HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: HCF
Appellant

and

10 THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I:

It is certified that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issues presented by the appeal

1. The Court of Appeal (Qld) held that the appellant's convictions should stand, despite the proven wilful transgression of unambiguous directions given to the jury by the trial judge that they should (a) not undertake independent research and (b) report any such conduct by a fellow juror. That misconduct undermines the assumption, fundamental to the system of criminal justice, that juries will obey judicial directions.

2. The Court of Appeal (Qld) concluded that verdicts of guilty were "true for the whole jury" despite the fact that only five of the twelve jurors who delivered the verdicts responded to an investigation by the Sheriff conducted pursuant to subsection 70(7) of the *Jury Act 1995* (Qld).

3. Can the common form proviso be applied where there has been a serious breach of one of the presuppositions of a trial, namely that a jury will obey judicial directions?

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Part III: Section 78B of *Judiciary Act 1903* (Cth)

4. The appellant does not consider that any notice is required in compliance with s 78B of the *Judiciary Act 1903* (Cth).

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Part IV: Citation of judgments below

5. The medium neutral citation for the decision of the Court of Appeal (Qld) is *R v HCF* [2021] QCA 189.

Part V: Relevant Facts

6. The appellant was charged with 25 sexual offences against two of his nieces. Count one charged the offence of Maintaining a sexual relationship with the first complainant over eleven years between 31 December 1989 and 19 September 1999. Counts 3, 4, 5, 7, and counts 10 to 20 and 23 to 25 were particularised offences which made up the Maintaining offence. Count two charged the offence of Maintaining a sexual relationship with the second complainant over a period of 6 years between 9 August 1994 and 10 August 2000. The appellant was separately charged with counts 6, 8, 9, 21 and 22 which were particularised offences alleged to have occurred during the maintaining period.

7. At the commencement of the appellant's trial, the learned trial judge directed the jury about, inter alia:
   (a) The need to come forward if a juror felt he/she could not be impartial or if he/she might be perceived as not being impartial.[1]
   (b) The need to pay careful attention to the evidence and ignore anything that they may have read or heard about the case, or similar cases.[2]
   (c) That it was important that they "do not get on the internet and look anybody up."[3]
   (d) That they should not do internet searches for legal principles or other research on the matter.[4]
   (e) Advise the court if a juror revealed that he or she has searched the internet contrary to the direction.[5]
   (f) Accept directions the judge gives them in law.[6]
   (g) Not to be prejudiced by the defendant facing 25 charges.[7]
   (h) The importance of weighing all of the evidence in an "unbiased and unprejudiced and rational way."[8]

[1] Appellant's BOFM at 16, l.27.
[2] Appellant's BOFM at 33, l.30.
[3] Appellant's BOFM at 34, l.9.
[4] Appellant's BOFM at 34, l.18.
[5] Appellant's BOFM at 35, l.1.
[6] Appellant's BOFM at 31, l.35.
[7] Appellant's BOFM at 33, l.23 and Appellant's BOFM at 37, l.27.
[8] Appellant's BOFM at 40, l.40.

8. His Honour's summing up was supplemented by written directions which the jury were able to take into the jury room. Significant matters upon which the jury were directed included:

    (a) Motive to lie;[9]
    (b) Preliminary complaint;[10]
    (c) Separate consideration of charges (supported by written directions);[11]
    (d) Evidence of a sexual interest (supported by written directions);[12]
    (e) Delay in making the complaint (supported by written directions);[13]
    (f) The use of similar fact evidence (supported by written directions);[14]
10 (g) Uncharged acts.[15]

9. Before the jury retired, directed verdicts were delivered in respect of counts 8, 10, 11, 12, 13 and 23. Count 10, 11, 12 and 13 related to the first mentioned complainant. Counts 8 and 23 related to the second complainant.

10. The jury acquitted the appellant in respect of all remaining counts relating to the second complainant (counts 2, 6, 9, 21, and 22).

20 11. The jury convicted the appellant of the following counts in respect of the first complainant:

    (a) count one after indicating they were hung on the rape circumstance of aggravation,[16]
    (b) count three of indecent dealing with a child under 16 years,[17]
    (c) count 4 of indecent dealing with a child under 16 years,[18]
    (d) count 5 of exposing a child under 16 to an indecent act,[19]
    (e) count 14 of indecent dealing with a child under 16 years,[20] and

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[9] Appellant's BOFM at 269, l.5.
[10] Appellant's BOFM at 269, l.30.
[11] Appellant's BOFM at 271, l.12.
[12] Appellant's BOFM at 271, l.40.
[13] Appellant's BOFM at 273, l.11.
[14] Appellant's BOFM at 273, l.39.
[15] Appellant's BOFM at 275, l.28.
[16] Appellant's BOFM at 299, l.17.
[17] Appellant's BOFM at 300, l.3.
[18] Appellant's BOFM at 300, l.10.
[19] Appellant's BOFM at 300, l.22.
[20] Appellant's BOFM at 302, l.1.

(f) count 17 of unlawful carnal knowledge as an alternative of rape on count 17.[21]

12. The appellant was acquitted of counts 7, 15 and 25 (indecent dealing with first mentioned complainant), count 16 and 19 (exposing the first complainant to an indecent act), count 18 and 20 (of both rape and unlawful carnal knowledge of the first complainant) and 24 (procuring the first complainant to witness an indecent act).

13. In respect of count one, the appellant was convicted of maintaining a sexual relationship involving unlawful carnal knowledge over a period of 10 years from when the child was 5 years of age. Count 3, 4 and 5 were particulars of the maintaining and occurred as part of one incident.[22] He went into her room and took her to his room where he undressed her, felt her vagina,[23] rubbed his penis on her vagina[24] then ejaculated on her stomach.[25] Count 14 involved kissing the complainant.[26] Count 17 involved the first act of unlawful carnal knowledge when the child was sometime between 14 to 16 years of age in the bathroom.[27] Although her evidence was that it occurred more than once, he was sentenced on the basis that it occurred "at least once."

14. The jury retired at 1.06 p.m. on Friday 16 October. They had two notes on the day they retired. The jury had three notes on Monday 19 October. They had a further note on Tuesday 20 October and returned with a verdict at 2.50 p.m. The sentence was then adjourned to a later date.

15. The sentence resumed on 22 October 2020. The transcript reveals[28] that the day after the verdict was delivered a juror hand delivered a letter to the Registrar which had been provided to both counsel.[29] It disclosed irregularities in the conduct of several jurors, prompting the trial judge to observe that there were "real issues"[30] in respect of consistency of the jury verdict. His Honour indicated that the letter disclosed that a

[21] Appellant's BOFM at 303, l.1.
[22] Appellant's BOFM at 43, l.35 and Appellant's BOFM at 57, l.40 to Appellant's BOFM at 58, l.15.
[23] Count 3 – Appellant's BOFM at 58, l.8.
[24] Count 4 – Appellant's BOFM at 58, l.8.
[25] Count 5 – Appellant's BOFM at 58, l.8.
[26] Appellant's BOFM at 59, l.30.
[27] Appellant's BOFM at 60, l.10.
[28] Appellant's BOFM at 325, l.33.
[29] Appellant's BOFM at 346.
[30] Appellant's BOFM at 325, l.13.

particular member of the jury indicated that he would not convict as he had a legal dealing with a 13-year-old child when he was young.[31] His Honour said it was "unfortunate in the extreme"[32] that the jury did not then inform the court in accordance with his direction. The letter went on to say that on the second day of deliberations, the same juror indicated a willingness to convict on unlawful carnal knowledge based on internet research that he had conducted on the weekend which showed lighter sentencing for such an offence. The letter indicated that after he and other jurors realised from their discussion that sentencing for rape was not significantly different, the juror reiterated his "absolute opposition"[33] to conviction on either rape or unlawful carnal knowledge. The
10 letter indicated that based on jury polling his vote did not alter the ability to obtain a unanimous verdict. His Honour indicated that given these inappropriate matters evolved contrary to his specific direction it raised "serious concerns about the efficacy of the jury deliberations."[34] His Honour said that on the face of the letter there were "grounds to suspect that a particular juror may have been guilty of bias or an offence relating to the person's performance of functions as a member of the jury." He then referred the matter to the Sheriff pursuant to section 70(7) of the *Jury Act 1995* (Qld) for the purpose of an investigation.[35]

16. The Sheriff's report[36] dated 18 March 2021 revealed that a questionnaire had been sent
20 out to the fourteen jurors empanelled. Six jurors responded, one of whom was a reserve juror who was not part of the deliberations. No response was received from 8 jurors including the subject juror.

17. The Sheriff concluded that:[37]

> *"It is clear from the recollections of the responding jurors that they believed JUROR "Y"[38] demonstrated a bias in that he was unable to impartially consider the facts of the matter before the Court and referred in conversation to his own*

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[31] Appellant's BOFM at 325, l.39 and BOFM at 346.
[32] Appellant's BOFM at 325, l.42.
[33] Appellant's BOFM at 346.
[34] Appellant's BOFM at 326, l.15.
[35] Appellant's BOFM at 327, l.5.
[36] Appellant's BOFM at 332.
[37] Appellant's BOFM 337 under "Findings".
[38] Referred to as "Juror X" by Morrison JA.

similar circumstance when he was younger. Some were of the belief that he may have been able to set that bias aside."

18. The Court of Appeal summarised the findings of the Sheriff as follows:

    1. The responses supported the comments of the juror's unwillingness to convict based on his interaction with a 13 year old.
    2. The responding jurors' recollection was that the subject juror announced early that he would not find the defendant guilty because of his own experience.
    3. The responding jurors believed the subject juror demonstrated bias.
    4. Two of the responding jurors recalled the subject juror admitting to an online search in relation to penalties.
    5. The subject juror should be referred to the Queensland Police for investigation as to whether he should be prosecuted.[39]

19. The applicant appealed his conviction on the grounds that a miscarriage of justice had been occasioned by:

    (a) The conduct of investigations by a juror;

    (b) The failure of that juror to disclose his own bias; and

    (c) The failure of the other jurors to report that conduct to the trial judge.

20. The Court of Appeal found there was little doubt the subject juror "displayed a bias based upon his own personal previous experience" and if internet research was in fact done, he "acted contrary to the directions of the learned trial judge and contrary to the oath or affirmation" he took.[40] The jury had plainly continued deliberations with the juror in question after forming the belief that he had conducted internet research. The responses of some of them indicated that the fact of the research and its ramifications were the subject of debate within the jury's deliberations. Despite forming the belief that the subject juror had done the research contrary to the clear directions given by the judge, the other jurors "did nothing to bring that to the attention of the trial judge at the time."[41]

[39] CAB at 90-91; Reasons in *R v HCF* [2021] QCA 189 at [19].
[40] CAB at 93; Reasons at [28].
[41] CAB at 93; Reasons at [30]-[33].

21. The Court of Appeal noted that each of the verdicts given was unanimous and there was no dissent. The Court of Appeal concluded that, in light of the chronology of the deliberations, the conclusion to be reached was that the verdicts delivered were "genuinely unanimous and unaffected by the conduct" of the subject juror.[42] It further concluded that so far as the subject juror announced his position, it was a position that favoured the defendant "and was contrary to the prosecution's interest."[43] Applying the test in *Webb v. Queen,*[44]the Court of Appeal concluded that a fair-minded informed member of the public, knowing the jurors' responses as exposed in the Sheriff's report, would not have a reasonable apprehension or suspicion that the juror or jury had not
10 discharged its task impartially.[45]

22. The Court concluded that although the conduct by the subject juror was to be deplored, and his conduct conflicted with his oath or affirmation and the trial judge's directions, the responding jurors' responses showed that there "had not been a serious departure from the essential requirements of the law after all." Although the conduct of Juror Y was to be deplored, the "material…shows that there was no miscarriage of justice." [46] Morrison JA went on to say that appeal was dismissed "on the basis that it ha[d] not been demonstrated that there had been a substantial miscarriage of justice."[47]

20 23. The Court of Appeal's reasoning did not involve any consideration of the evidence in order to determine whether the convictions were inevitable.

Part VI: The appellant's argument

24. In *Gilbert v The Queen*,[48] Gleeson CJ and Gummow J observed that:

> *"The system of criminal justice, administered by appellate courts, requires the assumption that, as a general rule, juries understand, and follow, the directions they are given by trial judges."*

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[42] CAB at 97; Reasons at [43].
[43] CAB at 97; Reasons at [43].
[44] (1994) 181 CLR 41.
[45] CAB at 97; Reasons at [44].
[46] CAB at 98; Reasons at [50].
[47] CAB at 98; Reasons at [51].
[48] (2000) 201 CLR 414, [13].

25. In *HML v The Queen*,[49] Kirby J said:

"The analysis in these reasons adopts the assumption, inherent in much appellate examination of jury decision-making, that members of a jury reach their conclusions by a process of deliberation from evidence to verdict by way of an accurate application of judicial directions on the law. Such empirical evidence as there is casts serious doubts upon such assumptions. Indeed, psychological research applied to judicial or other decision-making, including investigations based on the cognitive reflection test, suggests the very large role played by intuition in such decisions. In such matters, the human brain has a tendency to make automatic, snap judgments. However, in default of contrary argument, these reasons will continue to make the law's assumptions, however dubious they may be in scientific terms."

26. In the present case, the Court of Appeal referred to *R v Peter,*[50] where the Queensland Court of Appeal acknowledged the fundamental importance to a fair trial of the impartiality of a jury.[51] In *Peter*, the court referred to *R v Panozzo*,[52] where the Victorian Court of Appeal (Vincent JA, with whom Buchanan and Harper JJA agreed) said:

"[28] The system of law under which our courts operate embraces as one of its finest achievements the development of trial by jury. Sir Patrick Devlin, in a Hamlyn Lecture, echoing the earlier words of Blackstone, once described the jury as a "bulwark" of liberty. Although that "bulwark" may not seem as secure as it once was, the central role of the jury in our legal system is still accepted as it represents the determination by independent and impartial members of the general community of the issues raised by the making of an allegation of serious criminal conduct against an individual. The integrity and the perception of the integrity of that system is a matter of considerable importance. Only if the community can be entirely confident that the proper procedures have been followed will the reality and perception of integrity of the process be maintained."

27. Compliance by a jury with judicial directions should therefore be regarded as one of the essential presuppositions of a criminal trial.

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[49] (2008) 235 CLR 334, [52].
[50] (2020) QCA 228.
[51] CAB at 94-95; Reasons at [34].
[52] (2003) 8 VR 548.

Characterisation of what occurred

28. The jury's disobedience meant that appellant's trial involved a departure from trial according to law and was therefore a miscarriage of justice.[53] The question then arises as to whether it could be said that the miscarriage was not "substantial".

29. In *Awad v The Queen*,[54] Edelman and Gordon JJ, referring to *Baini v The Queen*,[55] identified two of the "non-exhaustive categories of substantial miscarriage of justice" as being where:

10 (i) "there has been a serious departure from the prescribed processes for trial"; or

(ii) "there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial".[56]

30. This case falls into both categories. The departure from proper process was serious because it involved wilful disobedience – arguably by each member of the jury – of simple instructions, and because (a) only five of the jurors provided information about the verdicts, and (b) the Court of Appeal did not make its own assessment of the
20 evidence, it cannot be said that it did not make a difference.

31. The jury's collective misconduct should properly be regarded as meeting each of the following descriptions:

(a) "a departure from the essential requirements of the law that it goes to the root of the proceedings"; or

(b) "a failure to observe the requirements of the criminal process in a fundamental respect"; or

(c) "such a serious breach of the presuppositions of the trial as to deny the application of the…proviso."

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[53] *Weiss v The Queen* (2005) 224 CLR 300, [18].
[54] [2022] HCA 36.
[55] (2012) 246 CLR 469.
[56] *Awad*, [76].

(d) A trial that has "lost its character as a trial according to law."[57]

32. The misconduct of the primary juror, compounded by failure of the others to report it, meant that members of the community cannot be "entirely confident that proper procedures had been followed." The summing up included directions on topics that required the jury's scrupulous attention. Given their disregard of the two simple instructions concerning independent research, a fair minded member of the public would wonder whether the jury complied with any of the other directions given during the summing up.

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The Sheriff's investigation did not eliminate concerns about the verdicts

33. The Court of Appeal was wrong to decide the appeal on the basis that the Sheriff's inquiry revealed that the misconduct of the juror had no impact upon the verdicts. That investigation only resulted in responses from five of the twelve jurors who ultimately returned the verdicts.[58] In any event, those jurors who did respond during the Sheriff's investigation revealed wilful disobedience of the trial judge's explicit and unambiguous directions.

34. Further, jurors who had participated in the delivery of verdicts of guilty on serious charges would be unlikely to admit that their deliberations were tainted by a failure to conform to judicial directions.

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35. The investigation material therefore did not provide reassurance "there had not been a serious departure from the essential requirements of the law after all",[59] nor that the jury misconduct did not make a difference to the result. It was an unsatisfactory basis for concluding that the convictions were sound.

The proviso

36. At paragraph [50] of his judgment, Morrison JA found that, despite the deplorable misbehaviour of Juror Y,[60]

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[57] *Lee v The Queen* (2014) 253 CLR 455, [47].
[58] CAB at 90; Reasons at [16]; six jurors responded, but one of them was a reserve and did not participate in deliberations.
[59] CAB at 98; Reasons at [50].
[60] Whom his Honour called "Juror X".

(e) "there ha[d] not been a serious departure from the essential requirements of the law after all"; and

(f) "there was no miscarriage of justice."

37. But a departure from the essential requirements of the law *would* constitute a miscarriage. The question then became whether the Court of Appeal was satisfied that it was not a substantial miscarriage.

38. In his concluding paragraph on the appeal against conviction, Morrison JA said:

10 *[51] I would dismiss ground 1 of the appeal on the basis that it has not been demonstrated that there has been a substantial miscarriage of justice.*

39. This statement is, with respect, inconsistent with the conclusion in the previous paragraph that no miscarriage of justice had occurred, but - more significantly - wrongly suggested that the appellant bore the onus of demonstrating the occurrence of a substantial miscarriage of justice. In *Driscoll v The Queen*,[61] Barwick CJ said:

"[I]t must rest upon the appellant in the first instance to raise in the mind of the Court of Criminal Appeal a reasonable doubt as to whether in all the circumstances a miscarriage may not have occurred. It then must rest upon the Crown, if an order

20 *for a new trial is not to be made, to remove any such doubt from the mind of the court so that it is not satisfied that a miscarriage has occurred."*

40. In any event, the defect in the trial could not be cured by the application of the proviso. That is because of the nature of this particular breach, which involved the concealment of a juror's apparent determination to rely on extrinsic materials, went to the root of the trial.[62] Had the trial judge learned of it at the time, it is inevitable that Juror Y would have been summarily discharged. Depending upon how widely his independent research had been communicated to other jurors, the whole panel might well have been discharged. This wilful misconduct undermined the fundamental assumption that these

30 jurors followed judicial directions, both generally and on specific matters of great significance.

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[61] (1977) 137 CLR 517, 526; see also *Perara-Cathcart v The Queen* (2017) 260 CLR 595, [44], [133].

[62] See paragraph 30(a)-(d) above, and the cases referred to.

41. Furthermore, were the proviso to be employed to save the convictions it was necessary for the Court of Appeal to make its own independent assessment of the evidence and satisfy itself that the evidence established the appellant's guilt beyond reasonable doubt.[63] That did not occur.

Part VII: Orders sought

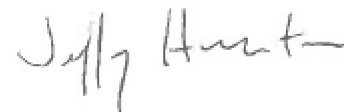
42. Appeal allowed.

10 43. Set aside the judgment of the Court of Appeal of the Supreme Court of Queensland made on 3 September 2021, and, in lieu thereof, order that the appeal to that Court be allowed and the appellant's conviction be set aside, and a new trial be had.

Part VIII: Time estimate

44. The appellant estimates the presentation of his argument will occupy up to 1.5 hours.

Dated: 2 December 2022



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[63] *Weiss*, [41].

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: HCF
Appellant

and

10 THE QUEEN
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ANNEXURE

LIST OF STATUTES

1. *Criminal Code* (Qld) s 668E (Reprint as at 5 July 2021)
2. *Jury Act 1995* (Qld) s 70(7) (Reprint as at 30 March 2017)