IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P 51 of 2013

B E T W E E N:

MARK SHARNE SMITH
Appellant

and

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THE STATE OF WESTERN AUSTRALIA
Respondent

APPELLANT'S REPLY

PART I CERTIFICATION INTERNET

1. These submissions are in a form suitable for publication on the Internet.

20 **PART II REPLY**

2. The Respondent seeks to re-frame the issues in this appeal, see [2] of the Respondent's Submissions ('**RS**'). With respect, those issues are clear:

Issue 1 What is the ambit of the Exclusionary Rule (can it apply to exclude evidence of criminal conduct, or alleged criminal conduct, by a juror against a fellow juror for the purpose of changing their vote)?

Issue 2 If the answer to 1 is '*Yes*', are there any exceptions to the Rule?

Issue 3 If the answer to 2 is '*No*', should there be any exceptions to the Rule?

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3. The Appellant accepts an inquiry is necessary to establish that the juror adheres to the allegations in the Juror's Note, and to generally identify the '*physical coercion*'. This raises the foundation for, and nature of, such an inquiry (**Issue 4**).

4. The Respondent suggests (RS [2.1]) that the meaning of '*physical coercion*' is '*uncertain'*. The concept is well known to the criminal law. It means physical compulsion (or the threat of such compulsion) by a person (A) to force another (B) to do, or not to do, something against B's will.

5. The Juror's Note must be read through the eyes of an average juror, and it is unambiguous in its assertion of alleged criminal conduct (emphasis added): '*I have been physically coerced by a fellow juror to change my plea to be aligned with the majority vote*', [see s 123 ***Criminal Code (WA)***, ('**Code**'), Appellant's Submissions ('**AS**') Annexure A p 6]. It is neither ambiguous nor uncertain.

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CONTESTED FACTS

6. The trial transcript ('**TT**') speaks for itself. It is not contested by the Appellant. It is unclear why RS [4]–[5] appear under the heading '*Statement of contested material facts*'.

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7. There is, however, no basis in fact for the Respondent's submission (RS [6]) that: '*The trial judge did not order an inquiry for the reason that he considered that a judgment of conviction had been entered and that the jury had been discharged*'. The trial Judge states (TT 187), (emphasis added): AB 23

> I mean the judgment is perfected *so it could only be an appeal point'*, and 'And *on the appeal point* the leading authority in this state which was handed down in January last year is Frubasteba (sic) ...[Shrivastava]... v State of Western Australia (2) 2011 WASCA 8. So its 2011, WASCA 8.

8. Contrary to the Respondent's submission there is no evidence the trial Judge turned his mind to the question of an inquiry into the Juror's Note, or indeed, with respect, that his Honour was aware of the power to order such an inquiry. The trial Judge made no reference to the jury having been discharged.

9. At RS [14] the Respondent submits that '*there is no evidence of dissent by any of the jurors when the verdict was announced*'. This is expressly contradicted by the trial Judge who records (TT 186) (emphasis added): AB 22

> *You may have noticed that the foreman was a little slow to say 'Yes that's the verdict of you all' and there was an unusually noisy departure*. I was a bit curious as to what was going on. *One of the jurors it was probably obvious to you who it was, was somewhat upset afterwards* and although he didn't hand it to the court a note in an envelope was left on the jury table ... (see also passage at the bottom of TT 187). AB 23

10. Whilst trial counsel may have sighted the Juror's Note (TT 187) the Appellant's current legal representatives have never seen, and do not have a copy of, the Juror's Note. The complaint regarding the placing of a full stop at the end of the Juror's Note (RS [7]) could have been made to the court reporter who reproduced it in *exactly* the same way (TT 187). AB 23 AB 23

RELEVANCE

11. The contention (RS [8]) that the ***Community Protection (Offender Reporting) Act* 2004 (WA)** '*is irrelevant to any issue raised by the appeal*' is wrong. Its relevance is that the Appellant remains subject to ongoing multiple obligations to report. These obligations go to the '*miscarriage of justice*' within s 30(3)(c) of the ***Criminal Appeals Act* 2004 (WA)** in the absence of an inquiry, or the quashing of the verdicts if such an inquiry is now impracticable.

CONCESSION

12. The Respondent submits (RS [52]) that the Appellant conceded below that '*the note was intrinsic to the deliberative process*'. It is acknowledged that counsel below conceded the Juror's Note was to be seen as '*intrinsic*' to the Rule, but in the context that it described events that were part of the interaction between jurors reaching their verdicts. The case below did not develop the distinction between criminal and non-criminal conduct. The concession was not made in that regard. In that sense the concession has nothing to do with the primary case put on appeal.

13. Calloway JA considered the law in ***Masters v McCubbery & Ors* [1996] 1 VR 635** at 658 regarding the spectrum of appellate opinion on applications to withdraw concessions, see also ***Lafranchi v. Transport Accident Commission* (2006) 14 VR 359** and ***Whisprun Pty Ltd v. Dixon* (2003) 200 ALR 447** at [51].

14. The point was not raised at the Special Leave stage. The Respondent relied on other hurdles to a grant based on the way in which the Appellant ran the case below (see [3.17]-[3.18] Application Book p 69). The Respondent does not say why the point is raised now, nor how it would affect the State's case had the concession not been made. The Appellant accepts the events described in the Juror's Note occurred in interaction amongst jurors leading to the verdicts, but contends that the criminal conduct described could not be subject to the Rule. If the Respondent seeks to rely upon the concession below to preclude argument as to the admissibility of such evidence (the basis upon which Special Leave was granted) then the Appellant contends that would not be in the interests of justice. If necessary, the Appellant seeks leave to withdraw the concession.

15. **The Respondent concedes (RS [59]) that evidence of violence between jurors may be extrinsic to the Rule, which implies the need for an inquiry if necessary - that concedes the Appellant's primary contention in this appeal.**

ISSUE 1 – CRIMINAL CONDUCT

16. It is not until RS [54]-[63] that the Respondent seeks to engage the Appellant's primary contention that evidence of criminal conduct, or alleged criminal conduct, by a juror against a fellow juror is extrinsic, to the Rule. To rely, as the Respondent does (RS [54]), on the nugatory report of ***Vaise v. Delaval*** (fn. 76 p 13 RS) as an example of criminal conduct ('*a very high misdemeanor*') misunderstands the Appellant's case. The tossing of a coin is not criminalised in WA, nor is a juror's failure to abide by a judge's direction as to how a verdict is to be reached. The conduct in *Vaise v. Delaval* was not directed against a juror.

17. The Respondent relies on cases about juror *misconduct,* not *criminal conduct.* The former can only establish the rationale and operation of the Rule. As those cases do not engage the distinction between (i) criminal conduct by a juror to coerce the vote of another, and (ii) jury deliberations properly so called, the conclusion that '*There is no authority supporting this distinction*' (RS [54]) is of limited utility. There is *no authority that contradicts* the Appellant's primary contention and many that support it (AS [52]–[60] and [77]-[83]).

18. The Respondent makes no reference to ***R v. Emmett* (1988) 14 NSWLR 327** (Lee J, Enderby and Grove JJ agreeing). *Emmett*, a decision by the NSW Court of Criminal Appeal, is the closest analogue to this appeal. It was a case tried (March 1987) before the amendments to the ***Jury Act* 1977 (NSW)** by the ***Jury (Amendment) Act* 1987 (NSW)**. The amendments added ss. 68 and 68A (AS Annexure A pp 17-18). Those provisions commenced on 14 January 1988 (Grove J, *Emmett* at 341). *Emmett* establishes common law practice in Australia prior to the changes in juries' legislation noted in the AS, and shows how an inquiry of the type argued for here can be conducted. *Emmett* was applied by Martin CJ below (at [16]). It is not challenged in this appeal. It cannot be ignored.

19. The Respondent (RS [23]) seeks to rely upon the judgment of Buss JA in *Shrivastava* [73]-[84] (RS fn 37), for the proposition that the exceptions contained in sections 56B(2), 56C(2), 56D(2) and 56E of the ***Juries Act* 1957 (WA)** ('*JWA Act*') do not evince a Parliamentary intention to alter the general proposition that a court will not receive evidence from a former juror *as to discussion between jurors in the course of their deliberations*, the *reasons for the jury's verdict* or the *individual thought processes of a juror referable to the verdict.*

20. If that is so, then the common law must always have contemplated the right of Police and prosecutors, at s 56B(2)(e) (AS Annexure A p 8), to access '*protected information*' for the (emphasis added): '*purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations ...*'. In any event, Buss JA does not deal with physical coercion, or s 56B(2)(e), and did not find it necessary to decide the ambit of Part XIA *JWA Act* (at [84]).

21. Legislators would not have authorised Police and prosecutors, by s 56B(2)(e), to access '*protected information*' if that evidence was inadmissible under the Rule in a prosecution. The Respondent must accept either the Rule does not apply to criminal conduct or it is an exception. If '*protected information*' is admissible in a prosecution of a juror under s 123 of the *Code* as a result of an investigation authorised by s 56B(2)(e), then the conviction of the juror must be admissible on appeal against conviction by an accused in respect of that jury's verdict.

22. The Respondent rejects an analogy between the Rule and legal professional privilege (RS [48]-[50]). The operation of the Rule should be consistent with other common law rules dealing with protected communications. The two rules have been created for different purposes but they are not '*completely different*'. Both are made for public policy reasons to protect certain communications and for the administration of justice. The Respondent's submission that a juror has no privilege to invoke or waive misunderstands the analogy drawn.

23. The submission (RS [21]) that amendments to the *JWA Act* '*... has no declaratory role*' also misunderstands the Appellant's case. If an offence is introduced making disclosure of '*protected information*' a crime, then it will be necessary, if existing common law rights of disclosure are to be preserved, to expressly authorize them as exceptions. In WA disclosure is criminalised at s 56B(1) (Annexure A p 8) and authorized disclosures appear at s 56B(2).

ISSUE 2 – EXCEPTION TO THE RULE

24. If: (i) evidence of criminal conduct by a juror against a fellow juror *is* caught by the Rule, and (ii) there are *no exceptions* to the Rule (RS [32]-[39]), then a juror can commit crimes against fellow jurors with impunity. Arguably, that would lay the platform for interference with juries that is legally protected.

25. Is an exception to the Rule recognized in Australia? Certainly Gleeson CJ in ***R v. Minarowska* (1995) 83 A Crim R 78** at 86-88 acknowledged that prospect.

26. The Respondent's categorical statement (RS [32]) that there is no exception to the Rule is contrary to ***R v. Myles* [1997] 1 Qd R 199** Fitzgerald P (205) and Pincus JA (208). This is acknowledged by the Respondent (RS [60]-[63]). This case is not about '*a complaint as to the way in which the jury went about their task*' (*Minarowska* Gleeson CJ 86) but alleged criminal interference with the process.

27. The parties agree that the prospect of an Australian exception to the Rule has been considered (RS [41]-[42]). There is authority against the proposition: McLure J in *Shrivastava v The State of Western Australia [No.2]* [2011] WASCA 8 at [4]. The minimum guarantee that the law can offer those the subject of criminal proceedings before juries in this country is that such trials remain untainted by criminality (cp juror misconduct at [16] above), or untested allegations of criminal conduct. A judge cannot decide cases unlawfully (if conducting a criminal trial by judge alone) why would a jury be any different?

28. As per [21] above, if criminal conduct is caught by the Rule and there is no exception then the authorization of Police and prosecutors under s 56B(2)(e) of the *JWA Act* would be redundant.

ISSUE 3 – SHOULD THERE BE AN EXCEPTION TO THE RULE?

29. The Respondent submits that any modification of the Rule is best left to the Legislature rather than this honourable Court. That would necessitate at least six different versions of the relevant legislation and ignore the effect of the legislative amendments already effected. The rule is a creature of the common law, it should remain so, and the form of such rules, like the rule regarding legal professional privilege, is a matter for this Court.

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ISSUE 4 – INQUIRY

30. The Respondent submits that the Juror's Note cannot found an inquiry (RS [64]-[69]). Martin CJ at [16] describes the proper foundation for such an inquiry (emphasis added): *'If a court considers that there has been a material irregularity - that is, that possible extrinsic influences have affected jury deliberations - the court may of its own volition make inquiries into that situation'.* His Honour accepted that such inquiries may be an obligation, per Lee J in *Emmett*. ***R v K*** **[2003] 59 NSWLR 431** provides an example of how the Sheriff can conduct an investigation without breaching the Rule. The Sheriff's role is described by the court in ***R v Rinaldi*** **(1993) 30 NSWLR 605** at 612B-E.

AB 72

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31. The Respondent seeks to emphasise the purported ambiguity of the Juror's Note as undermining the foundation for an inquiry (e.g. RS [65]-[67]). That argument is speculative and circular. Any uncertainty emerging from the Juror's Note could be resolved by a contemporaneous inquiry authorised by the trial Judge, one that does not impinge on the Rule's operation. The Respondent's position (RS [79]-[80]) would result in the Appellant having to bear *any* risk of an unfair trial in the absence of an inquiry (albeit through no fault of his own), and in circumstances where the State acknowledges that physical violence may be extrinsic to the Rule.

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32. The Respondent submits (RS [78]) that it has invited the Appellant to seek answers to the questions posed at AS [76] regarding the practicability of an inquiry directly from the Sheriff's Office. The Appellant says those *administrative* inquiries should be made by the State and that the Sheriff is not precluded from providing that information. The Sheriff's Office, consistent with its position on the Appellant's interlocutory application below, has refused to provide *any* information to the Appellant despite a formal written request.

Dated: 21st November 2013

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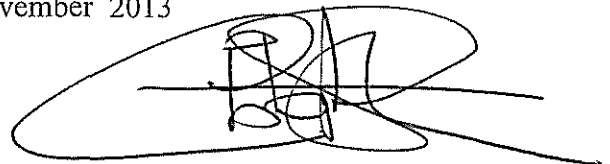

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