

SMITH v THE STATE OF WESTERN AUSTRALIA (P51/2013)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia
[2013] WASCA 7

Date of judgment: 17 January 2013

Date of grant of special leave: 12 September 2013

Following the appellant's conviction on two counts of indecent dealing with a girl under the age of 13 years, a note addressed to the trial judge was found in the jury room. The note was in the following terms: "I have been physically coerced by a fellow juror to change my plea to be aligned with the majority vote. This has made my ability to perform my duty as a juror on this panel." The identity of the juror was not apparent from the note. The trial judge expressed the view that as the verdicts had been entered there was nothing he could do as a result of the discovery of the note.

The appellant appealed against his conviction. The only ground of appeal was: "The trial of the appellant miscarried as a result of at least one juror being coerced, by another juror or jurors, into joining in the guilty verdicts."

On appeal, the appellant advanced three propositions. First, it was submitted that the note, on its face, provided sufficient evidence of an irregularity in the conduct of the jury as to give rise to a miscarriage of justice, in the sense of *R v K* (2003) 59 NSWLR 431. Second, in the alternative, it was submitted that if the note is construed as falling within the ambit of the exclusionary rule, there is an exception to that rule where the interests of justice require evidence which would otherwise fall within the scope of the rule to be admitted. Third, it was submitted that if the second proposition is accepted, directions should be made for the conduct of inquiries with respect to the course of the jury's deliberations.

The Court of Appeal (Martin CJ, McLure P, Mazza J) refused to set aside the conviction. The Court, per Martin CJ, relied on the exclusionary rule. This is a common law rule which prevents evidence being given of jury deliberations (as opposed to prejudicial events extrinsic to the process of deliberation). His Honour noted that the rule was so well established that any significant modification of the rule was not a matter for an intermediate court.

The grounds of appeal are:

- The Court of Appeal erred in law when it refused to allow the appellant to adduce evidence of a note addressed to the trial Judge written by a juror stating that the juror's vote had been procured by the physical coercion of a fellow juror ("Juror's Note"), because the Court of Appeal should have found that either:
 - The Juror's Note fell outside the common law rule precluding the admission of evidence of a jury's deliberations, or
 - The Juror's Note fell within an exception to that rule.
- The Court of Appeal erred in law when it refused to order an inquiry (as soon as practicable) into the circumstances referred to in the Juror's Note because such an inquiry was necessary to determine whether juror misconduct tainted the verdicts such as to constitute a 'miscarriage of justice' within the meaning of section 30(3)(c) of the *Criminal Appeals Act* 2004 (WA).