IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A15 of 2016

BETWEEN:

RROK JAKAJ

Appellant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

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APPELLANT'S REPLY

PART I: FORM OF SUBMISSIONS

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

PART II: REPLY ARGUMENT

Grounds (1) and (2): The evidence of the (former) jurors is inadmissible

2. At paragraph 6 of his submissions,[1] the Respondent (**the DPP**) contends that there are two questions to be asked to determine the question as to admissibility. There are not, however, two questions, but only one question, namely whether the evidence is admissible.

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3. To be admissible, the evidence must be relevant. In considering admissibility, what the High Court explained in *Smith v Western Australia*[2] is but the overarching general rule, under the umbrella of which the specific principle the subject of this appeal is to be answered. That specific principle is: after a jury has been discharged by the trial judge and it has separated (or dispersed), its (unequivocal) verdict (as pronounced by the foreperson and assented to by the entire jury) having been

1 See the Respondent's Submissions dated 6 May 2016 (**the DPP's Submissions**).

2 (2014) 250 CLR 473.

Filed on behalf of the Appellant by:

Ben Sale
Barrister & Solicitor
43A Wright Street
Adelaide SA 5000

Date of this document: 19 May 2016

Ref: BS 13042
Telephone: (08) 8221 6497
Facsimile: (08) 8212 0109
E-mail: benjamin.sale@salelegal.com.au

recorded, evidence from a juror(s) as to any misapprehension underlying the pronouncement of the verdict is inadmissible for the purpose of either altering (or correcting) the verdict given and recorded.[3] In short, the admission of such evidence cannot achieve the purpose of either altering (or correcting) the verdict given and recorded. It is, therefore, simply impermissible for such evidence to be received – any such evidence is legally irrelevant.

4. Here, it is not in issue that: (a) the verdicts were delivered in the sight and hearing of each and every member of the jury; and (b) there was no dissent by any member of the jury. The assent of each and every member of the jury to those verdicts, as announced by the foreperson in open court, is to be conclusively inferred. No evidence can be received subsequent to the discharge and dispersal of the jury from a (former) juror either challenging such assent or being in any way inconsistent with such assent[4] – even in circumstances where the evidence is to the effect that one, or more, of the (former) jurors misunderstood the relevant legal principles which governed the process of arriving at their agreed verdicts.[5]

5. As such, the DPP errs when he contends, at paragraph 40 of his submissions, that the Appellant "tends to confuse the issue of admissibility of evidence with that of a power to correct verdicts". The identification of the point of discharge and dispersal of the jury is critical both as identifying when a verdict may no longer be corrected

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3 *Biggs v DPP* (1997) 17 WAR 534 at 544-545 per Kennedy J, 555-558 per Franklyn J (with whom Walsh J agreed at 558); *In Re Donovan's Application* [1957] VR 333 at 336; *Nanan v The State* [1986] AC 860 at 871-872; *Head v R* [1986] 2 SCR 684 at 688-694; *R v Tawhiti* [1994] 2 NZLR 696 at 699-700.

4 See, in Australia, *R v Carroll* (1886) 12 VLR 859 at 863; *R v Atkinson & Clutton* (1907) 7 SR (NSW) 713 at 714-715; *Re Donovan's Application* [1957] VR 333 at 336; *R v Emmett & Masland* (1988) 33 A Crim R 340 at 346-347; *R v Challinger* [1989] 2 Qd R 352 at 365; *Evans v Davies* [1991] 2 Qd R 498; *Matta v The Queen* (1995) 119 FLR 414. See, in England, *Vaise v Delaval* (1785) 1 TR 11; 99 ER 944; *R v Wooller* (1817) 2 Stark 111; 171 ER 589; *Nesbitt v Parrett* (1902) 18 TLR 510; *Ellis v Deheer* [1922] 2 KB 113 at 118, 120, 121; *R v Roads* [1967] 2 QB 108; *Boston v W S Bagshaw & Sons (Note)* [1966] 1 WLR 1135; *Nanan v The State* [1986] AC 860 at 871.

5 While there may be circumstances in which enquiry may be made of the jury concerning their understanding of their obligations in relation to the delivery by them of verdicts, prior to discharge and dispersal, once the jury has been discharged and dispersed, no such enquiries are permitted. And so, once a trial judge has made an order for the discharge of the jury and they have dispersed, the trial judge – and any appellate court – cannot receive any information from them because they no longer have the character of a jury, such being the only character in which they are entitled to communicate to the Court. That is, once discharged, to recall the (former) jury would be "of no more effect than if twelve persons [were] called up from the body of the Court and asked to give a verdict": *R v Atkinson & Clutton* (1907) 7 SR (NSW) 713 at 715 per Simpson J.

and, relevantly, when any evidence going to the correction of that verdict becomes irrelevant and thus inadmissible.

6. In those circumstances, the DPP is wrong to say that "[n]o appellant appears to dispute that if the evidence is properly characterised as disclosing only an error in transmission, which all jurors agree upon, such evidence would be admissible".[6] To the contrary, the well-established principles set out paragraphs 3 and 4 above, supported by authority[7] dating back to, at least, 1785,[8] support the Appellant's submission that such evidence is plainly inadmissible.

7. The DPP errs in seeking to draw a distinction between circumstances where, on the one hand, evidence discloses that the foreperson misspoke or miscommunicated a verdict and, on the other, evidence disclosing that a jury accurately communicated a verdict, which may have been reached by a misapplication of the law.[9] The proper appreciation of the principles explained at paragraphs 3 and 4 above yields the inevitable conclusion that, howsoever characterised, the evidence here is irrelevant and inadmissible.

8. In constructing, and then coming out on one side of, that false dichotomy, the DPP calls in aid an unsupported theory as to the deliberations of a jury to support the (alleged) "miscommunication". It is pure speculation to say that "[f]irst, the jury votes" and "[s]econd, the jury unanimously agrees its verdict having regard to the outcome of that vote".[10] To so contend assumes a particular pattern of jury deliberations,[11] in circumstances where the principle that jury's deliberations are confidential is "a principle of the highest significance in the criminal justice

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6 DPP's Submissions, fn 26.

7 See fns 3 and 4 above.

8 "The rule … that jurors are incompetent to impugn a verdict to which they have been a party goes back at least as far the decision in *Vaise v Delaval* (1785) 1 TR 11; 99 ER 944": *R v Emmett & Masland* (1988) 33 A Crim R 340 at 343 per Lee J.

9 See paragraphs 7-8, 10 and 28 of the DPP's Submissions.

10 DPP's Submissions, paragraph 23.

11 cf. *Cheatle v The Queen* (1993) 177 CLR 541 at 553 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

system".[12] That attempt to explain how the "miscommunication" came to occur must be rejected.

Ground (3): There is no inherent jurisdiction to set aside the jury's verdict of acquittal

9. The DPP appears to focus exclusively on the foreperson having "misled the Court in a profound and fundamental manner"[13] as the criterion for the exercise of (a hitherto unrecognised[14]) power to correct an acquittal entered after a verdict of not guilty returned by a jury. But nowhere does the DPP grapple with the fact that, in so doing, he relies on the Court's own mistake or error, that is, the mistake or error of the Court, through the medium of the foreperson. To so found that power would be to allow a State Supreme Court, in its inherent jurisdiction, to re-visit a final judgment wheresoever error can be identified in that final judgment. No one would – or could – contend that such a power exists. To appreciate that point is to lay bare the fallacy of the DPP's invocation of the inherent jurisdiction of a Supreme Court in this case.

10. Further, it takes the DPP's argument no further to say, as he does at paragraph 56 of his submissions, that the powers of a State Supreme Court are identified by reference to the "unlimited" powers of the English courts. As the Appellant has previously explained, at the time of federation, the powers of the courts at Westminster neither extended to, nor permitted, the setting aside of a verdict returned by a jury in a criminal trial and directing that a new trial be ordered.[15]

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O. P. HOLDENSON
T 03 9225 7231
E ophqc@vicbar.com.au

ALBERT DINELLI
T 03 9225 6909
F 03 9225 8395
E albert.dinelli@vicbar.com.au

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12 *Smith v The Queen* (2015) 255 CLR 161 at 171 [32] per Gordon J, citing *HM v The Queen* (2013) 44 VR 717 at 719 [5].

13 DPP's Submissions, paragraph 50.

14 Appellant's submissions dated 15 April 2015 (**Jakaj's Submissions**) at paragraphs 42-46 and the cases there cited; see esp. at paragraph 46.

15 Jakaj's Submissions, paragraphs 49-51, and, esp, the cases cited at fn 59.