HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL (NSW)

BETWEEN: **QUY HUY HOANG**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

1. The appellant appeals pursuant to special leave granted on 10 September 2021 from the whole of the judgment of the Court of Criminal Appeal given on 3 August 2018 (N Adams J, Hoeben CJ at CL agreeing and Campbell J dissenting): *Hoang v Regina* (2018) 98 NSWLR 406, File No 2014/228167; High Court Number S146/2021.

Part I: Certification

2. These submissions are in a form suitable for publication on the internet.

Part II: Issues

Ground one

3. Did the majority of the Court of Criminal Appeal err in holding that in order for "misconduct" to be established pursuant to s 53A(1)(c) and s 53A(2) of the *Jury Act 1977* (NSW) ("the *Jury Act*"), the juror's stated intention or purpose for "making an inquiry" (as defined in s 68C of the *Jury Act*) is relevant?

4. Did the majority of the Court of Criminal Appeal err in holding that in order to satisfy s 53A(2)(a) of the *Jury Act*, the inquiry must have been made by the juror with the sole or specific intention or purpose of obtaining information relevant to the trial?

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5. Did the majority of the Court of Criminal Appeal err in holding that the trial judge was in error in determining that there was juror misconduct warranting mandatory discharge pursuant to s 53A(1)(c) of the *Jury Act*?

Ground two

6. Did the majority of the Court of Criminal Appeal err in holding that mandatory discharge was not required prior to the trial judge taking the verdicts in the trial in circumstances where the trial judge was satisfied that misconduct under s 53A had occurred?

Part III: Section 78B of the *Judiciary Act 1903*

7. Consideration has been given to the question whether notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) should be given, with the conclusion that this is not necessary.

Part IV: Citations

8. *Hoang v Regina* (2018) 98 NSWLR 406 ("**CCA**").

Part V: Facts

The trial

9. The appellant was tried in the District Court of NSW on an indictment charging twelve counts constituted by offences of aggravated indecent assault (Counts 1, 6, 8, 9, and 10), aggravated indecency with a person under the age 16 (Counts 2 and 3) and aggravated sexual intercourse (Counts 4, 5, 7, 11 and 12): CCA [25] Core Appeal Book ("**CAB**") 378-379. There were five complainants, the offences were alleged to have been committed whilst the appellant was tutoring each child in mathematics and the date range from the indictment was 1 January 2007 to 31 July 2014: CCA [27] CAB 379. Pleas of not guilty were entered on all counts: CCA [25] CAB 378-379. Evidence from each count was relied on as evidence of tendency and coincidence on each other count in the indictment. In the course of the trial, on 7 October 2015, a juror was discharged for reasons of ill health, meaning that the trial continued with a jury of eleven: CCA [44] CAB 383.

10. Directions were given by the trial judge at the outset of the trial, both orally and in writing that jurors were not to search the internet for anything relevant to the trial: CCA [29]-[31] CAB 379-380.

11. On 14 October 2015, the police officer in charge, Detective Paul gave evidence that he had made an enquiry with the State Office of the Children's Guardian to ascertain whether they had conducted a "Working with Children Check" in relation to the appellant: CCA [32] CAB 380. Detective Paul gave evidence that "if you are a teacher or if you work on the grounds around the school … and you are working with children, you have to get clearance pursuant to [the] *Children and Young Persons Protection Act* … that you are cleared and licensed to work with children": CCA [32] CAB 380. The officer gave evidence that there was no record of the appellant ever obtaining such a clearance certificate: CCA [32] CAB 380; Further Materials Book ("**FMB**") 10-11. The correspondence between the officer and the State Office of the Children's Guardian which referred to the relevant 1998 legislation was marked for identification but not before the jury: CCA [32] CAB 380.

12. On 16 October 2015, David Nguyen gave evidence in the defence case that he had no formal qualifications to do private tutoring and did not have a "Working with Children Certificate". He stated that at least 90 per cent of undergraduate students have tutored at some point. A lot of his friends were tutors and none of them had a "Working with Children Certificate": CCA [33] CAB 380-381; FMB 14-15.

13. While the evidence concerning "Working with Children" was not directly referred to in the prosecutor's closing address, the prosecutor relied on a case in closing that included a limb that while the appellant purported to be a "respectable, well regarded, successful teacher", in fact he was tutoring children as a result of subterfuge which was part of a system, in order to both create opportunity to be with children for his own sexual purposes and to minimise risk of discovery (T1426 FMB 24, T1473 FMB 71, T1479 FMB 77, T1482 FMB 80, T1483 FMB 81). The appellant's trial counsel responded in closing to the prosecutor's suggestion that there was "some fraud or ruse played out to get the accused into houses where he can tutor" and went on immediately to address the evidence of the Working with Children evidence in his closing address (FMB 92-93):

> "You remember the evidence late in the trial again from Detective Paul in relation to the enquiries that were made with the State Office of the Children's Guardian as to whether the accused had a working with children certificate. He didn't. It sounded bad at the time. Then we found out from David Nguyen, a capable young man, he is studying to be a doctor and working as a private tutor, he tells us that 90 per cent of undergraduate students have tutored at some point and lots of his friends are tutors and none them have that qualification.": CCA [34] CAB 381.

14. In the summing up, the trial judge referred to the prosecutor's submission as to the appellant's purporting to be a respectable teacher and his system for minimising risk (CAB 104) and to the defence submission that there was no ruse, along with the appellant's counsel address as to Mr Nguyen's evidence, including:

> "David Nguyen, he said, would have impressed you as an intelligent young man. He was an impartial witness, honestly answering questions. He said things like the accused not having a Working with Children's Certificate was not unusual, that most tutors in particular students do not have that …": CCA [35] CAB 381, CAB 106-107.

15. The jury of eleven retired to consider its verdicts on 23 October 2015. They deliberated for the week 26-30 October and then Monday to Thursday 5 November 2015. On the afternoon of 5 November 2015, the jury sent a note stating that it had reached agreement on eight of the counts, however not the remaining four, and requesting a direction in relation to the definition of indecency, delay in complaint, and as to evidence-in-chief and cross-examination: CCA [46] CAB 384 (Note MFI 97). Between 3.21pm and 4.03pm that afternoon, the jury were given further directions on indecency, delay in complaint, examination and cross-examination and the interviews of the complainants and transcripts, before they left for the day: CCA [47] CAB 384.

16. On the morning of 6 November 2015, the jury continued to deliberate until at 12.30pm, a note (MFI 99) was sent by the foreperson to the trial judge disclosing that a juror advised that she had "google/looked up on the internet the requirements for a working with children check. The juror had previously been a teacher and was curious as to why they themselves did not have a check. They discovered the legislation, which was only introduced in 2013". The foreperson did not feel the "information discovery (sic) of a juror making their own enquiry" had an impact on deliberations: CCA [48] CAB 384.

17. Immediately upon reading the note to counsel, the trial judge stated that she proposed to take the eight "verdicts" previously indicated in MFI 97 "because that was prior … to this juror last night doing a Google search …": CCA [49] CAB 384, CAB 265-6.

This was a reference to the "agreement on 8 counts" in the note also requesting redirections (CAB 246). There was discussion including observations that the "Working with Children" legislation in fact commenced in 1998, that there was a google search on something to do with the case, and as to ss 53A and 68C of the *Jury Act*, prior to the prosecutor conceding: "It is a breach". Her Honour agreed: "It is a breach". Her Honour stated that it triggered the mandatory discharge provision (s 53A): CCA [51]-[53] CAB 385; CAB 273.

18. The trial judge then said that prior to taking any further step: "I'm going to take those verdicts first". Defence counsel objected to this course, with the prosecutor concurring: "I'm instructed to agree with my learned friend, those verdicts will be taken from a jury that includes within their number presently one that is, if the evidence is made out, guilty of an offence under the Act and subject to the mandatory provisions of the Act for discharge": CCA [53] CAB 385; CAB 273. This was a further clear concession that the terms s 53A(2)(a) had been satisfied, as was the prosecutor's further statement that "…one of them is presently subject to the mandatory provisions of the Jury Act…": CCA [53] CAB 273, CAB 385.

19. Over the objection of both trial counsel, the trial judge determined that the eight "verdicts" should be taken on the basis that if she discharged the juror "it will not be the verdict of the eleven jurors": CCA [55]-[56] CAB 385-386. The prosecutor again urged that the juror be discharged: CCA [56] CAB 386.

20. The trial judge asked the jury to identify which counts they had reached verdicts on: CCA [57] CAB 386. The note (MFI 100) indicated that the jury reached agreement on 5 November 2015 on eight counts, Counts 4, 6, 7, 8, 9, 10, 11 and 12 ("the eight counts") and then on 6 November 2015 on Counts 2 and 3 ("the two counts"): MFI 100 CAB 386. The trial judge then took all ten verdicts from the jury of eleven. The appellant was convicted of the eight counts and acquitted of the two counts by the jury of eleven: CCA [57] CAB 386.

21. The foreperson was then examined pursuant to s 55DA of the *Jury Act,* who confirmed that she was the author of the note and that the matter was raised with all members of the jury: CCA [59]-[61] CAB 387. There was subsequently an exchange with the relevant juror where the trial judge informed her that she had been advised that the

juror google searched the "Working with Children Act" and told others she had done that, and that mandatory discharge was required as contrary to express directions, the juror made an inquiry on the internet in relation to the trial, then discharging the juror: CCA [62] CAB 387-8. The remaining jury of ten was asked to confirm impartiality (MFI 101) and continued with deliberations, later returning two guilty verdicts on Counts 1 and 5: CCA [63]-[65] CAB 388.

22. In the reasons for judgment for discharging the juror, the trial judge held that prior to making inquiries and taking of the eight verdicts, she was of the opinion on the basis of the jury note MFI 99 that the juror made an inquiry for the purposes of obtaining information on a matter relevant to the trial, that the inquiry was specifically prohibited and that the provisions of s 53A which mandated the discharge of the juror were enlivened and required the discharge of the juror: CCA [66] CAB 388-389; CAB 309. The trial judge stated that the inquiry was one said to be primarily for the juror's own personal circumstances: CCA [68]-[70] CAB 389, CAB 317.

The appeal to the CCA

23. On the appeal, the Respondent conceded that a failure by a trial judge to immediately discharge a juror upon being satisfied of juror misconduct amounts to a failure to comply with a mandatory requirement under the *Jury Act* that admits no application of the proviso in s 6(1) of the *Criminal Appeal Act 1912*: CCA [93] CAB 394. However, the Respondent did not concede that the appeal should be allowed, arguing that the trial judge had erred in concluding that there had been juror misconduct within s 53A(2)(a) of the *Jury Act*: CCA [71] CAB 389, [80] CAB 391-392. Thus, a controversy arose on the appeal in relation to a matter conceded by the Respondent at trial.

24. N Adams J (Hoeben CJ at CL agreeing) was of the view that the concession on the appeal only arose for consideration in the event that the intermediate appellate court was satisfied of juror misconduct, and if the CCA was not so satisfied, then the appeal should be dismissed: CCA [93] CAB 394. After construing the relevant provisions, her Honour concluded that, contrary to the finding of the trial judge, there was no juror misconduct within s 53A(2)(a) or (b) of the *Jury Act*: CCA [123] CAB 401; CCA [135] CAB 404-5.

25. N Adams J held that there was a need for "the *purpose* of the inquiry to be obtaining of information relevant to the trial rather than for personal reasons": CCA [121] CAB 401 (emphasis added). Her Honour held that the information here obtained "was why the juror was not required to have a Working with Children Check", and that was relevant to herself and not relevant to the trial: CCA [121] CAB 401, [139] CAB 406. On this basis, her Honour determined that an offence under s 68C could not be established: CCA [121], CAB 401.

26. N Adams J held that the finding in the trial was an evaluative process and that there was a failure of the trial judge to have regard to the purpose of the making of the relevant inquiry as required by s 68C(1) of the *Jury Act,* in determining whether the offence could be made out: CCA [121], [136]-[138], CAB 401, 405-6.

27. Further, N Adams J held that the trial judge had not found prior to the taking verdicts that "the juror was guilty of misconduct" and was not satisfied that the requisite intent for s 68C(1) could be established and so was not satisfied that the trial was fundamentally flawed: CCA [137], [139]-[140], CAB 405-6. Her Honour held that the verdicts on the remaining counts, Counts 1 and 5, were lawfully taken from the jury of ten and the trial did not miscarry: CCA [157]-[158], CAB 410.

28. Hoeben CJ at CL, agreeing with N Adams J, held that the removal of the juror, as a result of an error in the evaluative assessment, did not constitute a fundamental defect in the trial process: CCA [1]-[2] CAB 374.

29. Campbell J in dissent, held that the trial judge did not err in holding that there was misconduct. He held that the trial judge should have immediately discharged the juror, her Honour fell into error in taking the verdicts on eight counts and those verdicts should be quashed: CCA [3]-[11], [23] CAB 374-375, 378.

30. Campbell J concluded that there was misconduct on the basis of the conduct of the juror and noted that the fact that the inquiry might have been undertaken for the juror's own purposes did not, of itself, establish that the inquiry was not made for the purpose of obtaining information about a matter relevant to the trial: CCA at [4], [6] CAB 375.

Part VI: Argument

Ground One

31. Section 53A of the *Jury Act* was inserted by the *Jury Amendment Act* 2008 No 24 (NSW) and commenced on 1 July 2008. It appears in Part 7A of the *Jury Act* which governs the discharge of jurors and provides for the mandatory discharge of a juror. The two other powers in Part 7A relate to discretionary powers to discharge a juror or the whole jury. Where a juror has engaged in misconduct in relation to the trial, the Court must discharge a juror: s 53A(1)(c). Misconduct is defined in s 53A(2). Part 9 of the Act contains offences, which includes s 68C that prohibits inquiries by a juror about an accused or any matters relevant to the trial.

32. The proper construction of ss 53A(1)(c), which in the context of making a prohibited inquiry requires consideration of ss 53A(2) and 68C, turns on three simple questions. First, whether s 53A(1)(c) and (2) refer to conduct alone or also the purpose of the conduct, for example in an offence such as s 68C(1). Second, if the purpose is relevant, whether the misconduct found in s 53A (1)(c) by consideration of misconduct in the context of s 68C(1) should be construed as requiring a sole or specific purpose of a juror of obtaining information about the accused or matters relevant to the trial or whether a dual purpose will suffice as capable of triggering s 53A(1)(c). Third, whether a juror's stated intention or purpose negates a finding of a purpose relevant to the trial.

Section 53A(1)(c) applies to conduct alone

33. Commencing with a consideration of the text itself, s 53A (1)(c) of the *Jury Act* does not create an offence. Misconduct is defined in s 53A(2) as "(a) *conduct* that constitutes an offence against this Act, or (b) any other *conduct* that, in the opinion of the court … gives rise to the risk of a substantial miscarriage of justice in the trial…" (emphasis added). While misconduct is defined in s 53A(2)(a) as meaning *conduct* constituting an offence against the Act, with the "Note" in the legislation referring to "For example, under s 68C it is an offence for a juror to make certain inquiries except in the proper exercise of his or her functions as a juror", s 53A(2)(a) does not purport to attach any particular intention to the misconduct. As is patently clear from the definition – the focus of the question of whether there has been misconduct pursuant

to s 53A is on the *conduct* of the juror in question, not the purpose for which the conduct was engaged. The natural and ordinary meaning of the words in the text focus on the act of the juror.

34. Section 53A(2)(a) does not relate exclusively to conduct constituting an offence contrary to s 68C. It also applies to the conduct constituting offences such as: a juror engaging in misconduct by, during the trial, disclosing information about deliberations or how a juror or the jury formed any opinion in relation to an issue in the trial, apart from to another member of the jury (s 68B); a juror soliciting information from a former juror for the purpose of obtaining information about how a juror formed an opinion or conclusion in a trial (s 68A); a juror making available to another person a card prepared for the purposes of the Act (s 67A); and a juror disclosing information likely to lead to the identification of another juror (s 68). The conduct constituting each of these offences has been deemed by the legislature to be sufficiently inimical to the criminal trial process as to warrant mandatory discharge regardless of intent or purpose.

35. Section 53A(1)(c) of the *Jury Act* provides for the circumstances in which a trial judge "must discharge a juror…in the course of a trial", including if the juror has "engaged in misconduct in relation to the trial". The provision is concerned with the integrity of the trial itself as opposed to the criminalisation of juror conduct which is governed by offence provisions which are to be prosecuted separately in the Local Court as required under s 71 of the *Jury Act.* It permits the individual juror to be discharged and the trial to continue on in appropriate circumstances, avoids costly disruptions to the trial and by virtue of the discharge protects public confidence in jury verdicts and the oaths of jurors to give true verdicts according to the evidence. This is not only apparent from the text and context of the provision but accords with the purpose as stated in the Second Reading Speech: Legislative Council Hansard 15/05/2008 p.7681. The appellant's interpretation accords with the broader statutory context of the provision, and the general purpose of the provision, in light of the *Jury Act* read as a whole: cf. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 (***Alcan***) at [47].

36. It is also supported by Bell P's judgment in *Zheng v R* [2021 NSWCCA 78 at [66]-[67] where his Honour found that for s 53A(1) to be engaged: first, certain conduct

must be found to have occurred; and second, there should be an analysis of the character of the conduct as amounting to an offence, however not to the level of proof beyond reasonable doubt. Section 53A(1)(c) is satisfied where the juror has, on balance, so engaged in misconduct, whereas s 53A(2)(b) is concerned with conduct giving rise to a risk: *Zheng* at [65]-[66].

37. The provision read as a whole also shows that the emphasis is on conduct in both subsection s 53A(2)(a) and (2)(b), and not the intention or purpose of a juror. It is *conduct* which does not satisfy (2)(a) that will fall within (2)(b), rather than the same conduct with some other stated purpose. Conduct such as a juror doodling or playing a word game in the course of evidence does not amount to conduct constituting an offence under the Act but will fall to be considered under s 53A(2)(b), such as occurred in *Li v R* (2010) 265 ALR 445.

38. N Adams J erred in approaching the question as to whether there had been misconduct referred to in s 53A(2)(a) by focussing on whether the juror's inquiry contravened s 68C of the *Jury Act* and considering intention and the reference in that section to 'purpose': cf. CCA at [97]-[123] CAB 395-401. In doing so, her Honour was diverted from the question of the proper construction of s 53A(2)(a) which referred to the conduct of the juror. N Adams J instead erroneously held that the juror's subjective stated purpose in conducting the inquiry was the critical consideration in whether there had been misconduct by way of an offence against s 68C. The approach taken by her Honour to the question of statutory construction failed to consider the broader statutory context of the provision and failed to construe the terms of s 53A(2) in light of the whole Act, giving appropriate attention to its purpose: cf. *Alcan* at [47].

39. Contrary to the findings of the majority (CCA [1], [102], [121] CAB 374, 396, 401), s 53A(2)(a) does not purport to attach any particular intention or purpose to the misconduct. It refers to the *conduct* that constitutes an offence, here making an inquiry on a matter relevant to the trial "except in the exercise of his or her functions as a juror". These quoted words are a specific reference to s 68C(4), which inform the interpretation of ss 53A and 68C(1). The purpose of the conduct is relevant to whether an individual juror has committed an offence contrary to s 68C of the *Jury Act* but not whether there has been misconduct under s 53A(1)(c) of the *Jury Act*. It may be soundly assumed that limiting the consideration of misconduct under s 53A in this

manner was a deliberate choice made in order to avoid a "trial within a trial" or lengthy collateral inquiries during the course of a trial, including during deliberations of the jury.

40. It is noted here that the jury were directed at the outset of the trial not to make "any inquiries about anything to do with the case": CCA [29]-[31] CAB 379-380. This reflected a foundational direction in criminal trials that jurors not make extraneous inquiries on matters relevant to an accused and the trial, in order to protect the integrity of the trial proceedings. The term "making an inquiry" under the Act includes, for present purposes conducting any research on the internet: s 68C(5)(b) of the *Jury Act*. A juror is not prohibited from making an inquiry of the court or of another member of the jury so long as it is in the proper exercise of his or her functions as a juror: s 68C(3)(a) of the *Jury Act*. Inquiries made by a juror in contravention of a direction to the jury by the judge is not a proper exercise by the juror of his or her functions as a juror: s 68C(4) of the *Jury Act*.

41. There is no question that the conduct of the juror during deliberations in the appellant's trial was in breach of the express direction of the trial judge to the jury not to make inquiries of their own or "about anything to do with the case on the internet" and the direction "do not make your own enquiries about the law" and to withstand the temptation to "hop onto …Google": CCA [29]-[31] CAB 379-380. It was also in spite of the trial judge emphasising the importance of the direction and warning the jury of the offence. The foreperson recognised that such an inquiry had been made in the note MFI 99, referring to the written directions (MFI 1; FMB 7-8) of the trial judge given at the outset of the trial: CCA [48] CAB 384. The trial judge correctly held that checking the Working with Children requirements was a prohibited inquiry on matters relevant to the trial not made in the proper exercise of the juror's functions as a juror. Campbell J was correct to hold that the trial judge was not in error in finding that the internet inquiry was a matter relevant to the trial within the meaning of s 68C of the *Jury Act*, constituting misconduct for the purposes of s 53A(2)(a) of the Act: CCA [3]-[6] CAB 374-375.

42. The construction of the appellant supports the critical assumption necessary for the functioning of fair trials and appeals in the Australian constitutional context and relied on by trial judges, court participants and appellate judges, namely that jurors act on

the evidence and abide by directions that they are given by the trial judge: *Dupas v The Queen* (2010) 241 CLR 237 at [28]-[29].

43. N Adams J recognised that the purpose of s 68C(1) of the *Jury Act* is to "prevent jurors from discovering information extraneous to the trial unbeknownst to counsel and which may influence jury deliberations …. The potential for such an inquiry to create unfairness to an accused person is obvious": CCA [120] CAB 401. Description of that statutory purpose applies a fortiori to s 53A of the *Jury Act* which is concerned with the integrity of the trial itself and expressly provides a mechanism for removal of a juror in the course of a trial who has obtained information extraneous in consequence of a prohibited inquiry but relevant to the trial. The purpose of s 53A of the *Jury Act* is undermined by her Honour's conclusion that a juror's stated purpose in making the inquiry is relevant to establishing misconduct under s 53A.

44. The appellant's construction of the provision as it applies to "misconduct" is also supported by s 55DA of the *Jury Act* which permits a judge to question a juror on oath "to determine whether a juror has engaged in *any conduct* that may constitute a contravention of s 68C" (emphasis added). The reporting and examination of such matters in the fast-moving context of a trial do not lend themselves to detailed investigations as to stated subjective purposes of jurors, particularly where inevitably such inquiries by jurors will include those conducted in circumstances extraneous to the court proceedings.

45. In the context of decisions in the course of trials following the enactment of s 53A, the cases of *R v Sio (No 3)* [2013] NSWSC (***Sio (No 3)***) at [6] and [14] and *R v JP (No 1)* [2013] NSWSC 1678 at [9] referred to at CCA [112] CAB 399, demonstrate that misconduct under s 53A (1)(c) may be found on the basis of a juror's research into law relevant to the trial in breach of directions to the jury not to conduct their own research, without any necessity for ascertainment of whether such a search was for personal reasons. So too in *Carr v R* [2015] NSWCCA 181 (***Carr***) at [16]-[17], [20], Basten JA (McCallum J and R A Hulme J agreeing) held that the question turned on the conduct of the foreperson in that case and whether it revealed a willingness to make inquiries as to matters involving the case but arising outside of the courtroom, in contravention of the judge's directions. It was held that conduct of reading newspaper reports and bringing them into the jury room was not encompassed by s 53A(1)(c) and was not an

inquiry under s 68C of the *Jury Act*: *Carr* at [19]. Not only was it not an inquiry, the trial judge had directed the jury in that case that jurors were not prohibited from reading newspapers: *Carr* at [8].

46. The appellant's construction accords with a proper and practical application of the section which avoids the mischief of a juror, who in breach of trial directions, has engaged in the conduct of making an inquiry to gain access to information on matters relevant to the trial which has come to attention during the trial, from remaining on the jury. The immediate mandatory discharge of a juror upon a finding of misconduct in such circumstances also avoids the spectre of an appeal triggering a further inquiry into the subjective purposes of a juror who has stayed on a jury following a declaration of personal interest in the laws or trial topic in question. It accords with the approach of the legislature in deeming certain conduct of jurors so anathema to the proper functioning of criminal justice system that mandatory discharge is warranted. The appellant's construction of the provision is also coherent with the integral requirement in s 72A(1) of the *Jury Act* that a juror take an oath of affirmation to "give a true verdict according to the evidence" and public confidence in that process having occurred.

Alternatively, if purpose is relevant to the application of s 53A, the juror's stated purpose does not negate the existence of the requisite state of mind

47. Alternatively, if "the purpose" in s 68C is relevant to the application of s 53A(2), the judgment of N Adams J appears to hold that "the purpose" is a reference to a sole purpose, which must be "the purpose of obtaining information about … matters relevant to the trial" rather than "for personal reasons": CCA [101]-[104] CAB 395-396, [121] CAB 401. Her Honour also held that it was necessary to establish the requisite intent for s 68C (1), which could not be established where the juror was said to have made an inquiry relevant to herself which was triggered by something she became aware of during the trial and was as to relevant evidence in the trial: CCA [139] CAB 405-406.

48. Campbell J, with respect, was correct to hold that any dual purpose did not establish that the inquiry was not made for the purpose of obtaining information relevant to the trial, here the requirements for a Working with Children check: CCA [6] CAB375. A person may have more than one purpose in mind when engaging in conduct and the

presence of a specific stated purpose does not necessarily exclude the presence of an additional purpose sufficient to establish an offence or, as here, juror misconduct: see *Zaburoni v The Queen* (2016) 256 CLR 482 at [19]. As Campbell J observed "A person's motive may well be complex. That one motive is dominant does not necessarily exclude another": CCA [6] CAB 375.

49. In any case, the application of s 53A(1)(c) and (2)(a) of the *Jury Act* do not turn on whether the juror's stated subjective purpose was for personal interest or to satisfy her or his own curiosity. Here, the juror's purpose was to obtain information on clearances for a Working with Children check, a matter relevant to the trial. Her motive in doing so may have been to satisfy her own personal interest but that did not exclude the existence of the impugned purpose: cf. CCA [102]-[104] CAB 396-397; CCA [139] CAB 405-406. There is no requirement of an intention to use the information in the trial proceedings and no reference to this in either s 53A(2)(a) or here, s 68C: cf. CCA [101]-[102]; CAB 396. In considering s 53(2)(a), purpose is not determined by a simple examination of the juror's stated subjective purpose in making the inquiry or consideration of an alternative use to which the information is put (eg. to determine why the juror herself did not have a check). The trial judge must look at the circumstances and nature of the inquiry itself to evaluate the juror's purpose and whether the inquiry was made for the purpose of obtaining information about a matter relevant to the trial: cf. *Smith v R* (2010) 79 NSWLR 675 (***Smith***) at [31]. While purpose was held to be relevant, the correct construction and scope of s 68C (1) in relation to purpose was not resolved in *Smith*: *Smith* at [31].

50. The trial judge in the appellant's case did not find that the inquiry was exclusively or solely for the juror's own personal reasons, nor was it correct to say that there was "no evidence" of any other purpose for the inquiry: cf. CCA [98] CAB 395, CCA [99] CAB 395, CCA [121] CAB 401. The trial judge found that the inquiry was made for the purpose of obtaining information about a matter relevant to the trial (Judgment at 5 CAB 309). Misconduct under s 53A(1)(c) was satisfied and mandatory discharge required. The trial prosecutor correctly conceded that there had been misconduct by the juror in question and that the juror should be discharged prior to verdicts being taken: CAB 270, 273. The trial judge made the finding of misconduct despite the stated purpose of the juror being for her own personal circumstances and the inquiry relating

to that purpose also (Judgment at 13 CAB 317). There is no question that defence counsel, the trial prosecutor and the trial judge considered the subject matter of the inquiry relevant to the trial.

51. The CCA erroneously constrained the evident purpose in this respect to the subjective account of the purpose of the juror as recounted by the foreperson, holding that was a matter relevant to her: CCA [121] CAB 401, CCA [139] CAB 405-406. As stated by Campbell J at CCA [4]-[5] CAB 375, the inquiry was made for the purpose of obtaining information about matters relevant to the trial, namely clearances under the Working with Children legislation, given that: evidence the appellant had not obtained those clearances was called by the prosecutor in his case; defence counsel addressed on the topic; the trial judge summed up on that aspect of the address; the search was into the requirements for such clearance; and, the evidence was clearly on the juror's mind during the deliberations.

52. The hypotheticals addressed at CCA [103]-[104] CAB 396-397 do not have the claimed effect of there being a sole purpose as to the searches undertaken. Nor is it a requirement to s 53A(1)(a) being triggered that the juror making the inquiry will "necessarily have made the inquiry" for the trial purpose. Contrary to the "sole purpose" found by N Adams J, neither the medical practitioner nor the fast-food loving juror examples exclude a dual purpose or a purpose of obtaining information that was relevant to the trial. Furthermore, the mischief to which the section is addressed is not served by such an interpretation. The latter juror need only have a response that there was no such deal on a Tuesday night for the evidence of the witness in the trial summarised in CCA [104] CAB 396-397 to be undermined. The information retrieved could not but inform the juror that the evidence of the witness as summarised was either honest or not correct, on a basis extraneous to the trial, whether or not the juror could now avail himself of the fast-food deal or give further advice to a patient.

53. The resolution of the hypotheticals by N Adams J underscores the undesirability of a construction which is framed by the personal interest or expressed sole purpose of the juror and which denies the significance of s 68C(4) to the interpretation of both s 53A(2)(a) and s 68C(1). Take for example, jurors attending the scene of the alleged crime for a private view and claiming an express purpose of seeing a rare tree that grew there, along with either of the surrounding circumstances in *R v Skaf* (2004) 60

NSWLR 86 or *R v Wood* (2008) 186 A Crim R 454 or jurors claiming a purpose of a night visit to the alleged scene of the crime in *Wood* as one of going rock fishing. Such a postulated express purpose would not change that there was misconduct in those cases. Notwithstanding that an accused is entitled to be tried on the known evidence led in the trial, the judgment of the majority condones a juror making inquiries on the internet upon a factual or legislative matter, which they also have a personal interest in, during the trial, provided they express there to be a personal purpose for the inquiry. This does not accord with the text or context of the legislation.

54. Legitimate concerns such as the hypothetical medical practitioner scenario, could be raised by way of a direction to the patient to take alternate medication without any such inquiry or if necessary, by way of a note to the trial judge or an application to be discharged. In relation to the fast-food dilemma, the importance of protecting the integrity of a verdict given upon the evidence, should require the juror to wait until the conclusion of the trial or discharge of the juror to check if he or she can receive a half-price meal.

55. N Adams J held that if there were another purpose for the inquiry, this would then need to be shown to amount to misconduct within the meaning of s 53A(2)(b) (CCA [105] CAB 397). It is contended that this is not a correct construction of misconduct, such as the conduct in s 68C(1) when a juror conducts inquiries in contravention of directions not to do so (s 68C(4)), especially where there is no reference to other purposes in s 53A(2)(b).

56. A construction of s 53A(1)(c) and 53A(2)(a) that admits of misconduct which is not dependent on purpose or where there is not a sole purpose under s 68C(1) facilitates the stated intention of the legislation to prevent jurors from discovering information extraneous to the trial, which counsel neither has the opportunity to call further evidence on, nor to address before the jury. As Campbell J observed, one purpose does not necessarily mean that there was not also another prohibited purpose: CCA [7] CAB 375. Further, the majority accepted that the *Jury Act* now provides that any juror who makes such an inquiry after being directed not to do so is to be discharged, with a remaining discretion in relation to the whole jury: cf. CCA [120] CAB 401. Preventing jurors from conducting their own inquiries is not served, nor is misconduct negated, if a juror's evidence as to his or her subjective reason for conducting the inquiry or a

foreperson's hearsay statement as to the same, provides an alternative purpose for the search. While there is provision to examine a juror, that is not to say that any such examination is determinative. Clearly it is not, as *Sio (No 3)* demonstrates.

57. There are also considerable practical difficulties with the test as espoused by the majority. First, in the context of legislation which must be explained to lay jurors, it is difficult to conceptualise a workable direction which could parse matters relevant to the trial from matters that are of personal interest the subject of evidence or law canvassed during the trial. The test of N Adams J would leave it to the jurors to determine the breadth of their personal interest which would then sanitise any search upon a matter raised in the trial. Secondly, given the nature of any inquiry, and in particular the unpredictable results of internet searches, whether something is going to be used or could be used in a trial is more dependent upon the product of search as opposed to the intent prior to embarking upon an inquiry: cf. CCA [101] CAB 395-396. The test of the majority would operate contrary to the clear purpose of the legislation where "*the focus of the prohibition is upon obtaining, or attempting to obtain, extraneous information about the accused or some matter relevant to the trial*": cf. *Carr v Regina* [2015] NSWCCA 186 at [19] per Basten JA.

58. The trial judge was, with respect, right to accept the trial prosecutor's concession that the juror had engaged in misconduct: CCA [52] CAB 385, [66] CAB 388-389. The juror had made an inquiry about a matter relevant to trial, namely looking up the requirements of a Working with Children check: CCA [48] CAB 385. That matter was the subject of evidence in the prosecution and the defence case. Defence counsel sought to neutralise Detective Paul's evidence that the appellant did not have such clearances by calling evidence to refute the necessity of him having them. The prosecutor's address on a system to aid opportunity and lower risk of detection was also expressly addressed in defence counsel's closing (T1500, 1502, 1506-7 FMB 86, 88, 92-93) and included reference to the evidence of Mr Nguyen called to counter evidence from Detective Paul, admitted by counsel as having "sounded bad at the time": CCA [34] CAB 381. It is not known the extent of the information obtained by the juror given that there was no inquiry by the trial judge into the matter, the matter having been conceded and found to be misconduct. In any event, it is clear from the foreperson's note that the juror in question was interested in the requirements for such

a check, the information sought was about matters relevant to the trial and the inquiry was in contravention of clear directions not to so inquire by the trial judge.

Conclusion on Ground One

59. There is no doubt that all parties who heard and saw the evidence in the trial, heard the addresses and summing up and were privy to evidence of the misconduct were on balance satisfied that misconduct had occurred: CCA [52]-[53] CAB 385. The trial judge correctly held that the juror made a prohibited inquiry "for the purposes of obtaining information about a matter relevant to the trial", s 53A was enlivened and there was no option but to discharge the juror: CCA [66] CAB 388-389. Campbell J was correct to so hold at intermediate level. This Court should hold that, contrary to the decision of the majority, misconduct under s 53A(1)(c) can be established on the basis of a juror engaging in prohibited conduct, the subjective stated purpose of a juror does not preclude a finding of misconduct and that the majority of the CCA in this case erred in a manner admitting no application of the proviso.

Ground Two

60. As held by Campbell J, in the trial judge's reasons for decision published on 27 November 2015, the trial judge was explicit in stating that she was satisfied that she had sufficient information in jury note MFI 99, and prior to taking verdicts, that a breach had occurred and that it was therefore mandatory that that juror had to be dismissed: CCA [8], [11] CAB 375-376. The trial judge noted the following in her reasons:

> "I declined to conduct the inquiry with the juror before taking the verdicts as I was of the opinion that I had sufficient information in jury note MFI 99 that a breach had occurred. It was therefore mandatory that that juror be dismissed." [CCA [66] CAB 388-389].

61. Campbell J held that the trial judge should have immediately discharged the juror, her Honour fell into error in taking the verdicts on eight counts and those verdicts should be quashed: CCA [3]-[11] CAB 374-376, CCA [23] CAB 378. This was, with respect, correct and supported by the Respondent's concession at trial.

62. It was erroneous for the majority to determine, contrary to the reasons of the trial judge, that the decision to discharge the juror was only made after taking the verdicts: CCA

[137] CAB 406; CCA [2] CAB 374. The decision to discharge the juror is to be contrasted with the actual discharging of the juror, which her Honour in terms delayed. Contrary to the reasoning of the majority, there was no "tentative" view formed, rather there was a determination that the juror engaged in misconduct as is apparent from the reasons of the trial judge herself: CCA [8] CAB 375-376. cf. CCA [137] CAB 405. It was not open to hold otherwise.

63. As Campbell J observed at CCA [7] CAB 375:

> "As counsel below, and in this Court, all agree, in my view correctly in accordance with the decision of this Court in *Smith v The Queen* (2010) 79 NSWLR 675; [2010] NSWCCA 325 ("*Smith"*), the combined effect of s 68C and s 53A of the *Jury Act* is that once the '…trial judge is satisfied that a juror has 'engaged in misconduct in relation to the trial', there is no course available other than to discharge the juror' (*Smith* at [26], R A Hulme J; McClellan CJ at CL and McCallum J agreeing)".

64. Further, there was no need for any decision by the trial judge that "the juror was guilty of misconduct", s 53A not being an offence provision: cf. CCA [137] CAB 405. The majority also applied a wrong test in that respect.

65. In this case, there is no dispute that the provision in s 53A of the *Jury Act* was mandatory: cf. *Katsuno v The Queen* (1999) 199 CLR 40 at [41] per Gaudron, Gummow and Callinan JJ. It is unquestionable that the disqualifying provisions of s 53A relate to "the constitution and authority of the jury". It was a fundamental failure for the trial judge not to observe the requirements of the *Jury Act* and discharge the juror at the time of satisfaction that the provision was engaged. The jury was not properly constituted when the verdicts were taken. The majority erred in holding that it was not until after the ten verdicts were taken that discharge was mandatory. There was a fundamental breach of the suppositions of the trial and the convictions should be quashed. As the Respondent conceded below "a failure by the trial judge to immediately discharge a juror upon being satisfied of juror misconduct amounts to a failure to comply with a mandatory requirement of under the *Jury Act* and is as such a fundamental defect leaving no room for application of the proviso in s 6(1) of the *Criminal Appeal Act*": CCA [93] CAB 394 (emphasis added).

66. Should there be any doubt as to whether the verdicts on Counts 1 and 5 should also be quashed, if the convictions on the eight counts are quashed, the convictions on Counts

1 and 5 must also be quashed as there is a real possibility that the verdicts on the impugned counts, as to which the evidence was relied on for tendency and coincidence reasoning in the trial, were taken into consideration in determining the verdicts for Counts 1 and 5: CAB 86-92. The risk was not cured by an enquiry about impartiality in determining the remaining counts: cf. CCA [16], [23] CAB 377, 378.

Part VII: Orders sought

67. The following orders are sought:

(i) Appeal allowed;

(ii) Set aside the orders of the Court of Criminal Appeal on 3 August 2018;

10 (iii) Order that the convictions on all counts be quashed and a new trial be had;

(iv) In the alternative to (iii), order that the convictions on Counts 4, 6, 7, 8, 9, 10, 11 and 12 be quashed and a new trial be had.

Part VIII: Time estimate

68. The appellant seeks no more than two hours for the presentation of oral argument.

Dated: 29 October 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **QUY HUY HOANG**
Appellant

and

THE QUEEN
Respondent

ANNEXURE: The statutory provisions relevant to the appeals in S146/2021, S147/2021, S148/2021, S149/2021

1. Section 6 *Criminal Appeal Act 1912* (NSW) as at 3 August 2018 (version in force between 30 April 2018 to 24 September 2018).
2. The whole of the *Jury Act 1977* (NSW) as at 6 November 2015 (version in force between 15 May 2015-1 July 2017).
3. The whole of the *Jury Amendment Act 2008* (NSW) as at 1 July 2008 (version in force from 11 June 2008 to 1 July 2008).

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Filed on behalf of the appellant.