IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B18 of 2015

BETWEEN:

LESLIE GLYN SMITH
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

Part II: ISSUES ON APPEAL

2. The jury sent a note to the judge stating they were unable to unanimously agree. The note specified the votes cast by the jury. The votes were not indicative of a statutory majority (11:1). The judge disclosed the effect of the note to the appellant but did not inform him of the votes cast.

3. The *Jury Act 1995* (Qld) (the Act) provides that members of a jury must take an oath not to disclose anything about the jury's deliberations, and identifies the votes cast by the jury as confidential jury information. In the event that the jury is not able to unanimously agree on a verdict the judge ordinarily exercises a discretion to allow a majority verdict or discharges the jury without knowing the votes cast by the jury.

4. The appellant contends that there has been a miscarriage of justice because he was denied procedural fairness when the judge exercised the discretion to take a majority verdict without first disclosing to him the votes cast by the jury.

5. The issues raised by the appeal are:

   a. Should the judge have disclosed to the parties the votes cast by the jury?

   b. If he should have, did the failure to do so deny the appellant procedural fairness when he did not ask for the votes cast to be disclosed to him and did not seek to make any submissions against exercising the discretion to take a majority verdict?

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Part III: SECTION 78B OF THE JUDICIARY ACT

6. It is certified that no notice is required under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: FACTUAL ISSUES

7. The facts set out in paragraphs five to nine of the appellant's submissions are not contested, other than to add:

   a. As part of the summing up, the judge directed the jury that:

      i. how they conducted their deliberations in the jury room was a matter for them: AB 9: line 38;

      ii. they were not to discuss the case with the bailiff : AB 9: line 45;

      iii. when they reached a verdict, they were only to tell the bailiff that a verdict had been reached, and not what it was: AB 10: line 5;

      iv. they were not to discuss the case with anyone outside their number: AB 10: line 25;

   b. At 4.20pm on 24 February 2014, before the judge directed the jury that he could take a verdict on which 11 of them agreed, he advised counsel of his proposed course and allowed the appellant's counsel the opportunity to comment. The appellant's counsel responded, "I've got nothing to add to any of that, your Honour": AB 66: line 15-42.

8. The chronology provided by the appellant is not contested.

Part V: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

9. The appellant's statement of applicable statutes in Annexure A is accepted, except to add the following statutory provisions which are provided in the respondent's Annexure A:

   a. *Juries Act 2000* (Vic), s 42 and Schedule 3;

   b. *Oaths Act 1867* (Qld), ss 17 and 22.

Part VI: STATEMENT OF THE RESPONDENT'S ARGUMENT

10. The appellant contends that, if a jury provides information as to the votes cast to a judge, the judge in a criminal trial should disclose that information to the parties before exercising the discretion to take a majority verdict. The appellant further contends that failure to do so is a denial of procedural fairness that renders the trial unfair.

11. The respondent submits:

    a. The jury's deliberations, including votes cast, constitute confidential jury information and should not be disclosed under the Act because disclosure is not necessary for the proper performance of the jury's functions: ss 50, 70(2), 70(4), 70(6) of the Act;

    b. If the jury discloses the votes cast to the judge, and the votes are not 11:1, the judge should not disclose them to the parties because:

        i. The Act does not intend them to be disclosed;

        ii. Sound reasons of policy accepted by previous cases establish they should not be disclosed: *Gorman*, *Townsend*, *Kashani-Malaki*, *Millar (No 2)*, *Black*, *Watts and Black*, *Yuill*, *MJR*;

        iii. The votes cast are not relevant to, nor capable of influencing, the judge's discretion under s 59A or s 60 of the Act: see judgment of Holmes JA below at [88], with whom Philippides and Dalton JJ agreed;

    c. The decision of the majority in *HM v R* (2013) 231 A Crim R 349; [2013] VSCA 100 does not apply in Queensland because the *Juries Act 2000* (Vic) is materially different to the Act;

    d. The trial, given the appellant's counsel's conduct, was fair, and so there has been no miscarriage of justice.

The jury should not have disclosed the votes cast to the judge

12. In Queensland, the Act applies to State offences prosecuted on indictment. The appellant was indicted on rape under s 349 of the *Criminal Code* (the Code). The appellant pleaded not guilty and was deemed by s 604 of the Code to have demanded to be tried by a jury. His trial took place before Judge Shanahan and a jury. Section 33 of the Act provides that "[t]he jury for a criminal trial consists of 12 persons". The trial had reached the stage where the judge had instructed the jury and asked it to retire to consider its verdict under s 620 of the Code (see also s 51 of the Act). The jury was instructed that its verdict needed to be unanimous: AB 22: line 26-31.

13. The 12 members of a jury take an oath or affirmation, prescribed by s 17 and s 22 of the *Oaths Act 1867* (Qld), pursuant to s 50 of the Act that provides:

> "The members of the jury must be sworn to give a true verdict, according to the evidence, on the issues to be tried, and not to disclose anything about the jury's deliberations except as allowed or required by law."

14. Section 70 of the Act is concerned with the confidentiality of jury deliberations and expressly provides that the votes cast by the jury in the course of the jury's deliberation is 'jury information'. Section 70 allows for the disclosure of 'jury information' only in specific circumstances and relevantly provides:

"(2) A person must not publish to the public jury information.
Maximum penalty—2 years imprisonment.
(3) A person must not seek from a member or former member of a jury the disclosure of jury information.
Maximum penalty—2 years imprisonment.
(4) A person who is a member or former member of a jury must not disclose jury information, if the person has reason to believe any of the information is likely to be, or will be, published to the public.
Maximum penalty—2 years imprisonment.
(5) Subsections (2) to (4) are subject to the following subsections.
(6) Information may be sought by, and disclosed to, the court to the extent necessary for the proper performance of the jury's functions."

15. Section 70 was introduced in the Act by the *Jury Bill 1995* as part of the reformation of the jury legislation in 1995. In the same Bill, the juror's oath was changed to include the requirement that nothing about the jury's deliberations be disclosed. The two changes were introduced to ensure the continued confidentiality of jury deliberations following the publication by the media of comments of former jurors in high profile trials. The preservation of the secrecy of the jury room by the creation of an offence and the inclusion of the words in the juror's oath to mandate confidentiality was intended to ensure jurors could deliberate freely and openly, and maintain the finality of the verdict. The creation of the offence and addition to the oath was recommended in reports cited in the explanatory notes to the Bill.[1]

16. Consequently, judges do not ask the jury to disclose the votes cast before taking a unanimous verdict (it being unnecessary), exercising the discretion to ask the jury to reach a majority verdict or discharging the jury.

17. The jury in this case, as is common, sent a note to the judge stating that they were unable to reach unanimous agreement. The note did not include the votes cast. The judge did not ask the jury to disclose the votes cast. The judge, with the consent of the appellant, exercised the discretion to give the direction recommended by this Court in *Black v The Queen* (1993) 179 CLR 44 at 51-52 and instructed the jury that:

> "Ladies and gentlemen, I've got your note. I've got the power to discharge you from giving a verdict, but I should only do so if I'm satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues, but if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence. Each of you has sworn that you'll give a true

[1] See Explanatory Notes to the *Jury Bill 1995* (Qld), p1, referring to Reform of the Jury System in Queensland, Report of the Criminal Procedure Division, Litigation Reform Commission, August 1993, pp43-51; The Jury System in Criminal Trials in Queensland, Issues Paper, Criminal Justice Commission of Queensland, March 1991, pp35-38; Nolan Committee Report, 1992, pp17-20.

verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability.

Each of you takes into the jury room your individual experience and wisdom and you are expected to judge the evidence fairly and impartially in that light. You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong. That is not, of course, to suggest that you can consistently with your oath as a juror, join in a verdict which you do not honestly and genuinely think is the true and correct one.

Experience has shown that often juries are able to agree in the end if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in a disagreement, and to make a further attempt to reach a verdict before they may be discharged. So in the light of what I've just said, I'll ask you again to retire and consider the matter anew. So can you retire again please." (AB 64)

18. The jury was told in that direction that they were allowed to change their minds as to its verdict.

19. If, after being directed in accordance with *Black*, the jury is still unable to unanimously agree on a verdict the judge can, if s 59A of the Act is engaged, exercise the discretion to ask the jury to return a majority verdict. Section 59(1)(a) and (b) provide that the verdict of the jury must be unanimous in particular circumstances that are not relevant here. Section 59(3) provides that ordinarily a verdict must be unanimous. Section 59A was inserted in the Act in September 2008 in order to "reduce the number of hung juries ... [and] give certainty and finality to criminal proceedings".[2]

20. Section 59A is engaged if s 59(1)(a) and (b) do not apply and pursuant to s 59A(2):

> "If, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation, the judge may ask the jury to reach a majority verdict." (underlining added)

21. Section 59A(6) relevantly defines a "majority verdict" as "a verdict on which at least 11 jurors agree" and the "prescribed period" as a period of at least eight hours of actual deliberation after the jury retires to consider its verdict or any further period the judge considers reasonable having regard to the complexity of the trial.

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[2] See Explanatory Notes to the *Criminal Code* and *Jury and Another Act Amendment Bill 2008*, p2. See also Second Reading Speech, Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 August 2008, p. 2244 – 2245.

22. Section 60(1) of the Act provides:

> "If a jury can not agree on a verdict, or the judge considers there are other proper reasons for discharging the jury without giving a verdict, the judge may discharge the jury without giving a verdict."

23. Section 59A and s 60 deal with different circumstances. Section 59A is concerned with circumstances where, after the prescribed period, the jury is unlikely to reach unanimity after further deliberation, but a majority verdict is possible (in the context of *Black*). Relevantly, s 60(1) is engaged when a jury cannot agree on a verdict, unanimously or by a statutory majority. It has no temporal requirement for its exercise. When a jury indicates that they have not agreed unanimously after the prescribed period, it is the discretion under s 59A which first arises. For the pre-condition to the exercise of the power in s 60 that the jury "can not agree on a verdict" to be satisfied, the judge must have decided either that a majority verdict is not possible, or exercised the discretion not to take a majority verdict.

24. In this case, after eight hours of deliberation, and after a *Black* direction had been given, the judge received another note from the jury indicating that they were still not "in total agreement." The judge disclosed that part of the note to counsel. The note also disclosed their "voting pattern", which the judge did not disclose to counsel: AB 65: line 7-13. It is accepted that the note did not disclose a statutory majority for conviction.

25. The statement that the jury was not in total agreement was, as the appellant accepted by his acquiescence at trial (AB 66), sufficient to satisfy the judge the jury was unlikely to reach a unanimous verdict after further deliberation and thus engage s 59A of the Act. The judge then, with the consent of the appellant, explained to the jury he could take a verdict of 11 of them and asked, in the context of their note, if they wanted more time to deliberate: AB 67: line 4-17. The speaker indicated more time could assist, and the judge, without objection, asked the jury to retire to attempt to reach a majority verdict: AB 67: line 25-28. The jury returned after approximately 20 minutes with a majority verdict of guilty: AB 77.

26. The actual votes cast could only confirm the jury was not in total agreement and could not be used to go behind the jury's statement, in the context of the *Black* direction, that a majority verdict was possible. If the jury's answer to the judge's question was that neither a unanimous nor a majority verdict was possible, then s 60 would have been engaged.

27. Section 50 of the Act directs that each juror be sworn to give a true verdict according to the evidence, and not disclose anything about the jury's deliberations other than as allowed or required by law. Section 70(4) makes it an offence for a juror to disclose jury information, in particular the votes cast, if the juror has reason to believe any of the information is likely to be published to the public.

28. The appellant submits that writing a note to the judge could not fall within the terms of the offence in s 70(4): [19]-[20]. That point was not taken below: see Holmes JA at [82]. The disclosure of information in a note to the judge fits naturally within the scope of s 70(4).

29. The trial was heard in open court. Any juror would have expected that the note would be disclosed in open court, consistently with every other part of the trial they had seen, excepting the complainant's evidence. When the court was closed for that evidence, they were specifically told of it in the summing up: AB 19: line 10-12. The content of their first note requesting re-directions had been disclosed in open court in front of them during the re-directions given: AB 62. Their note prior to the *Black* direction was not kept secret: AB 64. There was every reason for the jury to expect the note containing the votes cast to be treated similarly. Further, if disclosing jury information to the court is not "publish[ing] to the public", s 70(6) would have no work to do, except insofar as it allows solicitation of information. An interpretation of the Act should be preferred which gives all sections meaning.

30. Section 70(6) is the only relevant exception to s 70(4), and it requires any disclosure to be "necessary for the proper performance of the jury's functions". Holmes JA was correct to find at [83] that:

> "...it cannot be said that the disclosure is necessary for the jury's performance of its functions. A trial judge can reach a view on whether to ask for a majority verdict without receiving the information; the jury can similarly perform its role without providing it. I conclude that s 70(6) does not contemplate the disclosure of the jury's voting break-up to the trial judge in order to inform the exercise of the discretion under s 59A(2)."

See also Philippides J at [98].

If disclosed by the jury, the judge should not disclose the votes cast to the parties

<u>The Act does not intend them to be disclosed</u>

31. The Act makes clear in ss 70(2) and 70(4) that confidential jury information, including votes cast, is not to be disclosed, by the jury or any other person, except in the limited circumstances spoken of above.

<u>The common law</u>

32. The position at common law is that votes cast should not be disclosed by the jury to the judge, or by the judge to counsel.

33. In *R v Gorman* [1987] 1 WLR 545 and *R v Townsend* (1982) 74 Cr App Rep 218, it was held that the judge should not disclose those parts of the note that the jury should not have revealed, particularly votes cast. Those judgments did not place any weight

on the terms of s 8 of the *Contempt of Court Act 1981* (UK); as the appellant accepts at [31] the provision is not mentioned in either judgment. The judgments are based on the view that "it would clearly be undesirable for information as to voting figures to be made public": *Gorman* at 550.

34. The approach approved of by the Court of Appeal in *Gorman* was for the judge to disclose the fact of the note to counsel in open court, and that it indicated the jury could not agree, without disclosing the votes cast: at 551. That approach was approved by the Queensland Court of Appeal in *R v Kashani-Malaki* [2010] QCA 222 at [43] and *R v Millar (No 2)* (2013) 227 A Crim R 556 at 562 [27] and in Victoria and New South Wales in *R v Black, Watts and Black* (2007) 15 VR 551 at 555 and *R v Yuill* (1994) 34 NSWLR 179 at 190. That approach is identical with that taken by the trial judge in the present case.

35. The undesirability of disclosure of votes cast is not further explained in *Gorman* and *Townsend*. In *R v Burrell* (2007) 190 A Crim R 148 at 210-211 [256]-[257], the New South Wales Court of Appeal identified the finality of the verdict and the protection of the jury's deliberations from external oversight and challenge as protecting the legitimacy of the jury's verdict, and so the jury system as a whole.

36. The appellant submits that those policy considerations do not easily apply to the present case: [26], [34]. The respondent submits that those considerations are as telling here as any case centering on a jury note. The disclosure of information about the jury's deliberations, whether that be arguments made, opinions expressed or votes cast would allow public scrutiny of the reasoning process that leads to the verdict. That scrutiny would lessen protection of jurors, and impeach the legitimacy and finality of the verdict, impairing public confidence in the jury system.

37. Similar considerations arise in cases where an appellate court is asked to accept evidence of some aspect of the deliberations of a jury to impugn the verdict. In *Smith v State of Western Australia* (2014) 250 CLR 473 at 476 [1], this Court confirmed:

> "It is a general rule of the administration of criminal justice under the common law that once a trial has been determined by an acquittal or conviction upon the verdict of a jury, and the jury discharged, evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict." (footnote removed)

38. This Court said that the rationale for the exclusionary rule lies in the "preservation of the secrecy of a jury's deliberations to ensure that those deliberations are free and frank so that its verdict is a true one and to ensure the finality of that verdict": at 481 [31]. The rule was held not to prevent consideration of unlawful pressure or influence that has been applied to a juror in relation to their verdict: at 485 [48]. The exclusionary rule does not deny admissibility to matters "extrinsic" to the jury's deliberations as opposed to those that are part of the substance of the deliberations: at 480-482 [27]-[37]. Jury votes cast are the heart of the proper deliberation of a jury; without a vote, there can be no unanimity or majority, and no verdict.

39. It follows that if votes cast are not admissible after a verdict to impugn it, they are not relevant to any discretion to be exercised prior to the verdict.

40. Holmes JA, with whom Philippides and Dalton JJ agreed, was correct to say at [81] that:

> "Generally speaking, the view has been that jury numbers should not be revealed to trial judges, and that where they are, the judge should not communicate them to counsel."

41. That does not, as the appellant submits at [32]-[33], place any undue emphasis on English decisions based on a different statute. It is the simple application of long-standing policy and judgment which has been accepted and applied by this Court as recently as *Smith*.

42. It was those same policy considerations which led to the introduction of s 70 of the Act and the amendment of the juror's oath, as discussed above.

Votes cast are not relevant to, nor capable of influencing, the exercise of discretion under s 59A and s 60

43. Holmes JA was right to distinguish between whether the votes cast are relevant to the discretion and whether they had the capacity to influence the judge: see [80]. The former deals with what considerations could feature in the judge's determination of the course to be taken. A relevant consideration is one which rationally affects the strength of the case to be made for one side or the other. Capacity to influence, on the other hand, deals with actual or perceived bias of the decision maker.

Relevance to exercise of discretion

44. The Act and the common law provide that the jury and the judge should not disclose the votes cast. Holmes JA was correct to find at [84]:

> "...it follows that the statutory intent is that such information is not among the matters properly to be taken into account in the exercise of the discretion under that sub-section, and in that sense is not a relevant consideration. If the numbers by which a jury is split cannot be a proper consideration for the trial judge, it must also follow that submissions based on that information would concern an irrelevant consideration. And that must be generally true: the information cannot acquire relevance purely by reason of its inadvertent disclosure."

See also Philippides J at [98]

45. To be relevant, the votes cast must have some rational effect, direct or indirect, on the assessment of some fact in issue. The facts in issue under s 59A are whether the prescribed period had elapsed, whether a unanimous verdict is likely and whether a majority verdict should be allowed. Under s 60, the facts in issue are whether a unanimous or majority verdict is possible, and whether the jury should be discharged.

46. The respondent submits that the votes cast could not be relevant to whether a unanimous or majority verdict is likely, or the exercise of either discretion.

47. First, because the jury system has at its foundation the principle that jurors are allowed to change their minds, votes cast are but a fleeting glance at the jury's deliberations. The *Black* direction has at its heart the premise that a juror's verdict can change after further deliberation. Jurors are exhorted to discuss their opinions to see if they can agree. They are told that experience has shown that often, after further consideration, they can agree. The implication is that changing one's mind is not prohibited, as long as a juror does not join in a verdict with which they do not honestly agree. That was confirmed in *Stanton v The Queen* (2003) 77 ALJR 1151; [2003] HCA 29 at 1156 [27] where the majority judgment of Gleeson CJ, McHugh and Hayne JJ said:

> "As the direction recommended in *Black* acknowledges ... it was proper for individual jurors to attach weight to the opinions of others, and if persuaded by those opinions, to modify or alter their own views in response."

48. In *Burrell*, mentioned above, the appellant argued that the *Black* direction should not have been given where the judge was given a note from one juror indicating some distress and difficulties in the jury room and that the jury had been hung for some time. It was argued that the note gave rise to a reasonable apprehension of a lack of impartiality on the part of the minority juror who changed their mind (for a unanimous verdict of guilty of murder). The New South Wales Court of Appeal rejected that argument at 219 [294], saying:

> "The jury had, by the time the note was written, been in deliberations for a number of days. It is not surprising that firm positions had been taken and rigorous debate was occurring. It could not rationally be suggested that all jurors must come to the same conclusion at the same time before they may enter a valid verdict. If it could be argued that a minority juror's decision to join the majority gives rise to an inference of bias, then in almost any case where the jury deliberated for any length of time there may be grounds for discharge. Any delay in reaching a verdict may indicate that one of the jurors (at least) was not immediately convinced of the accused's guilt or innocence and had to be convinced to change their mind."

49. If, consistently with those authorities, jurors can change their minds, then the jury numbers at one time cannot rationally affect what course the trial should take.

50. Secondly, the judgment of this Court in *Smith v The Queen* is consistent with the irrelevance of the voting information. Votes cast would not be admissible after the verdict to impugn it. From *Black* it is clear that no matter the votes cast at any stage of deliberations, there could be no complaint about the jury reaching a verdict and delivering it. It follows that the votes cast are not relevant to the exercise of the discretion to take a verdict in the first place.

51. Thirdly, as Philippides J explained at [99], votes cast disclosed by the jury, without more information, are incomplete and potentially misleading. The votes cast by

themselves do not give any real insight into the state of jury deliberations. They do not distinguish between jurors arriving at the same result by different routes, or indicate whether the vote was taken on a particular assumption of fact or before some evidence or a particular juror's opinion was considered. The vote, without more, could not be the basis on which to draw any conclusions about the state of the jury's deliberations or how the trial should proceed. It is the jury's statements to the judge about the possibility or likelihood of reaching a verdict which have substantive meaning.

52. Fourthly, there is no relevant submission that could be made by counsel that would properly influence the exercise of the discretion in one direction or the other. The appellant's counsel at the special leave hearing indicated that "if it was 10:2 either way, both opposing counsel would want to urge a particular course..." [2015] HCATrans 84 (17 April 2015), p10. Such a submission would be inconsistent with the purpose of the allowance for majority verdicts and tantamount to a submission that the defendant does not want to be convicted. The proposed submission also ignores the Crown's duty to prosecute firmly and fairly but not seek a conviction at all costs: see Office of the Director of Public Prosecutions (Qld), Director's Guidelines, Guideline 1 and *Barristers' Rule 2011* (Qld), [82]-[85]. The Crown should not oppose a majority verdict on the basis that it might be one of acquittal.

53. In the appellant's written submissions it was said "if the numbers were locked at 6-6 or close to that, it is difficult to envisage a trial judge would see any utility in extending more time to the jury for a majority verdict": [67]. In *HM v R*, Redlich JA and Kaye AJA said at 359 [33]:

> "If counsel for the appellant had then been informed of the numbers, he would have been well placed to submit that any verdict delivered in the case would have involved almost one half of the jurors abandoning a seemingly entrenched position. In such a situation, a stronger argument could have been advanced by counsel against the judge allowing the jury to return a majority verdict."

54. Those submissions would not affect the discretion because it is exactly what *Black* contemplates. A similar argument was rejected in *Burrell*.

55. Holmes JA was correct to say at [86] (see also Philippides J at [100]):

> "What is relevant to the exercise of discretion is the fact of the jury's disagreement; the numbers entailed in that disagreement cannot, for the reasons already discussed, have any proper relevance under s 59A(2) of the *Jury Act* to the judge's decision or counsel's submissions."

56. It should be noted that it is only the majority in *HM v R* that held that, excepting cases where the votes were 11:1, the votes cast could be relevant to the exercise of the discretion.

57. In *MJR v R* (2011) 33 VR 306; [2011] VSCA 374, the jury had indicated their votes cast on all counts in a note to the judge; on three out of nine counts, there was an 11:1 majority in favour of conviction: 309 [13]. The Victorian Court of Appeal held that

the fact the note disclosed 11:1 votes in favour of conviction took the case out of the realm of previous decisions on the disclosure of votes cast. The key point was that the judge knew that taking a majority verdict would result in a conviction: 316 [56]. The Court held that not disclosing the votes cast that were 11:1 for conviction (and only those: 316 [57]) was a breach of procedural fairness: 316 [58].

58. It was said that disclosure was required because of a combination of the nature of the information, the significance of it for disposition of later applications and the fact the judge knew but defence counsel did not: 316 [59].

59. Non-disclosure was said to be "relevant" in at least two ways: because counsel was precluded from submitting that the judge could no longer dispassionately consider an application to discharge the jury, or dispassionately consider whether to allow a majority verdict: 317 [63]. The decision does not include any statement about the relevance of the votes cast to the substantive decision whether to allow a majority verdict or not; the focus is on the effect of the knowledge on the judge being able to exercise the discretion dispassionately.

60. *LLW v R* (2012) 35 VR 372; [2012] VSCA 54 does not, in the respondent's submission, unequivocally support *HM v R*. In a situation said to be "almost identical" to *MJR* (386 [69]), the Court held at 388 [78] that:

> "the revelation by the jury to the judge of the voting patterns on each count, in circumstances where her Honour had not yet determined whether to allow a majority verdict to be brought in and had failed to reveal the contents of the note to counsel, denied the appellant procedural fairness"

61. It was not clear in the judgment in *LLW* whether the votes disclosed were 11:1 or not. The judgment described the votes as "highly relevant" to the exercise of the discretion (at 386 [69]); a term not used in *MJR*. The majority in *HM* later assumed the numbers on the note were not 11:1 in *LLW* and distinguished it from *MJR*: *HM v R* at 357 [25]. If the votes cast in *LLW* were 11:1, then the lack of procedural fairness was caused by the information's capacity to influence the judge rather than its relevance to the discretion as in *MJR*. If the votes cast were not 11:1, then the judgment has departed from the judgment of *MJR* without providing detailed reasoning.

62. *Nguyen v The Queen* [2013] VSCA 65 is an entirely different case. The fact of the jury being split 11:1 was inadvertently sought from the jury by the judge in open court. The majority held that procedural fairness was afforded as all counsel were aware of the same information as the judge and had the opportunity to make submissions on the course to be taken: [18]. Priest JA, in dissent, was the only judge to deal with whether votes cast were relevant to the substantive discretion. His Honour found that they were irrelevant, and so to the extent the transcript suggested the judge considered them in deciding whether to take a majority verdict, the judge had taken into account an irrelevant consideration: [81].

63. In *HM v R*, the jury sent the judge a note that indicated that the votes cast were 7:5: 363 [51]. Redlich JA and Kaye AJA held that the votes cast were relevant to the question whether the jury should be discharged or allowed to deliver a majority verdict, and were capable of influencing the judge in that decision: 358 [30]. As those questions were still to be decided in the trial, the votes cast had to be disclosed: 358 [28]-[29]. The failure to disclose them meant there was a lack of procedural fairness, precluding the defendant's counsel from making stronger submissions for the discharge of the jury: 359 [33].

64. The respondent submits that the Victorian Act is materially different from the Act, and so *HM* has no practical application in Queensland: see below. Further, the analysis of the Queensland Court of Appeal and the Victorian Court of Appeal in *MJR* and the dissenting judgment in *HM* should be preferred to that of the majority in *HM*. The majority judgment in *HM* departed from a line of authority (putting *LLW* to one side) which supported the non-disclosure of votes cast, other than where the votes were 11:1. It was said at 353 [8] that *Gorman* and *Townsend* were not designed to deal with a circumstance where the content of the jury communication was relevant to an issue such as the discharge of the jury or the taking of a majority verdict. To the contrary, the note in *Gorman* communicated that the votes cast were 9:3 when the judge had the ability to allow a 10:2 majority verdict. The jury was discharged after telling the judge there was no possibility of them reaching a 10:2 verdict, and the appeal decided on other grounds, but there is no material factual difference between *Gorman* and *HM*.

65. At 358 [27] the majority held that *MJR* was an "illustration of the principle that voting details which have come into the possession of the trial judge must be disclosed where such information is relevant to a decision which the trial judge is required to make". The respondent submits that *MJR* did not hold that votes cast were relevant to any decision. *MJR* simply held that when the votes cast were a statutory majority, they might mean that the judge could not dispassionately consider taking a majority verdict or discharging the jury. Putting *LLW* to one side, no previous decision supported the finding in *HM* that the votes cast were relevant to the discretion to discharge or allow a majority verdict.

66. Part of the majority's reasoning in *HM* was the factual context set out in 359 [34]. A significant number of the jurors moved from an "apparently entrenched position" to return the majority verdict. Movement from a previous position was also the substance of the proposed relevant submissions counsel may have made had the votes cast been disclosed: 359 [33]. With respect, the reliance on jurors changing position is unfounded because of the principles in *Black*.

67. The reasoning of Whelan JA, in dissent, is preferable. Having reviewed the authorities before and after *MJR*, Whelan JA noted that *MJR* created an exception to the general rule that judges should not disclose the votes cast to the parties, but also endorsed that general rule: at 371 [81]. He held that there had been no procedural unfairness in the case, and said at 371 [86]:

> "[i]f disclosure were to be required in this case on the basis of procedural fairness, that would be inconsistent with well established principles in my view. Indeed, it would, in my view, be contrary to *MJR* itself."

Capacity to influence

68. Holmes JA was right to hold at [88] that the votes cast did not have the capacity to influence the judge in his discretion whether to allow a majority verdict. It is plain that the votes cast told the judge no more than the rest of the note: that the jury was not in agreement. The votes cast, not being 11:1, could not have given rise to an actual or perceived bias towards a particular result.

10 69. This case does not involve the situation where, as in the Victorian case of *MJR*, the jury disclosed to the judge a statutory majority to convict which may have been capable of influencing the exercise of discretion to accept such a verdict. If the votes cast were 10:2, 9:3, 8:4, 7:5 or 6:6, knowing that would not mean the judge would *know* the outcome of asking for a majority verdict. It would not have "the appearance of a charade" as in *MJR*: at 317 [63].

70. Counsel for the appellant knew all the significant information that the judge knew: the jury was not unanimous and not split at 11:1. There was nothing in the rest of the note that could influence the judge, requiring disclosure to counsel. Procedural fairness did not require the votes cast to be disclosed.

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_HM v R_ has no application in Queensland

71. The respondent submits that Holmes JA, with whom Philippides and Dalton JJ agreed, was right to find that *HM v R* had no practical application in the present case: [88]-[89].

72. First, the two Acts are materially different in their approach to jury information and the allowance for a majority verdict.

73. In contrast to s 50 of the Act, the Victorian oath or affirmation to be taken by a juror contains no promise not to disclose jury deliberations other than as allowed or required by law. Rather, it simply requires a juror to promise to return a verdict in accordance
30 with the evidence: s 42 and Schedule 3, *Juries Act 2000* (Vic).

74. When acting under s 59A of the Act, the choice is between seeking a majority verdict and not seeking one. There is no power of discharge in s 59A. The power to discharge appears in s 60. It can be exercised at any time. By contrast, s 46(2) of the Victorian Act requires the court to decide whether to take a majority verdict or to discharge the jury. That difference was highlighted by Holmes JA in the decision below at [62]. Queensland introduced majority verdicts some 15 years after they were introduced in Victoria. The Explanatory Notes to the Bill introducing majority verdicts made clear that the Queensland scheme was not based on any particular interstate model:

Explanatory Notes to the *Criminal Code and Jury and Another Act Amendment Bill 2008*, p4.

75. The offences created for disclosure of jury information are almost identical. The Victorian s 78(1)(a) is an effective equivalent of s 70(2), and s 78(2) of s 70(4). The exceptions, however, have significantly greater width. Disclosure by a juror or former juror to a judge or court is excepted absolutely by s 78(3)(a)(i) of the Victorian Act.

76. The scheme of the Act in Queensland is much stricter on the disclosure of jury information, both by including the prohibition in the juror's oath or affirmation, and by the narrow exception in s 70(6). The Victorian Act permits much wider disclosure. It is unsurprising then, that the type of jury information that might be thought relevant to the discretion to take a majority verdict in Victoria is a greater set than that which would be relevant in Queensland.

77. Second, the court in *HM v R* did not approach the matter as an exercise in statutory construction.

78. In *HM*, the only mention in the majority judgment of s 78 was to say at 352 [5]:

> "That principle [that jury deliberations should remain, so far as possible, confidential] is of the highest significance in our justice system. It was zealously guarded by the common law, and is reflected and reinforced by s 78 of the *Juries Act 2000* (Vic)."

79. The *Juries Act 2000* (Vic) was not the basis of the consideration in *HM v R* as to whether votes cast would be a relevant consideration when exercising the discretion under s 46 of that Act. Equally, in the earlier decisions of *MJR* (312 [37]-[38]) and *Nguyen* ([59]-[60]), there were brief references to s 78 of the Victorian Act, but no detailed analysis. In *MJR*, the first of the Victorian cases, Ashley JA noted that while the argument was made that s 78(2) of the *Juries Act* did not prevent jurors disclosing votes cast because a juror has no reason to believe the information would be published to the public, it was unnecessary for that point to be decided, because both counsel agreed s 78(2) did not displace the common law position from *Gorman*: see 312 [38].

80. The clear intent of the Act in Queensland puts the present case in a different factual context to *HM v R*. Holmes JA, with whom Philippides and Dalton JJ agreed, was right to hold that the statements of principle in *HM v R* have no application in the present case.

The appellant's trial was not unfair

81. If the judge should have disclosed the votes cast then, in the circumstances of this case, there has been no denial of procedural fairness in the sense that the appellant's trial was unfair. The appellant's counsel did not ask for the votes cast to be disclosed or raise any concern when the judge indicated he did not intend to disclose the votes cast: AB 65: line 7-15. When given the opportunity, he did not make any submission against

exercising the discretion to ask the jury to reach a majority verdict: AB 66: line 40. Contrary to [71] of the appellant's written submissions, the appellant's counsel had the opportunity to make submissions as to the appropriateness of taking a majority verdict before the jury was brought back into court.

82. Hayne J, Crennan and Heydon JJ agreeing, said in *Gately v The Queen* (2007) 232 CLR 208 at 232–233 [77] in respect of defence counsel agreeing to the jury having the pre-recorded evidence of the complainant in the jury room with them:

> "Great weight must be attached to that consent in considering whether there was a miscarriage of justice. So much follows inevitably from the adversarial nature of a criminal trial. As was said in *R v Birks*, '[a]s a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted'. It is for the parties, by their counsel, to decide how and on what bases the proceeding will be fought. Consent by counsel for a party to a course of conduct is usually an important indication that that party suffers no miscarriage of justice by pursuit of the intended course. But, as the cases concerning allegations of incompetent representation illustrate, the miscarriage of justice ground may yet be established despite the course that is taken by an accused person's counsel at trial. In the present case there was no allegation of incompetent representation. The circumstances surrounding trial counsel consenting to the course that was followed require the conclusion that there was no miscarriage of justice."

83. The appellant's counsel's decisions not to challenge the judge's proposed course as to the disclosure of the note and the taking of a majority verdict had a sound forensic basis: the jury had been deliberating for some time and he might have considered the chance of an acquittal was high. See *Nguyen* at [19] (Weinberg JA, with whom Whelan JA agreed).

84. Any submission to be made by the appellant's counsel urging the discharge of the jury would not have been solely based on the votes cast. Such a submission would have relied on the factual context of taking a majority verdict, for example based on the length of time the jury had been deliberating, the complexity or otherwise of the issues or some other feature. No such submission was made.

85. The appellant states that the jury was in an "entrenched position" because they had indicated they were not unanimous before and after the *Black* direction was given: [74] of appellant's written submissions. The respondent submits that is speculation. The note received at 2.30pm did not indicate the votes cast. The second note at 4.20pm did. The votes cast may have changed between those notes consistently with *Black*. Even if the votes cast in each note was the same, it still could not be confidently concluded that the jurors were entrenched as many may have changed position (in the context of *Black*), coincidentally resulting in the same votes cast as previously.

Summary

86. The respondent submits that the jury should not disclose votes cast to the judge. If they do, putting aside the case where the votes cast are 11:1, any votes cast disclosed to the judge by the jury should not be disclosed to counsel. The intent of the Act and sound reasons of policy support their continued confidentiality. They are irrelevant to decisions to be made under ss 59A and 60 of the Act, and incapable of influencing the judge.

87. In any case, the appellant was not denied procedural fairness in the case because his counsel did not make submissions, when given the opportunity, that the jury should be discharged.

Part VII

88. Presentation of the respondent's oral argument is estimated to take 1½ hours.

Dated 28 May 2015

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RESPONDENT'S ANNEXURE A

Juries Act 2000 (Vic)

42 Swearing of jury
On being empanelled, jurors must be sworn in open court in the form of Schedule 3 applicable to the case.

SCHEDULE 3 - SWEARING OF JURORS ON EMPANELMENT
Oaths by jurors—Criminal Trial
You (*or, if more than one person takes the oath, you and each of you*) swear (*or the person taking the oath may promise*) by Almighty God (*or the person may name a god recognised by his or her religion*) that you will faithfully and impartially try the issues between the Crown and [*name of accused*] in relation to all charges brought against [*name of accused*] in this trial and give a true verdict according to the evidence.
...
Affirmations by jurors—Criminal Trial
You (*or, if more than one person affirms, you and each of you*) solemnly and sincerely declare and affirm that you will faithfully and impartially try the issues between the Crown and [*name of accused*] in relation to all charges brought against [*name of accused*] in this trial and give a true verdict according to the evidence.

Oaths Act 1867 (Qld)

17 Affirmation instead of oath in certain cases
(1) If any person called as a witness or required or desired to make an oath affidavit or deposition objects to being sworn it shall be lawful for the court or judge or other presiding officer or person qualified to administer oaths or to take affidavits or depositions to permit such person instead of being sworn to make his or her solemn affirmation in the words following videlicet—

'I A.B. do solemnly sincerely and truly affirm and declare etc.'.

(2) Which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form and the like provisions shall apply also to every person required to be sworn as a juror.

22 Swearing of jurors in criminal trials
Jurors may be sworn for criminal trials in open court in the following form or in a form to the same effect—

> You will conscientiously try the charges against the defendant (or defendants) [*or the issues on which your decision is required] and decide them according to the evidence. You will also not disclose anything about the jury's deliberations other than as allowed or required by law. So help you God.