HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **QUY HUY HOANG**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

1. This reply is filed in respect of the appeal with the following identifiers: File No 2014/332309; High Court Number S149/2021.

Part I:

2. These submissions are in a form suitable for publication on the internet.

Part II:

Ground 1(a) the construction of s53A of the *Jury Act 1977* (NSW)

3. The respondent's construction of s 53A of the *Jury Act* (**the Act**) does not accord with the text of the relevant provisions: cf. Respondent's Submissions (**RS**) [29], [33]. Contrary to RS [30] and [38], there is textual basis for the appellant's contended construction of s 53A(2)(a), the definition of misconduct in s 53A(1)(c) and (2)(a) being concerned with a juror's *conduct* when determining whether they must be discharged from the jury: see Appellant's Submissions (**AS**) at [33]-[37]. The definition of misconduct in s 53A(2)(a) refers to "*conduct* that constitutes an offence" (emphasis added) not simply "the commission of an offence". The state of mind of the juror is not the focus of s 53A(2)(a). The respondent's analysis at RS [31]-[32] places significant emphasis on the word "constitutes", however little attention is paid to the qualifier, namely, the words "conduct that…" in s 53A(2)(a).

4. It does not need to be established that the juror "has committed an offence" before the juror must be discharged pursuant to s 53A(1)(c) of the Act by reason of the definition of misconduct in s 53A(2)(a): cf. RS [36], [37], [39]-[40], [50]. Mandatory discharge of the juror in question is required where, on balance, the juror has engaged in misconduct: *Zheng v R* (2021) 104 NSWLR 668 (***Zheng***) at [63]-[66]. The directive

of s 53A(1)(c) is to "conduct": *Zheng* [65]. Moreover, a requirement for the juror to have committed an offence, which follows from the respondent's construction, would defeat the purpose of s 53A(1)(c) and (2)(a) of the Act as no determination that a juror has committed an offence could occur in the course of a trial: cf. s 71 of the Act. If the respondent's construction is adopted, s 53 (2)(a) would have no work to do and would not address the very mischief towards which it is addressed- a juror making personal inquiries on matters the subject of trial.

5. The fact that a juror made the inquiry by reason of accident, negligence or oversight might be a defence to a charge laid against him or her under s 68C, but it does not mean the juror who has engaged in the forbidden conduct and obtained extraneous information relevant to the trial or accused or attempted the same should remain on the jury, or that there is no justification for mandatory discharge under s 53A(1)(c) and (2)(a): cf. RS [39]. Section 53A(2)(a) is concerned with the integrity of the trial and the conduct of a juror of a particular character, not proof of an offence. Moreover, the term "misconduct" and its specific definition in the Act are not analogous to phrases such as "unsatisfactory professional conduct" and "professional misconduct" which are used in different statutory professional regulatory contexts and have their own particular statutory definitions and textual purpose: cf. RS [30].

6. The purpose of s 53A(2)(a) is not as limited as the respondent suggests at RS [37]. The respondent's proposed construction does not pay proper attention to the purpose of the provision as outlined at AS [38], [42]-[46], [56]-[57]. Nor can it be said that the purpose that underlies s 53A(2)(a) would be subverted if the juror's state of mind was excluded from consideration: cf. RS [39]. The intent of s 53A(2)(a) is to exclude from the tribunal of fact a juror who has made an inquiry and thereby obtained information extraneous to the trial about a matter relevant to the trial or the accused. It does so by defining such conduct as misconduct: AS [43]. This in turn supports confidence in the jury as true to the fundamental oaths taken: s 72A.

7. The respondent's proposed construction has the potential to subvert the purpose of the provision by permitting jurors who have made inquiries about matters relevant to the trial or the accused to remain on the jury so long as they claim that the inquiry was made for their own personal purpose: cf. RS [33], [39]. Mandatory discharge does not turn on whether the juror in question claims the purpose of an inquiry was for their

own personal curiosity or benefit. Nor does it turn on whether the juror knew or believed what they were doing was an offence, even in the face of directions of a trial judge (such as given in this trial in MFI 1): cf. RS [40]. Any construction that would require, in effect, a mini trial to be held in respect of the juror's purpose would be impractical and unworkable in the context of a fast-moving, continuing criminal trial.

8. In this case there was no suggestion of accident or inadvertence or oversight or negligence: cf. RS [39]. The foreperson recognised a breach of the directions of the trial judge in relation to ss 53A and 68C of the Act by the juror's conduct, and her own duty to report the misconduct to the trial judge: CCA [48] CAB 384, CCA [29] CAB 379-380. The trial prosecutor, immediately after s 53A being raised and reading the terms of s 68C stated "It is a breach", which was instantly confirmed by the trial judge: CAB 269.28-270.22.

9. The respondent also relies upon a stated construction whereby s 53A(2)(b) of the *Jury Act* is said to apply in circumstances where, because a juror did not have the *purpose* said to be required under s 68C, but had some personal purpose, a trial judge may not be satisfied that misconduct has been established under s 53A(2)(a): RS [42]; CCA [105]-[106] CAB 397. However, s 53A(2)(b) of the Act is concerned with other *conduct* by a juror, not other purposes of the juror: s 53A(2)(b); *Zheng* at [65].

10. The respondent does not address arguments raised by the appellant concerning the practical difficulties associated with its construction of the s 53A(1)(c) and (2)(a): see AS [51]-[54], [57]. There is sound justification for the appellant's construction.

<u>The juror's own stated purpose does not negate the existence of the requisite state of mind</u>

11. The respondent contends that N Adams J did not apply a sole purpose test as her Honour found that there was no evidence that the juror's inquiry was for any purpose other than the juror's stated purpose as a personal purpose: RS [45]. However, the only basis upon which her Honour could have made this finding and excluded misconduct under s 53A(2)(a) was satisfaction of the juror's stated purpose (that is, the foreperson's account of the same) as the sole purpose. As Justice Campbell recognised (at CCA [5] CAB 375) the fact that the juror engaged in the impugned inquiry during jury deliberations and reported back to the jury during those deliberations (as disclosed in MFI 99) was powerful evidence itself of purpose – to obtain information about a matter relevant to the trial: cf. RS [71], see AS [49].

12. Further, it is clear that her Honour was of the view that a personal purpose negated any other purpose given her finding that the trial judge failed to take into account the need for the purpose to be obtaining information relevant to the trial "*rather than* for personal reasons" (emphasis added): CCA [121] CAB 401; see also CCA [99] CAB 395, CCA [138]-[139] CAB 405-6. This finding cannot be sustained given the finding of the trial judge that "It was my view that [the juror] did make an inquiry for the purposes of obtaining information about a matter relevant to the trial": CAB 309. The intention of the inquiry was to obtain information relevant to particular legislation canvassed in the evidence at trial, address and summing up: CAB 269-270. Curiosity as to whether the legislation applied to the juror did not defeat this purpose.

13. As the respondent recognises, the Crown's contention in the intermediate court was that the juror's only purpose was a purpose not impugned by s 68C of the Act. That relied on a stated personal purpose as recounted by the note MFI 99. The respondent does not address that the trial prosecutor, aware of the relevance to his case and seized of the contents of the note, conceded on several occasions there was a breach satisfying ss 53(1)(c) and (2)(a), such as to warrant mandatory discharge: CAB 269.28-270.15; CAB 273.13-16, .36-42; 289.45.

14. It is not correct to say that there was no difference between Campbell J and the majority on this issue: cf. RS [46]. Campbell J dissented for reasons including that the purpose impugned by the majority existed because the stated purpose did not negate the existence of the purpose captured by s 68C: CCA [4]-[6], CAB 374-375.

<u>The juror engaged in misconduct</u>

15. There can be no doubt that the inquiry was made about a matter relevant to the trial: cf. RS [63]-[67]; CCA [36] CAB 381. The trial judge was correct to find that the matter was relevant and the juror in question had engaged in misconduct, as conceded by the prosecutor who had just framed the Crown case to the jury and heard the address and summing up: CAB 269.28-270.15; CAB 273.13-16, .36-42; 289.45; CCA [50]-[52] CAB 384-385; CAB 309. The juror made an inquiry as to the requirements for a Working with Children Check, legislation traversed in the trial in evidence, address and the summing up. Moreover, the prosecution case was based on the appellant taking deliberate steps to gain access to children by a system to aid opportunity and lower risk of detection, which was responded to by defence counsel. The jury that included

the juror who made that relevant inquiry was not properly constituted when the verdicts were taken. Fundamental assumptions underpinning the criminal justice system in Australia were undermined by delaying the discharge, which personal curiosity did not defeat: cf. RS [55], [58]-[67]; [75].

Ground 2

16. The respondent's response to ground 2 is premised on the proposition that the trial judge erred in finding that the juror engaged in misconduct: RS [77]-[82]. For the reasons set out by Campbell J at CCA [4]-[12] CAB 375-376, above at [3]-[15] and at AS [31]-[59] this premise is incorrect. The judge was required to discharge the juror prior to taking the verdicts: see AS [60]-[65].

17. The prosecutor on appeal conceded that a trial judge's failure to immediately discharge the juror upon being satisfied of juror misconduct amounts to a failure to comply with a mandatory requirement under the Act: CCA [93] CAB 394. The trial judge had not merely formed a tentative view of misconduct, expressly stating in her judgment that she was satisfied that the breach had occurred triggering the mandatory requirements prior to taking the verdicts: CAB 309; cf. RS at [79].

18. The proviso does not apply in circumstances where the trial judge has failed to discharge a juror upon a finding of misconduct within the terms of s 53A: CCA [12] CAB 376, [93] CAB 394; cf. RS at [82]. The prosecutor on appeal conceded the failure to comply with a mandatory requirement under the Act was one which left no room for the application of the proviso: CCA [93] CAB 394. The CCA accepted that the result of a finding of juror misconduct within the meaning of s 53A was the quashing of the guilty verdicts in respect of counts 4 and 6 to 12: CCA [93] CAB 394. For the reasons at AS [65]-[66], the proviso cannot apply and the remaining verdicts would also be quashed.

Dated: 10 December 2021



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BETWEEN: **QUY HUY HOANG**
Appellant

and

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ANNEXURE: The statutory provisions relevant to the written submissions in reply filed in the appeals of S146/2021, S147/2021, S148/2021, S149/2021

1. The whole of the *Jury Act 1977* (NSW) as at 6 November 2015 (version in force between 15 May 2015-1 July 2017).