple defendants, the sheriff and only the sheriff will be in a position to know whether there has previously been an investigation into the jury. But whether or not the application is made initially to the sheriff, there will be no investigation until the relevant court either consents to it or requests it. There is plainly no obligation first to approach the relevant court.

It was also wrong to proceed on the basis that *Lodhi* authorised the making of a further application on the same material to the Court of Criminal Appeal. In *Lodhi* there had been an application made to the sheriff, who sought the Court's consent, which was refused, and proceedings for judicial review of the refusal of consent were heard by this Court. Those applications were dismissed. That emerges directly from the background recounted in [4]-[9], and confirmed in [11]: "the proceedings were directed to the refusal by a judge of the Supreme Court to consent to the sheriff's exercise of the statutory power".

Lodhi was a case where an application had been made to the sheriff, who sought the consent of the Supreme Court, which was refused, leading to proceedings for judicial review of the administrative act of refusing. Those proceedings were heard and determined by the Court of Appeal. There were two proceedings, and both were dismissed. There was an application for leave to appeal, which was plainly incompetent, there being no judgment or order in any proceeding, and an application under s 69 of the Supreme Court Act which was dismissed because the complaint (absence of reasons) was not a valid ground of review. Nonetheless, the Court took the view that "the application in these proceedings can be seen as a further request for consent": at [24].

That said, it is true that there is a peculiarity in *Lodhi* in that although the sheriff had sought the Court's consent, and the Court framed its analysis by stating, after dealing with both proceedings, that "[i]t remains necessary to consider whether consent to the investigation by the sheriff should nevertheless be granted": at [32], towards the end of the reasons, it was said that the Court was "being asked to exercise the power of request or consent under the Jury Act": at [62], and the ultimate order made was:

In the exercise of its power under s 73A of the Jury Act 1977, and such other jurisdiction as may be available in the administration of criminal justice, the Court requests the Sheriff to investigate whether a member of the jury which convicted the applicant of charges under the Criminal Code (Cth) in June 2006 may have been ineligible to serve as a juror pursuant to Sch 2, item 12 of the Jury Act 1977.

For that reason it is easy to see why *Lodhi* might be regarded as a case where a request was made to the sheriff by the Court, as opposed to seeking the Court's consent.

An exercise of judicial power?

Because in *Lodhi* an appeal to the Court of Criminal Appeal had already been dismissed, it was held that the Court when considering whether to grant consent was not exercising judicial power or a power ancillary to judicial power, but instead an administrative function: at [19]. It was common ground when I raised the point during the hearing that this Court was exercising a power ancillary to judicial power, because of the pending appeal to the Court of Criminal Appeal by the applicants. Because this was common ground, it was not the subject of debate. But I doubt that it was correct.

Of course, whether or not a function is judicial or administrative may depend on a variety of matters. *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34 shows how contestable the characterisation may be. Even so, and notwithstanding the pending appeal, I doubt that this Court is exercising judicial power.

It was common ground, and correctly so, that the sheriff was not bound to accede to any request from this Court. If the sheriff lacked a discretion to refuse to accede to a request, then she would have been a necessary party to the litigation, as a person directly affected by the Court's request. What right or obligation was determined following the granting or refusal of a request? All that would occur would be that the sheriff would have to consider the Court's request, in an independent exercise of discretion.

This is well removed from the traditional incidents of judicial power. Beazley P observed, albeit tentatively, in *Petroulias* at [5]:

In my opinion, the function of a judge under ... the Jury Act, s 73A does not readily fall within the supplemental powers of the Court of Criminal Appeal contained in s 12. If I am correct in this, the consent or direction given by a judge under s 73A does not bear the hallmarks of a judicial function.

Basten JA, with whom Bathurst CJ and Beazley P agreed, proceeded on the basis that irrespective of whether the decision was an exercise of judicial or administrative power, it should be considered on its merits, and concluded that it was devoid of merit. However, in *Lodhi*, Basten JA said at [35]-[36]:

This Court may request the Sheriff to carry out an investigation in circumstances where the information has come to the Court otherwise than from the Sheriff, or where the Sheriff himself or herself has not proposed an investigation, if that course is otherwise appropriate.

In considering this aspect of the matter, the Court is exercising an administrative function. Accordingly, no issue arises as to the admissibility of evidence or the form of the material. The only issue is whether the material is of sufficient substance to constitute “reason to suspect” within the terms of s 73A(1) and whether it should be investigated.

That aspect of his Honour’s reasons is not tied to the absence of a pending appeal.

I respectfully agree. I think that the better view is that when an application is made to a court to request the sheriff to conduct an investigation, the court is exercising an administrative, not a judicial, function. But against the possibility that that conclusion be wrong, I shall analyse the position on both bases.

Repeat applications to a court

Whether or not the function is administrative or judicial, an applicant is not entitled to apply repeatedly, on the same basis, until he or she obtains the outcome sought.

A person is not normally permitted to make repeat applications to a court, differently constituted, even if those applications be for the exercise of an administrative power, unless there has been a material change of circumstances. In *Lodhi* there was additional material which apparently had not been considered by the sheriff or the Chief Judge at Common Law. See at [37] (“The material now presented, read with the earlier material, is of the kind that would invite investigation.”)

In the present proceedings both applicants relied on precisely the same evidence relied on in the Common Law Division to obtain the same outcome, namely, a request to conduct an investigation.

In the case of applications to the Court for the exercise of a judicial power, this Court has refrained from applying a preclusive rule, and insisted that the question is what the interests of justice require in the particular circumstances of the case. Many of the decisions are reviewed in *Liu v The Age Company Ltd* (2016) 92 NSWLR 679; [2016] NSWCA 115 at [13]-[14], [168]-[227] and [292]-[296]. Repeatedly, however, this Court has reiterated the caution expressed by Heydon JA in *Nominal Defendant v Manning* (2000) 50 NSWLR 139; [2000] NSWCA 80 at [72]:

Nothing in the above reasoning rejecting the Nominal Defendant’s submission is intended to encourage litigants to avoid putting their best cases forward in any interlocutory application. ... The Nominal Defendant’s proposition that no second interlocutory application can be entertained unless there is a change of circumstances or unless evidence is relied on which could not reasonably have been obtained earlier is too extreme, but a litigant bringing a second application where circumstances have not changed on evidence available earlier is facing serious and self-created risks of an adverse exercise of judicial discretion.

See for example Liu at [182], Levy v Bablis [2012] NSWCA 128 at [19] and Ostojic v Trazmet Pty Ltd [2005] NSWCA 145 at [56]. Argument on this point, and the effect of ss 56-60 of the Civil Procedure Act 2005 (NSW), was heard in Bajramovic v Calubaquib [2015] NSWCA 139; 71 MVR 15 but it was not decided. But it is undoubted that there can be cases where the attempt to relitigate the same issue can be an abuse of process. In the case of an interlocutory decision, while there is always jurisdiction to recall an interlocutory order, generally some sufficient change of circumstances needs to be shown before that course can be taken: Brimaud v Honeysett Instant Print Pty Ltd (1988) 217 ALR 44 at 46-47; Proietti v Proietti [2025] NSWCA 11 at [21].

As noted above, I think the better characterisation of the present application was for an exercise of administrative power. Much will depend on the statutory context, but ordinarily a repeat application for a favourable exercise of an administrative power need not be assessed afresh and independently of the earlier refusal. More importantly, I do not think that it is a proper purpose to invoke the appellate jurisdiction of the Court of Appeal and the Court of Criminal Appeal, and obtain the benefit of a hearing of both of those courts simultaneously, only to abandon any attempt to persuade the court that there was error in the decision from which all four appeals have been brought at the heel of the hunt and then to apply afresh. I hasten to add that I do not mean to convey any impropriety on the part of the litigants or their lawyers who acceded to the course adopted at the hearing. I accept that that course proceeded on a genuinely held but misunderstood view of what occurred in Lodhi. But that does not prevent the endeavour from being wrong.

I think the possibility that the application might be dismissed for those reasons was sufficiently flagged at the hearing. However, I also bear in mind the seriousness of the offences of which the applicants have been convicted. If the foregoing were the only reason for the outcome, I would have been inclined to give the parties a further chance to be heard. Nonetheless, for the reasons that follow, there is no occasion to do so.

What follows proceeds on the assumption that there was appellable error, or error of law on the face of the record, on the part of the primary judge, with the result that this Court was considering the application afresh. If the discretion to request the sheriff to conduct an inquiry were to be exercised afresh, I would decline to issue a request.

Putting the foregoing to one side, the applications for an investigation should be dismissed because of the investigation that has already occurred

Delay

I have mentioned the delay which has occurred above. It is to be borne steadily in mind that the point of the investigation which is sought is to obtain evidence which may support the conclusion that one or more of the jury's verdicts must be set aside, leading to a retrial. For that reason, the considerable delay which has already elapsed is noteworthy. However, I proceed, favourably to Messrs Menon and Onley on the basis that delay can be put to one side. As was said in R v Bechalany [2021] NSWSC 1262 at [21] and [23]:

... a further investigation would entail the jurors in the trial being interviewed about their observations of one of their number, now almost three years after the event. That is in circumstances where it is already known that the Court Officer has indicated that he or she did not notice anything untoward, and nothing untoward was reported to the Court Officer. In addition, it may be assumed that the trial Judge did not see anything or had anything reported to him that was troubling.

...

There is another matter, and it is far from being determinative, but the time that has elapsed is now almost three years, and amongst the various interests of justice that might fall for consideration is one of finality. But I repeat, that is far from determinative. I mention this only to avoid any suggestion it has been overlooked but it is not a matter of any great weight in circumstances where Mr Bechalany has been found guilty of the most serious crime of murder and has been sentenced to serve a lengthy sentence.

I respectfully agree. Mere delay, even delay that is quite long (bearing in mind the ultimate purpose is a retrial) and entirely unexplained, should not be treated as fatal to the application.

The earlier investigation by the trial judge

Orders under the Court Suppression and Non-publication Orders Act 2010 (NSW) apply to paragraphs 50-63.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

I am unpersuaded that a further investigation should be requested.

Conclusion and orders

I have proceeded, favourably to Messrs Menon and Onley, on the basis that they are free to start afresh and make a further application to the Court as presently constituted on the basis of the same material as was considered by Sweeney J. Even so, I am unpersuaded that there should be a request to the sheriff.

It is important to bear steadily in mind that the critical thing is not to confine the inquiry to whether there is reason to suspect improper conduct. That is merely the precondition to the exercise of the power, and does not of itself mandate its exercise. In the present case, there has not been an investigation by the sheriff. But there has been something which, with respect, was better. There was an inquiry by the judge. It was timely, occurring immediately following the encounter between the juror and Mr Menon. It involved taking evidence on oath, which the sheriff is unable to do. It involved questions asked, after consultation with the accused who had not yet been convicted, questions of what must at that time have been at the forefront of the juror's mind. It yielded answers which go directly to the concerns raised by Messrs Menon and Onley. And it involved an assessment by the judge of the quality of the juror's answers, as well as the evidence of Mr Menon.

It is true that with the benefit of hindsight and further evidence supplied by Mr Menon's father, one can imagine questions which were not asked by the primary judge which might have been asked. The ability to craft such questions does not of itself mean that there is good reason for a second inquiry, this time by the sheriff, some two years afterwards. The prospect that anything going beyond what was obtained promptly and under oath by the trial judge is speculative.

For those reasons, I propose that in each case the application made to this Court be refused, the application for leave to appeal from the decision of Sweeney J made on 14 November 2024 be dismissed, and that the existing orders made under the Court Suppression and Non-publication Orders Act be extended to paragraphs 50-63 of these reasons. I did not understand the respondent to seek costs, a stance consistent with what occurred in Petroulias. Finally, I note that this judgment will be made available only to the parties for a period of 14 days, following which it, excluding paragraphs 50-63 will be posted to CaseLaw. If any application is made for a variation to the orders under the Court Suppression and Non-publication Orders Act, it should be made within 14 days from today.

I propose the following orders:

In each of 2017/148776 and 2024/441558 brought by Mr Menon, and 2017/149208 and 2024/464440 brought by Mr Onley:

1. Dismiss the applications for leave to appeal from the decision of Sweeney J made on 14 November 2024.
2. Dismiss the application made in this Court for a request to the sheriff to conduct an investigation.

3. Vary the non-publication orders made on 19 March 2025 so as to extend to paragraphs 50-63 of these reasons.
4. Note that in the first instance, these reasons will be provided only to the parties and not published on CaseLaw.
5. Any application to vary the extent to which the non-publication order applies to these reasons to be made by notice of motion and supporting materials and submissions to be filed and served within 14 days of today, with any materials and submissions in response from any other party to be filed and served within 14 days thereafter, and any materials or submissions in reply to be filed and served within 7 days thereafter, with a view to any such application being determined on the papers.

HARRISON JA: I agree with Leeming JA.

ADDENDUM

5 May 2025: The decision was delivered on 17 April 2025. In accordance with the regime described in [68], the judgment was provided to the parties but not published on CaseLaw. No party sought to vary the extent to which a non-publication order applied to the Court's reasons. On 1 May 2025, the Crown, Mr Menon and Mr Onley supplied a reformulated form of orders under the Court Suppression and Non-publication Orders Act 2010 (NSW). Those orders, which extend to paragraphs 50-63 of these reasons, were made on 5 May 2025, and the judgment, omitting those paragraphs, was thereafter published on CaseLaw.

Amendments

27 October 2025

-

case citation fixed in [16](2)

- "by" replaced with "..." in [36]
- "obtained" replaced with "obtains" in [40]
- insert "on the basis" before "that delay" in [48]

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated:

27 October 2025

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/1963c2b5c7085fd88995f8a3>

CASE PAGE <https://chat.esheria.ai/case-law/australia/menon-v-r-onley-v-r-2025>

Prepared on 29 October 2026 · Esheria