HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **QUY HUY HOANG**
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES RAISED ON APPEAL

2. The questions raised on the appeal are as follows:

   (i) Did the majority of the Court of Criminal Appeal ("CCA") correctly determine that the juror had not engaged in misconduct within the meaning of s. 53A(2)(a) of the *Jury Act 1977* (NSW)? (Ground 1)

   (ii) If the majority correctly concluded that the juror had not engaged in misconduct within the meaning of s. 53A(2)(a) of the *Jury Act*, was mandatory discharge required because the trial judge had (erroneously) concluded that misconduct had been established? (Ground 2)

3. The issues that emerge from these questions are as follows:

   (a) What is the proper construction of ss. 53A and 68C of the *Jury Act*?

   (b) Does the phrase "*conduct that constitutes an offence against this Act*" in s. 53A(2)(a) of the *Jury Act* encompass only the *actus reus* of the offence, or does it also require consideration of the *mens rea* of the offence? In particular, where the offence in question is an offence against s. 68C of the *Jury Act*, does the phrase "*conduct that constitutes an offence against this Act*" in s. 53A(2)(a) only include the fact of the making of an inquiry within s. 68C, or, as the CCA unanimously accepted, does that phrase also require consideration of the juror's purpose in making the inquiry, as prescribed by s. 68C?

(c) Is a juror required to be discharged where the juror makes an inquiry for personal purposes, rather than for the purpose of obtaining information relevant to the trial, and the juror does not obtain information as a result of the inquiry that could give rise to the risk of a substantial miscarriage of justice?

PART III: NOTICES UNDER S 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The respondent considers that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL CONTESTED FACTS

5. A factual issue in contention is whether the majority erred in finding that the juror had made an inquiry for personal reasons, and not for the purpose of obtaining information about the appellant, or any matters relevant to the trial.

PART V: ARGUMENT

Background

The trial

6. The appellant was charged with twelve offences of a sexual nature against five children.[1] The offences were alleged to have been committed during the period from 2007 to 2014, when the appellant was alone with each child tutoring them in maths.[2] The appellant entered pleas of not guilty to all charges.

7. The trial commenced in the District Court at Sydney on 9 September 2015 before a jury of twelve, presided over by Traill DCJ ("the trial judge"). A month later, on 7 October 2015, the trial judge discharged a juror for reasons of ill health.[3] The trial continued with the remaining 11 jurors.

8. In the afternoon of 5 November 2015, during the course of their deliberations, the jury provided a note to the trial judge informing her that they had reached agreement in respect of eight of the twelve counts.[4] The jury informed the trial judge that they had varying degrees

[1] CCA judgment at [25]; Core Appeal Book (**"CAB"**) at 378. The offences were aggravated indecent assault (s. 61M(2) of the *Crimes Act* 1900 (NSW)), aggravated acts of indecency (s. 61O(1) of the *Crimes Act*) and aggravated sexual intercourse with a child under 10 years (s. 66A(2) of the *Crimes Act*).
[2] CCA judgment at [27]; CAB at 379.
[3] CCA judgment at [44]; CAB at 383.
[4] CCA judgment at [46]; CAB at 383.

of agreement within the other four counts. The jury also asked to be directed again regarding the definition of "indecency" and delay in complaint. Those directions were given and the jury continued to deliberate until 4pm, at which time the jury were sent home.

9. When the jury returned the following morning, the jury foreperson sent the trial judge a note which stated that a juror had disclosed that she had "*google/looked up on the internet the requirements for a working with children check*".[5] The note stated that "*[t]he 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's note continued "*I myself have completed a working with children course and so already knew this*
10 *information but it had not been discussed in the jury room*." The foreperson assured the trial judge that she did not feel that this had had an impact, but understood that it was their duty to notify the court in accordance with the written directions that had previously been given.

10. The requirement to obtain a Working with Children Check had been briefly mentioned in evidence in the trial. In the course of his evidence in chief on 14 October 2015, the Officer in Charge, Detective Senior Constable Darren Paul, gave evidence that he had made an inquiry to ascertain whether the appellant had a Working with Children Check. Detective Paul explained that various people who work with children have to get a Working with Children Check. Detective Paul stated that there was no record of the appellant having obtained such a certificate.[6] Detective Paul was not cross-examined about this evidence.

20 11. On 16 October 2015, a character witness, David Nguyen, gave evidence in the defence case. Mr Nguyen was a tutor in English. He gave evidence that he did not have a Working with Children certificate. He said 90% of undergraduate students have tutored at some point, that a lot of his friends were tutors and that none had a Working with Children certificate.[7] Mr Nguyen was not cross-examined about this evidence.

12. Mr Nguyen's evidence was mentioned briefly in closing address by defence counsel. The Crown Prosecutor did not refer to Detective Paul's evidence or Mr Nguyen's evidence in his closing address.[8]

13. After receipt of the foreperson's note, the trial judge discussed with counsel the appropriate course to take. The Crown Prosecutor drew the trial judge's attention to s. 53A of the *Jury*

[5] CCA judgment at [48]; CAB at 384.
[6] CCA judgment at [32]; CAB at 380.
[7] CCA judgment at [33]; CAB at 380 – 381.
[8] CCA judgment at [34] – [36]; CAB at 381.

Act and submitted that it was "*technically or not materially a breach*", and that there was no risk of the search influencing the jurors.[9]

14. The trial judge responded by noting that the juror had made the inquiry "*for their own purposes*", as the juror had previously been a teacher and wanted to know why she did not have a Working with Children Check, which was when the juror discovered the date of the legislation.[10] Her Honour also observed that the search "*won't affect, you would think it wouldn't affect any count on the indictment but it did have something to do with the case and it was Google searched*".[11] Nonetheless, the Crown Prosecutor submitted (without explanation) that there had been a breach of the *Jury Act*.[12]

10 15. The trial judge then indicated that she intended to take the eight verdicts that had been indicated in the note from the previous afternoon. The Crown and defence each submitted that the judge should make an enquiry of the juror before receiving the verdicts.[13] Despite these submissions, the trial judge proceeded to take the verdicts from the jury. The jury returned verdicts of not guilty in respect of counts 2 and 3 and verdicts of guilty in respect of counts 4 and 6 to 12.[14]

16. After a brief adjournment, the trial judge examined the jury foreperson on an inquiry pursuant to s. 55DA of the *Jury Act*.[15] The jury foreperson confirmed the content of the information contained in the note. She also confirmed that the juror had told all of the members of the jury about the search that had been made.[16] The foreperson indicated that she also held "*that*
20 *qualification*" (namely a Working with Children Check) and added "*so I understand that legislation*".[17] The foreperson continued "*When it was mentioned no further discussion or circulation around that [occurred], and in fact that point of evidence was not weighed in any of our decisions thus far, nor has it been brought up in the continuation of our discussions*".[18] Finally, the foreperson confirmed that there were no discussions without all 11 jurors being present.

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[9] CCA judgment at [50]; CAB at 384.
[10] CCA judgment at [50]; CAB at 384.
[11] CCA judgment at [51]; CAB at 384 - 385.
[12] CCA judgment at [52]; CAB at 385.
[13] CCA judgment at [53] – [56]; CAB at 385 – 386.
[14] CCA judgment at [58]; CAB at 386.
[15] CCA judgment at [59]; CAB at 387.
[16] CCA judgment at [59]; CAB at 387.
[17] CCA judgment at [60]; CAB at 387.
[18] CCA judgment at [60]; CAB at 387.

17. The trial judge then examined the relevant juror. In that examination, the juror confirmed that she had made a Google search the previous night in relation to the "Working with Children" legislation.[19] The juror also confirmed that she had told the other jurors about the search. The trial judge then informed the juror that she would have to discharge the juror because of a "*mandatory provision*" in the *Jury Act*. The juror asked the trial judge if she was allowed to comment, but the trial judge said the juror could not do so.[20]

18. The trial judge then informed the remainder of the jury that the juror was required to be discharged because she had made an inquiry on the internet.[21] The trial judge asked the remaining 10 jurors whether the fact of the juror's inquiry on the internet, or the fact that the juror had been discharged, had affected them in any way that they felt they could not remain impartial. All 10 jurors responded 'no' to both questions.[22]

19. The jurors then continued to deliberate in respect of the remaining two counts (counts 1 and 5). Unanimous verdicts were later delivered with respect to both counts.

20. Two weeks after the verdicts were delivered, the trial judge delivered reasons for her approach. In those reasons, the trial judge explained that, although "*[i]t would seem that the inquiry made by the juror was for her own personal circumstances*" and the foreperson had given evidence that the information did not have any impact, the inquiry made by the juror was specifically prohibited and accordingly the juror had to be discharged.[23] In explaining why she had proceeded with the remaining ten jurors, the trial judge stated "*I am of the view that the misconduct by the juror was minor. It did not involve visits to the scene. It did not involve research of the accused. It was an inquiry primarily for the juror's own personal circumstances. The evidence of the foreperson and the jury notes also indicated that there was no consequential risk of a substantial miscarriage of justice*".[24]

The appeal

21. In the CCA, the Crown accepted that, if the juror's conduct in conducting the search constituted misconduct within the meaning of s. 53A of the *Jury Act*, the juror should have been discharged prior to the entry of the 10 verdicts.[25] However, the Crown contended that

[19] CCA judgment at [62]; CAB at 387 – 388.
[20] CCA judgment at [62]; CAB at 387 – 388.
[21] CCA judgment at [63]; CAB at 388.
[22] CCA judgment at [64]; CAB at 388.
[23] CCA judgment at [66] – [68]; CAB at 388 – 389.
[24] CCA judgment at [70]; CAB at 389.
[25] CCA judgment at [80]; CAB at 391.

the evidence did not establish that the juror's conduct constituted misconduct (and that the trial judge was in error in finding that misconduct was established). In particular, the Crown submitted that the juror did not make the inquiry "*for the purpose*" of obtaining information about a matter relevant to the trial (s. 68C(1) read with s. 53A).[26] Rather, as the trial judge had contemporaneously stated, the juror's purpose in making the inquiry was for her own personal purpose, i.e., to obtain information about why she (the juror) had not been subject to a Working with Children Check.[27]

22. The appellant's primary contention in the CCA was that, because the trial judge had concluded that there was misconduct, the juror was required to be discharged before any verdicts were taken.[28] In particular, the appellant submitted that the CCA's own view as to whether misconduct had occurred was irrelevant; rather the CCA was bound by the determination of the trial judge as to whether misconduct had occurred. In the alternative, the appellant submitted that the juror's conduct amounted to a substantial miscarriage of justice in any event, so that the juror should have been discharged under s. 53A(2)(b) of the *Jury Act*.[29]

23. In a judgment delivered on 3 August 2018, the appeal was dismissed by a majority of the CCA (N Adams J, with whom Hoeben CJ at CL agreed; Campbell J dissenting).

24. The majority held that the requirement in s. 68C that the inquiry be made for a specified "purpose" requires a finding of the juror's intention in making the inquiry, or the reason why the inquiry was made.[30] The majority found that the juror made the inquiry for the purpose of "*satisfying herself as to why she did not require a Working with Children Check*".[31] As that was not a matter that was relevant to the trial, the juror had not engaged in misconduct.[32]

25. The majority also considered whether or not the juror's conduct amounted to misconduct within s. 53A(2)(b) of the *Jury Act* (as conduct that gave "*rise to a substantial miscarriage of justice in the trial*"). The majority held that it did not.[33] (This finding is seemingly not challenged in the appeal.)

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[26] CCA judgment at [81]; CAB at 392.
[27] CCA judgment at [50]; CAB at 384.
[28] CCA judgment at [72]; CAB at 390.
[29] CCA judgment at [72]; CAB at 390.
[30] CCA judgment at [100]; CAB at 395.
[31] CCA judgment at [121]; CAB at 401.
[32] CCA judgment at [121], [123]; CAB at 401.
[33] CCA judgment at [135]; CAB at 404 – 405.

26. Finally, the majority held that, although the trial judge may have "*tentatively formed the view*" that there was misconduct prior to taking the eight verdicts, "*the decision that later discharged the juror was made after the point in time at which it is alleged that the obligation to discharge was enlivened*".[34] The majority further held that, "*if a trial judge errs in finding misconduct when no such misconduct could be established, the failure by the trial judge to comply with a procedure which is only mandatory if misconduct has in fact been found does not mean that the trial is flawed in a fundamental respect*".[35]

27. Justice Campbell dissented. Although his Honour agreed that the relevance of the Working with Children Check was *"at best obscure"*, he observed that evidence on that issue had been led in the trial and was mentioned in the defence counsel's address.[36] His Honour found that, even if the inquiry was made for the juror's own purpose, that fact did not *"of itself"* establish that the inquiry was not made for the purpose of obtaining information about a matter relevant to the trial.[37] His Honour noted that the trial judge was satisfied that the juror had engaged in misconduct and held that, in these circumstances, the juror should have been discharged before the first eight verdicts were taken.[38]

First Ground of Appeal

Ground 1(a): The proper construction of ss. 53A and 68C of the *Jury Act*

28. Section 53A(1)(c) of the *Jury Act* relevantly provides that a court must discharge a juror if, in the course of the trial, the juror has "*engaged in misconduct in relation to the trial*". Section 53A(2)(a) defines misconduct to include "*conduct that constitutes an offence against this Act*". Section 68C(1) provides that it is an offence for a juror in a criminal trial to "*make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror*" (emphasis added). In this provision, the word "*purpose*" directs attention to the reason why the inquiry was made.[39]

29. In support of ground 1(a), the appellant contends that the reference to "*conduct*" in s. 53A(2)(a) encompasses only a juror's physical acts: AWS at [33]. In particular, the appellant submits that, although a juror's subjective purpose in making an inquiry is a critical

[34] CCA judgment at [137]; CAB at 405.
[35] CCA judgment at [140]; CAB at 406.
[36] CCA judgment at [4]; CAB at 375.
[37] CCA judgment at [6]; CAB at 375.
[38] CCA judgment at [8] and [11]; CAB at 375 – 376.
[39] CCA judgment at [100] (per N Adams J); CAB at 395.

element of an offence under s. 68C, this mental element cannot be considered when determining whether a juror has engaged in "*conduct that constitutes an offence*" under s. 53A(2)(a): AWS at [39]. This construction, which the appellant did not advance in the proceedings before the CCA,[40] should not be accepted. The construction does not accord with the text, context or the purpose of the *Jury Act*; nor is it supported by authority.

30. There is no textual basis for excising the mental element from offences when considering whether a juror has engaged in misconduct under s. 53A(2)(a). Contrary to the appellant's submissions, the natural and ordinary meaning of the word "conduct" is not restricted to a juror's physical acts, to the exclusion of the juror's state of mind. It may be observed that the word "conduct" is used in many disciplinary contexts.[41] It is well established that phrases such as "unsatisfactory professional conduct" and "professional misconduct" encompass a practitioner's state of mind as well as the practitioner's physical acts and omissions.[42]

31. Importantly, s. 53A(2)(a) defines misconduct as including "*conduct that constitutes an offence against this Act*" (emphasis added). As the appellant observes (at AWS [34]), there are various offences prescribed by the *Jury Act* including, *inter alia*, supplying false or misleading information to the sheriff (s. 62); wilfully publishing or disclosing information that is likely to lead to the identification of a juror (s. 68); and wilfully disclosing information about the deliberations of the jury during the trial (s. 68B). None of those offences are "*constituted*" by the specified *actus reus* alone; rather, establishment of each of these offences requires proof of a specified *mens rea*.

32. Likewise, in respect of an offence contrary to s. 68C, the *actus reus* of making an inquiry does not alone "*constitute*" an offence against the provision. A juror will not commit an offence by making an inquiry unless the inquiry is made for a purpose specified in s. 68C. Accordingly, it is not necessary for s. 53A(2)(a) to attach any particular intention to the misconduct; the relevant intention is prescribed by the particular offence specified (cf AWS at [33]).

33. Nor is there a purposive basis for excising the mental element of offences under the *Jury Act* from a consideration of whether the juror has engaged in misconduct within the meaning of s. 53A(2)(a).

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[40] CCA judgment at [74]; CAB at 390.
[41] See, for example, s. 296 of the *Legal Profession Uniform Law* (NSW); s. 139B of the *Health Practitioner Regulation National Law* (NSW).
[42] See, for example, *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115 at [8].

34. The appellant submits that the purpose of s. 53A is to enable an individual juror who has engaged in "*misconduct*" to be discharged, and for the trial to continue to verdict by the remaining jurors: AWS at [35]. This is non-contentious.[43] However, this purpose does not advance the appellant's construction of s. 53A(2)(a).

35. It may be accepted that s. 53A(2) of the *Jury Act* generally concerns the integrity of the trial: AWS at [35]. However, the scope of s. 53A(2)(a) cannot be understood in isolation from s. 53A(2)(b).[44] When read as a whole, it can be seen that s. 53A(2) protects the integrity of the trial in two distinct ways.

36. First, s. 53A(2)(a) (which relates to conduct that constitutes an offence under the *Jury Act*) is concerned with juror delinquency; a juror who has committed an offence against the *Jury Act* must be discharged, whether or not the commission of the offence by the juror could have had any impact upon the determination of any issues in the trial. Secondly, and in contrast, s. 53A(2)(b) (which relates to "*any other conduct that, in the opinion of the court … gives rise to the risk of a substantial miscarriage of justice in the trial*") is concerned with the conduct of jurors that falls short of amounting to an offence. In those latter circumstances, the court is required to discharge the juror if satisfied that the juror's conduct gives rise to the risk of a substantial miscarriage of justice.

37. The purpose of protecting against the risk of a miscarriage of justice is achieved by s. 53A(2)(b). The purpose of s. 53A(2)(a) is more limited. It applies only where a juror has committed an offence against the *Jury Act*. Its focus is not upon whether the conduct engaged in by the juror poses a risk of a substantial miscarriage of justice; as stated above, the conduct engaged in by the juror need not have any effect on the determination of any issue by the jury. Rather, the risk that s. 53A(2)(a) seeks to address is the danger of allowing a delinquent juror to remain on the jury. In particular, s. 53A(2)(a) recognises that the administration of justice may be bought into disrepute if a juror continues to remain part of the tribunal of fact, which is entrusted to determine whether the Crown has proved that the accused has committed an offence, despite having themselves committed an offence under the *Jury Act* in connection with the trial.

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[43] Second Reading Speech, *Jury Amendment Bill* 2008 (NSW), 15 May 2008; New South Wales Law Reform Commission, Report 117, "*Jury Selection*", Ch. 11.

[44] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70]; *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 452.

38. Given the breadth of s. 53A(2)(b), there is no justification for construing s. 53A(2)(a) other than in accordance with its natural and ordinary meaning. In particular, protection against the risk of a miscarriage of justice does not require that the construction of s. 53A(2)(a) be strained so as to preclude consideration of the mental element of offences under the *Jury Act*; cf AWS at [42].

39. Indeed, the purpose that underlies s. 53A(2)(a) would be subverted if a juror's state of mind was excluded from consideration under the provision. A juror's guilty state of mind is a critical component of the criminality inherent in each of the *Jury Act* offences to which s. 53A may relate. A juror who has engaged in conduct without the requisite *mens rea* has not engaged in any wrongdoing, and their presence on the jury does not, of itself, have the capacity to bring the administration of justice into disrepute. In the absence of any indication that the juror's conduct has given rise to the risk of a miscarriage of justice (which would be considered under s. 53A(2)(b)), there is no justification for discharging a juror who has engaged only in the *actus reus* of an offence by reason of accident, negligence or oversight.

40. For the reasons outlined at paragraph [75] below, there is no evidence that the juror in the present case knowingly contravened the trial judge's directions; cf AWS at [41]. In any event, s. 53A(2)(a) of the *Jury Act* is not concerned with a juror's capacity or willingness to follow a trial judge's directions (however a juror's contravention of a trial judge's directions may constitute a miscarriage under s. 53A(2)(b)): cf AWS at [40] – [44]. A juror may commit an offence under the *Jury Act* without contravening a trial judge's directions (for example, if the trial judge neglects to direct the jury in respect of the offence in question). Conversely, a juror may contravene a trial judge's directions without committing an offence under the *Jury Act*.[45]

41. For completeness, it should also be noted that none of the authorities cited by the appellant (AWS at [36] and [45]) support his contention that a juror's state of mind is irrelevant to a consideration as to whether there has been misconduct under s. 53A(2)(a) of the *Jury Act*. In each of the cases cited by the appellant where misconduct was found under s. 53A(2)(a), there was no issue that the jurors' inquiries (legal research relating to the elements of the offences)

[45] Section 68C(4) of the *Jury Act*, which provides that "[a]*nything done by a juror in contravention of a direction given to the jury by the judge in the criminal proceedings is not a proper exercise by the juror of his or her functions as a juror*", does not create a substantive criminal offence. This subsection provides that the exception to criminal liability in s. 68C(1) (that a juror will not have committed a criminal offence by making an inquiry in the proper exercise of the juror's functions as a juror) does not apply where the juror is acting in contravention the trial judge's directions.

were made for the purpose of obtaining information relevant to the trial.[46] As N Adams J held, authorities such as those cited by the appellant are useful insofar as they show the type of misconduct that led Parliament to enact s. 68C (that is, inquiries by a juror made for the purpose of determining the issues in the trial).[47] Those authorities do not support the appellant's contention that a juror's state of mind must be excised from consideration when determining whether a juror has engaged in misconduct under s. 53A.

42. For these reasons, the reference in s. 53A(2)(a) of the *Jury Act* to "*conduct that constitutes an offence against this Act*" should not be read as referring to the acts of a juror alone, divorced from consideration of the mental state of the juror. Where the offence identified is an offence against s. 68C of the *Jury Act*, it will only be where a juror makes an inquiry "*for the purpose of obtaining information about the accused, or any matters relevant to the trial*" that discharge is mandated under s. 53A(2)(a). Where, despite a juror's permissible purpose in making an inquiry, prejudicial information comes to the juror's attention that gives rise to a risk of a substantial miscarriage of justice, discharge will be required under s. 53A(2)(b) of the *Jury Act*, and not under s. 53A(2)(a).

43. Accordingly, in the present case, both N Adams J (with whom Hoeben CJ at CL agreed) and Campbell J (in dissent) each correctly considered whether the juror's inquiry was made for a purpose impugned by s. 68C.[48]

Ground 1(b): Whether the CCA erred in applying a sole purpose test

44. By ground 1(b) (which is relied on in the alternative to ground 1(a)), the appellant submits that N Adams J (with whom Hoeben CJ at CL agreed) "*appears to hold that* 'the purpose' [in s. 68C] *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'": AWS at [47].[49]

45. Ground 1(b) is premised on a misreading of the CCA judgment. Justice N Adams did not hold that a "sole purpose" test applies to s. 68C of the *Jury Act*. None of the paragraphs of the CCA judgment cited by the appellant indicate that her Honour was applying a "sole

[46] *R v Sio (No 3)* [2013] NSWSC 1414 and *R v JP (No 1)* [2013] NSWSC 1678. *Zheng v R; Li v R; Pan v R* (2021) 104 NSWLR 668 concerned conduct that was alleged to fall within s. 53A(2)(b). The juror's conduct in *Carr v R* [2015] NSWCCA 186 was found not to constitute an "*inquiry*" within the meaning of s. 58C.
[47] CCA judgment at [107]; CAB at 397.
[48] CCA judgment at [98] (per N Adams J); CAB at 395, and CCA judgment at [6] (per Campbell J); CAB at 375.
[49] CCA judgment at [101] – [104] and [121]; CAB 395 – 397 and 401.

purpose" test. Rather, her Honour found that there was "*no evidence*" that the juror's inquiry was for any purpose other than the juror's personal purpose, which did not fall within s. 68C.[50]

46. In the CCA, the Crown did not contend that a sole purpose test applies to s. 68C. The Crown's contention was that the juror's only purpose was a purpose that was not impugned by s. 68C. In this respect, it may also be noted that there was no difference between the approach of the majority and Campbell J in dissent on this issue. Justice Campbell differed from the majority in respect of his conclusions as to the factual inferences that should be drawn about the particular juror's purpose(s) in all of the circumstances of the case.

47. Ground 1(b) contends that the CCA erred in holding that, to satisfy s. 53A(2)(a), an inquiry must be made by a juror with the sole or specific intention or purpose of obtaining information relevant to the trial. As the CCA did not so hold, it follows that ground 1(b) should be dismissed.

Ground 1(c): The CCA did not err in finding that the juror had not engaged in misconduct

48. By ground 1(c), the appellant challenges the substantive finding of the CCA that the juror did not engage in misconduct within the meaning of s. 53A(1)(c) of the *Jury Act*.

49. As outlined above, s. 53A(1)(c) requires that a juror be discharged if the juror has engaged in misconduct, in that the juror has either engaged in conduct that constitutes an offence under the *Jury Act* (s. 53A(2)(a)) or the juror has engaged in conduct that otherwise gives rise to the risk of a substantial miscarriage of justice (s. 53A(2)(b)). In his appeal to this Court, the applicant appears to contend only that the juror should have been discharged under s. 53A(2)(a), on the basis that the juror engaged in conduct that constitutes an offence under s. 68C of the *Jury Act*.

50. For the reasons that follow, the majority of the CCA correctly concluded that the juror's conduct in making the inquiry did not constitute an offence under s. 68C, and hence, that it did not amount to misconduct under s. 53A(2)(a).

The scope of an offence under s. 68C

51. The scope of s. 68C must be considered in the context of its purpose and its history. Section 68C was introduced by the *Jury Amendment Act 2004* (NSW). The purpose of the amendment, as stated in the Second Reading Speech introducing the Bill, was to address the

[50] CCA judgment at [98]-[99] and [121]; CAB at 395 and 401.

conduct of jurors that occurred in cases such as *R* v *Skaf* [2004] NSWCCA 37; 60 NSWLR 86 and *R v K* [2003] NSWCCA 406; 59 NSWLR 431.[51]

52. *Skaf* concerned jurors who, for the purpose of testing the evidence that they had heard in the trial, determined to conduct a view of the park in which a sexual assault allegedly took place. *K* concerned jurors who performed an internet search relating to the accused and discovered that the accused had been previously convicted of murder. In introducing the Bill, the Minister referred to these cases as demonstrating "*the danger in a jury's verdict being determined not by the evidence and the relevant law, but by external factors, such as personal experiments or inquiries or prejudicial material bearing on the case*."[52]

10 53. Section 68C requires that the inquiry be made for the purpose of obtaining information about the accused or any matters "*relevant*" to the trial. An inquiry will be "*relevant*" to a trial, within the meaning of s. 68C, if the information sought to be obtained has the capacity to rationally affect the assessment of a fact in issue in the trial.[53] Whether a matter is "*relevant*" to a trial within the meaning of s. 68C must be assessed at the time that the impugned inquiry is made.

54. Importantly, it must also be borne in mind that s. 68C creates criminal liability (including the possibility of a custodial sentence) for jurors who are compelled to discharge a public service. Such a provision should not be construed so as to impose any form of strict liability.[54] The history of s. 68C, as set out above, demonstrates that the provision was intended to deter
20 jurors from exceeding their proper functions *as jurors*. Section 68C was not intended to intrude into the private lives and affairs of jurors. For this reason, s. 68C should be construed as imposing liability only where a juror acts with a purpose of obtaining relevant information *that is understood and intended by the juror* to have real relevance to contested issues in the trial.

The juror's conduct was not prohibited by s. 68C

55. For the reasons that follow, in the present case the juror had not made an inquiry about a matter that was, at the time that the inquiry was made, relevant to the trial; nor had the juror

[51] Second Reading Speech, *Jury Amendment Bill 2004*, 27 October 2004; CCA judgment at [39]; CAB at 382; see also CCA judgment at [102]; CAB at 396.
[52] Second Reading Speech, *Jury Amendment Bill 2004*, 27 October 2004; CCA judgment at [39]; CAB at 382.
[53] See, by analogy, s. 55 of the *Evidence Act* 1995 (NSW).
[54] *The Queen v He Kaw Teh* [1985] HCA 43; 157 CLR 523.

made an inquiry for the "purpose" of obtaining information that the juror understood to be relevant to the trial.

56. In assessing whether the inquiry was made about a matter that is "relevant" to the trial, it is necessary to firstly identify the inquiry that was made. That inquiry must then be assessed against the issues in the trial, as known by the juror, at the time that the inquiry was made.

57. As to the inquiry, it is clear from the jury notes, and the evidence of the foreperson, that the juror had formerly been a teacher and that the juror's inquiry related to the question of whether she, as a former teacher, should have been subject to a Working with Children Check under the *Child Protection (Working with Children) Act 2012* (NSW).

10 58. Turning to the question of relevance, as outlined above the juror's inquiry in the present case was made on 5 November 2015. This was after the evidence in the Crown and defence cases had closed, after the Crown and defence counsel had addressed, and after the jury had retired to deliberate. (Indeed, the inquiry was made after the jury indicated that they had reached verdicts in respect of eight of the twelve counts charged.)

59. At that time, evidence had been given in the Crown case by Detective Paul that the appellant did not have a Working with Children Check. When asked about the requirement to obtain a Working with Children Check, Detective Paul gave evidence that the classes of person who were required to obtain such a check included teachers, persons who work on the grounds at schools and police officers who work with children.[55]

20 60. However, in the defence case, Mr Nguyen gave evidence that he was a tutor, that he had not obtained a Working with Children Check, that the vast majority of undergraduate students have tutored at some point, and that none of his friends obtained a Working with Children Check.[56] Mr Nguyen was not cross-examined by the Crown about this evidence. In particular, the Crown Prosecutor did not suggest to Mr Nguyen that he, or any of his friends, were in breach of any requirement to obtain a Working with Children Check.

61. Importantly, the Crown Prosecutor did not refer to the Working with Children Check at any time in his closing address.[57] Defence counsel referred to the Working with Children Check

[55] T1240.50; AFM at 10.
[56] T1343 – 1344; AFM at 13 – 14.
[57] T1418 – 1498; AFM at 16 – 84.

only once in the closing address, when he noted Mr Nguyen's evidence that neither he nor any of his friends had that qualification.[58]

62. In her summing up, the trial judge referred to the issue of the Working with Children Check only in summarising the defence counsel's address. In particular, her Honour noted that defence counsel had submitted that Mr Nguyen was an impartial and honest witness, and that Mr Nguyen had given evidence that "*the accused not having a Working with Children's Certificate was not unusual, that most tutors in particular students do not have that…*".[59] The summing up did not identify the Working with Children Check as being in any way relevant to the Crown case or to the jury's assessment of any fact in issue.

63. There was no evidence in the trial that, had the appellant applied for a Working with Children Check, it would have been denied; or that, if tutors were required to obtain such a Check, the appellant either knew of that requirement or actively circumvented it.[60] Detective Paul gave evidence that the appellant had no prior convictions, and the trial judge directed the jury that "*[t]he fact that the accused is a person of good character is relevant to the likelihood of his having committed the offences alleged*".[61] As outlined above, Mr Nguyen's evidence that many tutors do not have Working with Children Checks was unchallenged by the Crown.

64. In summary, at the close of the evidence, the fact that the appellant had not obtained a Working with Children Check could not have rationally affected any fact in issue in the trial. As N Adams J observed:

> "There was no evidence before the jury to suggest that the appellant had deliberately avoided obtaining such a Check nor that he would not have been approved in any event. He relied upon good character evidence at his trial. <u>The evidence was thus of dubious relevance and did not appear to remain as a live issue in the trial by the time of counsel's closing addresses.</u>"[62] (emphasis added)

65. By the conclusion of counsel's addresses and the summing up, there was no question that the appellant's failure to obtain a Working with Children Check had no relevance to the trial. The Crown Prosecutor did not refer to the evidence at all in his closing address, and did not make any submission to the jury that they should draw any inference against the appellant by reason of him not having obtained a Working with Children Check.

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[58] T1507.10; AFM 93.
[59] CCA judgment at [35]; CAB at 381.
[60] CCA judgment at [36]; CAB at 381.
[61] Summing up at 69 – 70; CAB at 94 – 95.
[62] CCA judgment at [36]; CAB at 381.

66. It is also clear that the jury appreciated that, at the time the inquiry was made, the Working with Children Check evidence was irrelevant. In the examination of the foreperson prior to the discharge of the juror, the foreperson explained:

> "When [the juror's inquiry] was mentioned no further discussion or circulation around that [occurred], and in fact that point of evidence was not weighed in any of our decisions thus far, nor has it been brought up in the continuation of our discussions."[63] (emphasis added)

67. As the Working with Children legislation was not relevant to the trial at the time that the inquiry was made, the juror had not engaged in misconduct by making an inquiry about the timing of the application of that legislation to herself, as a former teacher.

68. Furthermore, for the reasons outlined above in respect of ground 1(a), it is not sufficient that the juror has merely made an inquiry about a matter relevant to the trial in order for a finding of misconduct to be made under s. 53A(2)(a). Rather, it is necessary to establish that the juror's purpose in making the inquiry was to obtain information that was relevant to the trial, and that was understood by the juror to be relevant to the trial.

69. Justice N Adams correctly held that, in the present case, the juror's purpose in making the inquiry did not fall within s. 68C of the *Jury Act*. As the trial judge found, the evidence before the Court strongly indicated that "*the inquiry made by the juror was for her own personal circumstances*".[64] The foreperson's note recorded that the juror had previously been a teacher, and that she wanted to know why she did not have a Working with Children Check. As outlined above, the sworn evidence of the foreperson confirmed that the issue of the Working with Children Check had not played any part in the decision making process. The juror's research was not prompted by the jury deliberations; rather, it was independently prompted by the juror's concern about her own professional obligations following Detective Paul's evidence.

70. In these circumstances, N Adams J (Hoeben CJ at CL agreeing) correctly concluded that the juror did not make the inquiry for the purpose of obtaining information relevant to the trial.[65] In so holding, N Adams J did not constrain the evidence of the juror's purpose; cf AWS at [51]. Her Honour considered the subjective, contemporaneous account of the purpose of the inquiry as contained in the foreperson's note. The only other matter advanced by the

[63] CCA judgment at [60]; CAB at 387.
[64] CCA judgment at [68]; CAB at 389.
[65] CCA judgment at [121]; CAB at 401.

appellant in the CCA as relevant to the assessment of the juror's purpose was the fact that the juror disclosed that she had conducted the Google search to the remainder of the jury. As her Honour held, this fact did not indicate that the juror had made the inquiry for the purpose of obtaining information relevant to the trial; rather, it suggested that the juror "*did not believe that she had made any prohibited inquiry and [that she] mentioned it to the other jurors as a matter personal to her*".[66]

71. Justice N Adams correctly concluded that there was "*no other evidence*" of the juror's purpose. Of course, a court will not be bound to accept a juror's assertion of their subjective purpose in making an inquiry: AWS at [56], citing *Sio (No 3)*. However, in the circumstances of the present case, there was no reason to doubt the account given in the foreperson's note. This was not a case where the stated purpose was questionable, such as where a number of jurors attend the scene of the alleged crime for the claimed purpose of seeing a rare tree that grew there: AWS at [53]. Nor was it a case where a juror had made an inquiry about a matter that was of central relevance to the trial. In such cases, a juror's explanation that the inquiry was made for personal purposes might readily be open to question. Rather, as Campbell J observed in dissent, the juror's inquiry in the present case concerned a matter whose relevance to the trial was "*at best obscure*".[67]

72. The inquiry made by the juror was as to whether a Working with Children requirement applied to her, as a former teacher. This was not a matter "*relevant to the trial*", nor was the purpose of the juror's inquiry to obtain information that was relevant to the trial. The majority was correct to find that s. 68C had no relevant application.

73. As s. 68C had no application, it follows that the juror had not engaged in misconduct within the meaning of s. 53A(2)(a) of the *Jury Act*. As outlined above, the appellant does not appear to contend in this Court that the CCA erred in finding that there was no misconduct within s. 53A(2)(b). Nor could such a contention be sustained.

74. Where, despite a juror's permissible purpose, prejudicial information comes to the juror's attention, it may be necessary to discharge the juror under s. 53A(2)(b) in the same way that it may become necessary for a juror to be discharged if the juror becomes aware of prejudicial material without having made any inquiry. The information obtained in the present case was not of that character. Indeed, the foreperson of the jury indicated, in the note to the trial judge,

[66] CCA judgment at [99]; CAB at 395.
[67] CCA judgment at [4]; CAB at 375.

that she held a Working with Children qualification, and had independent knowledge of the Working with Children legislation.[68] It has never been suggested that this knowledge precluded the foreperson from serving on the jury.

75. Where a juror knowingly contravenes a trial judge's instructions, discharge may be appropriate under s. 53A(2)(b) if the contravention gives rise to the risk of a substantial miscarriage of justice. In the present case, it should not be inferred that the juror knowingly contravened the trial judge's instructions. The jury were instructed that they were to decide the case on the evidence that they heard in court and that they could not "*make inquiries about anything to do with the case*".[69] The jury also received a written warning that it was a criminal offence for the jury to make any inquiry "*for the purpose of obtaining information about the accused or any matters relevant to the trial*".[70] The juror did not contravene these directions. For the reasons outlined above, the juror did not make the inquiry for the purpose of obtaining information about the accused or any matters relevant to the trial. Nor is there any suggestion that the juror proposed (either before or after the inquiry was made) to use the information obtained in deciding the case.

76. As the juror had not engaged in misconduct within s. 53A(2)(a) or (b), the majority of the CCA were correct to conclude that mandatory discharge was not required under s. 53A(1)(c).

Second Ground of Appeal

77. By the second ground of appeal, the appellant contends that the majority of the CCA erred 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(2) had occurred*."

78. For the reasons outlined above, the majority of the CCA correctly held that misconduct under s. 53A(2) had not occurred. The second ground of appeal contends that, even if this Court accepts that the CCA was correct to so find, mandatory discharge was required because the trial judge (erroneously) concluded that misconduct had been established.

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[68] CCA judgment at [48]; CAB at 383.
[69] CCA judgment at [29]; CAB at 379.
[70] CCA judgment at [30]; CAB at 380.

79. As the majority of the CCA concluded, the trial judge had formed a tentative view that misconduct had occurred at the time of taking the verdicts, but had not formally concluded that the juror had engaged in misconduct.[71]

80. However, even if the trial judge's reasons are properly read as indicating that she had made a determination that misconduct was established, there can be no "*fundamental breach of the suppositions of the trial*" if the trial judge's determination to this effect was in error; cf AWS at [65]. Section 53A(1)(c) mandates discharge where a juror has engaged in misconduct in relation to the trial. A decision as to whether a juror has engaged in misconduct will generally be an evaluative decision[72] and, for this reason, it may be appropriate to give deference to the decision of the trial judge that a juror has, or has not, engaged in misconduct. However, such deference should not be afforded where the trial judge is demonstrated to have erred in law in making this determination.

81. In the present case, the trial judge erred in the test that she applied when expressing the opinion that the juror had engaged in misconduct. The trial judge failed to identify the relevance of the subject matter of the inquiry to the matters in the trial. Further, the trial judge failed to consider whether the juror had made the inquiry "*for the purpose*" of obtaining information relevant to the trial. Rather, the trial judge concluded that there was a breach because "*it did have something to do with the case and it was Google searched*".[73] Indeed, the trial judge later held that the inquiry was made by the juror "*for her own personal circumstances*".[74] In other words, the trial judge approached the question of misconduct consistently with the appellant's contentions in respect of ground 1(a). For the reasons outlined above in respect of ground 1(a), a juror who conducts an inquiry for purposes unconnected to the trial does not engage in misconduct under s. 53A(2)(a) of the *Jury Act*.

82. The trial judge did not err in failing to discharge a juror who should not have been discharged. Further, if the trial judge technically erred by failing to discharge the juror consequent upon any (erroneous) finding of misconduct, this is an error to which the proviso can, and should, apply. There can be no substantial miscarriage of justice within the meaning of s. 6 of the

[71] CCA judgment at [137]; CAB at 405.
[72] CCA judgment at [2] (per Hoeben CJ at CL); CAB at 374.
[73] CCA judgment at [51]; CAB at 385.
[74] CCA judgment at [68]; CAB at 389.

Criminal Appeal Act 1912 (NSW) where a juror remains on the jury in circumstances where mandatory discharge was not properly required.[75]

Appropriate orders

83. For the reasons outlined above, grounds 1 and 2 should be dismissed.

84. If, contrary to the above, either ground 1 or 2 is allowed, the appropriate order would be for the convictions relating to counts 4 and 6 to 12 to be quashed, and for a retrial to be ordered in respect of those counts. As Campbell J concluded, there is no basis for the counts taken after the discharge of the juror to be quashed, although the sentences imposed for those counts should be set aside as they formed part of an aggregate sentence; cf AWS at [66].[76]

10 85. The appellant no longer submits that there was error in the trial judge's decision to proceed with the remaining jurors pursuant to s. 53C of the *Jury Act* (as he contended in the CCA). Rather, the only basis upon which the appellant contends that counts 1 and 5 should be quashed is that there is a "*real possibility*" that the verdicts of guilt in respect of the first eight counts were relied on for tendency and coincidence reasoning in the trial and that those "verdicts" may have been taken into consideration in determining the verdicts of guilt for counts 1 and 5: AWS at [66]. Contrary to the appellant's submission, the jury were not directed that they could reason from "verdicts of guilt". Rather, the jury were directed that if they found that one or more acts had been proved beyond reasonable doubt, they could use those findings to support tendency reasoning.[77] In these circumstances, if the first eight
20 verdicts are quashed, that determination should have no effect upon the remaining two verdicts.

PART VII: ESTIMATE OF TIME

86. The respondent estimates that it will require 1 hour for its oral argument.

26 November 2021

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[75] See, similarly, CCA judgment at [156]; CAB at 409.
[76] CCA judgment at [23]; CAB at 378.
[77] Summing up at 61 – 64; CAB at 86 – 89.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **QUY HUY HOANG**
Appellant

and

THE QUEEN
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

CONSTITUTIONAL PROVISIONS

1. There are no constitutional provisions that are relevant to this appeal.

STATUTES

2. *Child Protection (Working with Children) Act 2012* (NSW), version in force between 2 November 2015 – 7 January 2016.

3. *Crimes Act 1900* (NSW), s. 61M(2) as in force between 1 January 2007 – 1 January 2008, 1 May 2011 – 1 March 2013 and 1 January 2014 – 31 July 2014; s. 61O(1) as in force between 1 January 2007 – 1 January 2008; and s. 66A(2) as in force between 1 May 2011 – 1 March 2013 and 1 January 2014 – 31 July 2014.

4. *Criminal Appeal Act 1912* (NSW), version in force between 30 April 2018 – 23 September 2018.

5. *Evidence Act 1995* (NSW), as currently in force.

6. *Health Practitioner Regulation National Law* (NSW), as currently in force.

7. *Jury Act 1977* (NSW), version in force between 15 May 2015 – 30 June 2017.

8. *Jury Amendment Act 2004* (NSW), version in force between 15 December 2004 – 30 June 2005.

9. *Jury Amendment Act 2008* (NSW), version in force between 11 June 2008 – 1 July 2008.

10. *Legal Profession Uniform Law* (NSW), as currently in force.

STATUTORY INSTRUMENTS

11. There are no statutory instruments that are relevant to this appeal.