THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN:

No B18 of 2015
LESLIE GLYN SMITH
Appellant

and

THE QUEEN
Respondent

Annotated.

10 **APPELLANT'S REPLY**

Part 1: Certification

1. This reply is in a form suitable for publication on the Internet.

Part II: Reply

Factual matters

2. The respondent states[1] that the voting numbers in the 4.25pm jury note were not indicative of a statutory majority (11:1).[2] The note has not been viewed by the parties.

Disclosure of votes cast by jury to judge – the statute

3. The respondent's reference to secondary material[3] does not serve to enlarge the operation of s 70 of the *Jury Act 1995 (Qld)* ('the Act') beyond its terms. The provisions
20 bear no inherent ambiguity, nor do these materials speak of the disclosure of 'jury information' to a judge by a jury during the course of a trial. **AS [15]-[19].**

4. The developed practice of judges in Queensland, referred to at **RS [16],** of not asking the jury to disclose votes cast is not the product of a considered application of the Act.

5. Whilst it is correct that submissions as to the construction of s 70(4) made at **AS [15], [19]-[20]** were not specifically made below,[4] that should not distract this Court's task. Properly construed, a note to a trial judge does *not* fall within the terms of any of the s 70 prohibitions.

6. As to the first argument in **RS [29]**, it is not axiomatic that because the first two jury notes (which did not contain jury information) were discussed in open court after they had
30 been sent to the trial judge, that subsequent notes (containing jury information) would be, for the following reasons:

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[1] Respondent's Submissions (**'RS'**) **[2], [24], [69].**

[2] Apparently based upon Holmes JA's conjecture to that effect below: *R Smith* [2014] QCA 277 (*'Smith'*) at [88] **AB 105.**

[3] **RS [15]**, footnote 1.

[4] **RS [28]**. It is not accepted that the passage in the decision below (*Smith at* [82] **AB 104**) referenced by the respondent correctly records the submissions which were made.

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(a) The jury was directed by the judge to put any request for assistance in a note so the court might consider it before speaking to the jury about it.[5]

(b) The putative belief that would render the jurors' conduct unlawful under s 70(4) is that the note's content "is likely to be, or will be, published to the public".

(c) The jurors would be entitled to assume that if any part of the note should not be published in open court, the judge would act to prevent that happening.

(d) The jurors would also be entitled to assume that they would be warned if any part of their written communications, which were specifically invited, could render them guilty of offences. At no stage was such warning given.[6]

10 To construe the jurors' conduct in the fashion contended for by the respondent does not "give effect to harmonious goals".[7]

7. The second argument in **RS [29]**, viz., that if publishing information to the court is not publishing to the public, then s 70(6) would have no work to do, should not be accepted. At the very least, s 70(6) applies as an exception to s 70(3).

8. The phrase "to the extent necessary for the proper performance of the jury's functions" does not limit disclosure to that which could be considered essential under the Act.[8] Rather, in operating as an exception which permits disclosure to the court, it should be read as facilitative of the jury's task, by permitting disclosure which is *reasonably necessary or conducive to* the performance of the jury's functions.[9]

20 **9.** The disclosure in this instance could not be seen as improper or as conduct amounting to an offence. It was reasonably conducive to the jury's functions to communicate with the court about its difficulties in reaching a verdict. They were invited to make such communications and were not warned about non-disclosure of jury information to the judge.

10. If however this Court was to conclude that the 4.25pm jury note breached s 70(4), it was then a material irregularity in the jury's deliberations which warranted, of itself, the discharge of the jury under s 60(1).

Disclosure by the judge to counsel – the common law

11. The respondent's selective reliance upon the common law to suggest that votes cast should not be disclosed by the jury to the judge, or by the judge to counsel,[10] fails to

30 acknowledge the following about the English cases to which this principle is sourced:

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[5] 21.02.14 Transcript redirections T22 L5-11 **AB 52.**

[6] The oaths under s 50 of the Act and s 22 *Oaths Act 1867* (Qld) contained an exception "as required by law".

[7] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [31], citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; (1998) 153 ALR 490; (1998) 72 ALJR 841; [1998 8 Leg Rep 41; [1998] HCA 28 at 381-382 [69]-[70].

[8] Cf. **RS [30]**, *Smith* at [83] **AB 104.**

[9] *Lithgow City Council v Jackson* (2011) 244 CLR 352; (2011) 281 ALR 223; (2011) 85 ALJR 1130; [2011] HCA 36 at 375 [53]. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; (2004) 209 ALR 582; (2004) 78 ALJR 1279; [2004] HCA 41 at 199 [39]. Necessary must be subjected to the "touchstone of reasonableness": *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435; (1999) 162 ALR 336; (1999) 73 ALJR 687; (1999) 8 Leg Rep 17; [1999] HCA 19 at 452 [51].

[10] **RS [11.b.ii], [32]-[41].**

(a) The comments in this regard were *obiter dicta*;[11]

(b) The cases did not deal with disclosure before the discretion to take a majority verdict;

(c) The cases referred to jury information disclosed "in public"[12] or "made public".[13]

12. Whilst, as the respondent says at **RS [64]**, in *Gorman* there was the capacity for taking a majority verdict, that direction had already been given by the time of the note.[14] The only discretion decision left was to discharge the jury, upon its indication of a deadlock.

13. As to the policy considerations relied upon at **RS [35]** from *R v Burrell,*[15] they primarily relate to the possibility of examination of the jury's deliberations.

14. The respondent's reliance[16] upon this Court's decision in *Smith v State of Western Australia*[17] to suggest that the common law renders the votes cast irrelevant to any discretion to be exercised prior to verdict is similarly misplaced, as the exclusionary rule discussed there operates post-conviction only. The Court's recognition of the importance of secrecy in jury deliberations before conviction (to encourage free and frank deliberations)[18] is not cavilled with. Disclosure to counsel in the ways elaborated at **AS [20]**[19] would not disturb such policy concerns.[20]

Relevance of votes cast

15. It must be accepted[21] that jury members can change their minds.[22] This means that the voting pattern at any point in time may not reflect the jury's ultimate decision. But that does not mean the voting pattern is irrelevant to a discretion to be exercised at that very point.[23]

16. The knowledge of votes cast is relevant to determining the likelihood of any change in the jury's position, in the context of its path towards a particular verdict or a deadlock. The votes logically and directly inform the discretions regarding the time to be permitted for deliberations, discharge, or the taking of a majority verdict.[24] **AS [53]-[56], [67]-[68].**

17. Furthermore, voting numbers would not be interpreted in a vacuum; they would be considered in the context of questions asked or indications given in jury notes, directions that had already been given, and would be more revealing as time progresses.

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[11] *HM v R* (2013) 231 A Crim R 349; [2013] VSCA 100 *('HM')* at 352 [7], [8], 353 [10], 355 [16].
[12] *R v Townsend* [1982] 1 All ER 509 at 511; (1982) 74 Cr App R 218 at 220.
[13] *R v Gorman* [1987] 1 WLR 545 at 550; 2 All ER 435 at 439; (1987) 85 Cr App R 121 at 126. It is acknowledged and regretted that the appellant's recital of *Townsend* and *Gorman* in the primary submissions erroneously inversed the factual frameworks for those cases. **AS [29]-[30].**
[14] 2 All ER 435 at 436.
[15] (2007) 190 A Crim R 148; [2007] NSWCCA 65.
[16] At **RS [37]-[41], [50].**
[17] (2014) 250 CLR 473; (2014) 236 A Crim R 133; (2014) 88 ALJR 384; (2014) 305 ALR 338.
[18] Ibid at 481 [31].
[19] In chambers, in closed court, or by passing the note to counsel to view privately.
[20] See also *HM v R* at 360 [36].
[21] As contended by the respondent at **RS [47]-[48].**
[22] *Stanton v The Queen* [2003] HCA 29; (2003) 77 ALJR 1151; (2003) 198 ALR 41 at [27].
[23] Cf. **RS [49], [51].**
[24] *HM* at 359 [33].

18. Contrary to the respondent's submissions,[25] counsel being informed of the voting numbers that have been made available to the trial judge does permit more effective submissions about the appropriateness and fairness of taking a majority verdict in the circumstances of the case, and engenders more transparency.[26]

19. In the circumstances of this case, counsel would have been in a better position to formulate compelling submissions that protected the appellant's position, for example:

(a) If 10-2 in favour of conviction, by seeking a discharge on the basis that the jury had already sought assistance on the meaning of reasonable doubt, and twice indicated its deadlock, demonstrating that there was reasonable doubt about the guilt of the accused despite the prescribed period having lapsed. Further, that informing the two jurors who held a reasonable doubt that one of their views would in effect not count, would put impermissible pressure on one or the other to change their his or her mind.

(b) If in the vicinity of 6-6, by submitting that there was no utility in permitting either a majority or a unanimous verdict, because (based on the circumstances described in the preceding paragraph) to take any verdict would involve the abandonment of a "seemingly entrenched position" by a large number of jurors, itself a cause of concern.[27]

20. *Black v The Queen*[28] does not preclude the making of the submission set out immediately above.[29] The principle that a juror can change their mind, "if honestly persuaded that his or her preliminary view is not well founded" after listening to other jurors' views[30], could not explain the change in position of almost half of the jurors after two indications of deadlock.

21. The respondent's adoption of the approach taken by Ashley JA in *MJR v R*,[31] that a trial judge need only disclose voting numbers to the parties if they reveal a statutory majority,[32] should not be accepted. Firstly, it must be remembered that in *MJR* the trial judge did not even inform counsel that the jury had disclosed its votes. Second, whilst it is true that Ashley JA discriminated between which figures should have been disclosed,[33] his Honour gave no explanation as to why 11:1 should be considered differently to, for example, 10:2. Such numbers still suggest that a majority verdict direction is "very likely" to or would "very probably"[34] result in a conviction. Non-disclosure of those figures to counsel would still preclude effective submissions in support of an application to discharge or against a majority verdict. A judge in possession of such information would still be "disabled from dispassionately considering" such a submission, leading to the exercise of

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[25] **RS [52]-[55], [68], [70].**
[26] *HM* at 360 [35].
[27] *HM* at 359 [33].
[28] (1993) 179 CLR 44; (1993) 118 ALR 209; (1993) 68 ALJR 91; (1993) 69 A Crim R 248; [1993] HCA 71.
[29] Cf. **RS [50], [54], [66].**
[30] Ibid, at 51.
[31] *MJR v R* (2011) 33 VR 306; (2011) 216 A Crim R 349; [2011] VSCA 374 ('*MJR*') at 316 [58].
[32] **RS [11.b], [56]-[70], [86].**
[33] *MJR* at 316 [57].
[34] *MJR* at 316 [55], [56].

discretion to take a majority verdict taking on "something of the appearance of a charade."[35] Third, other configurations of the votes also inform upon the factual premise in s 59A(4), that is, whether "the jury is likely to reach a unanimous verdict after further deliberation".

22. The respondent's contention[36] that the majority approach in *HM* does not apply in Queensland because of statutory difference is wrong. It is true that s 46 of the *Juries Act 2000* (Vic) provides for the discretions to take a majority verdict or discharge the jury within the same section, whereas ss 59A and 60 of the Queensland Act separate the discretions. However, ss 59A and 60 jointly operate in the same way as s 46, once the prescribed period in s 59A has lapsed. The respondent's contention at **RS [23], [26]** that the power to discharge in s 60 of the Act, when exercised in circumstances where a jury "cannot agree on a verdict", must *only* follow *after* consideration of the discretion to take a majority verdict under s 59A, should not be accepted. When such a position is reached after the period prescribed in s 59A has lapsed, *both* discretions fall for concurrent determination. However, whether the discretions are available to be exercised concurrently or in the order submitted by the respondent, this does not disturb the fact that whether the appellant's trial was in Victoria or Queensland, the same three alternatives, viz. to take a majority verdict, discharge the jury or permit them to continue deliberating, arose for consideration by the judge upon receipt of the 4.25pm jury note. The approach taken in *HM* remains compelling. **AS [47]**. Also, to the extent suggested otherwise, the respondent's contention in this regard did not form any part of the Court of Appeal's reasons for rejecting the approach in *HM*.[37]

Miscarriage of justice

23. The appellant's trial counsel acquiesced to the judge's proposed course of not disclosing the voting pattern and directing on a majority verdict.[38] This was informed by counsel's mistaken view[39] that the judge should not, or was not entitled not to, disclose the voting pattern. No tactical course dictated this approach.[40] Without access to the precise numbers, it was a speculative exercise to make submissions on the available discretions.

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[35] *MJR* at 317 [63].
[36] **RS [11.c], [64], [71]-[80].**
[37] To the extent the respondent infers otherwise, at **RS [71].**
[38] As referred to by the respondent at **RS [25], [81].**
[39] Cf. *R v Kashani-Malaki* [2010] QCA 222.
[40] *TKWJ v R* (2002) 212 CLR 124; (2002) 193 ALR 7; (2002) 76 ALJR 1579; (2002) 23(17) Leg Rep C8; (2002) 133 A Crim R 574; [2002] HCA 46 at 130-131 [16]-[17], 132 [24], [27], and 150 [81]-[82].