**IN THE HIGH COURT OF AUSTRALIA**
**ADELAIDE REGISTRY**

No A16 of 2016

BETWEEN **DAVID ZEFI**

Appellant

and **DIRECTOR OF PUBLIC PROSECUTIONS**

Respondent

## APPELLANT'S REPLY

**REDACTED IN ACCORDANCE WITH ORDER OF GORDON J DATED 27 APRIL 2016**

### PART I: Internet publication

1 This redacted version of the appellant's submissions in reply is suitable for publication on the internet.

### PART II: Reply to the respondent's argument

The evidence admitted in the Full Court

2 Having considered [4] of the respondent's submissions, the appellant accepts that (the foreperson's affidavit apart) the Full Court admitted into evidence only *part of the answer* to question 5 (ie, the answer to question 5 insofar as it related to *the verdict of guilty of murder* for each defendant).[1] The appellant therefore accepts that answer referred to in the second example given in [74] of the appellants' written submissions was not admitted into evidence.

The meaning of the part of the answer to question 5 which was admitted into evidence

3 The respondent claims that "[n]o party contends that the affidavits should not be read in their entirety for the purposes of ascertaining the meaning and effect of those portions tendered".[2] But the respondent sought selectively to tender, and the Full Court selectively admitted, only *part* of the answers given by each juror to question 5. It is one thing to take into account the whole of the affidavits for the purpose of determining the question of admissibility. It is quite another to rely upon material that has not been admitted into evidence, in order to interpret opaque answers contained in the material that has been

---

1 (2015) 123 SASR 523 at [116] per Gray and Sulan JJ.
2 Respondent's Written Submissions at [11].

---

Filed on behalf of the Appellant
ADDRESS FOR SERVICE
Patsouris and Associates
82 Halifax Street
Adelaide SA 5000

Date of Filing 20 May 2016
Tel (08) 8232 1993
Fax (08) 8232 1970
DX
Ref Harry Patsouris

admitted into evidence.[3] The whole purpose of formally ruling on the admissibility of evidence is undermined if the court is at liberty to draw inferences from other material that is not tendered or admitted in evidence.

**4** In any event, despite urging the Court to consider each affidavit "in its entirety", the respondent's submissions do not address the analysis contained in [75]-[78] of the appellant's written submissions, which demonstrates that [redacted].

**5** The respondent's submissions at [13]-[15] appear to attribute to the jurors an appreciation of the reasons behind the interrogatories which is, with respect, entirely unrealistic. [redacted] Further, what are jurors supposed to have made of the distinction between question 1 [redacted] and question 5 [redacted]?

**6** Contrary to the respondent's submission, it cannot be assumed that the jurors appreciated that [redacted].[4] The very nature of the questions asked of the jurors suggests that the Court itself, when it drafted the questions, had no appreciation of the distinctions on which the respondent now relies. Questions 3 and 7, at least, would have suggested to lay jurors that [redacted].

**7** Question 3 asked:

[redacted]

The jurors' answers given to question 3 revealed deliberations of individual jurors. However, if the respondent is correct to submit that the Court can consider the *whole* of the affidavits, regardless of admissibility, "for the purposes of ascertaining the meaning and effect of the portions tendered", then question 3 is highly relevant for that purpose. [redacted]

[redacted]

**8** Moreover, if a particular juror did in fact support the verdicts, but did so on an incorrect legal basis (eg, because they did not appreciate the need for unanimity or special majority), then, as *Biggs* and *Nanan* establish, that was not a question of incorrect *communication* of

---

[3] Note that, in the Full Court, Jakaj and NH each sought to tender more of the affidavit material, which tender was not clearly ruled upon but which appears implicitly to have been rejected by the Full Court.

[4] Respondent's Written Submissions at [14].

the verdict but error in the *manner of reaching* the verdict, and such evidence is inadmissible.

**9** The unadmitted affidavit material demonstrates that [redacted][5]. If [redacted], then it cannot be said that any error as to communication was "a unanimous one".[6]

**10** The respondent's reliance upon [redacted] is, with respect, misplaced. [redacted]

**11** These are not "fanciful" objections. If evidence is to be relied upon by the prosecution as supporting the extraordinary step of setting aside a perfected order of acquittal of murder, it is to be expected that that evidence will be unambiguous in its demonstration of an "error in communication". The evidence relied upon here is unsatisfactory.

*Biggs* and *Nanan* are not to be distinguished

**12** The respondent appears to concede that there is an ambiguity in the answers to question 5 which were admitted. The conceded ambiguity relates to [redacted].[7] The respondent appears to accept that the jurors' evidence is equally consistent with either understanding.

**13** The distinction is important. [redacted] That would not be an error in communicating a *verdict*.

---

5 [redacted]

6 As required by *Wigmore*, relied upon by the respondent and by the Full Court.

7 The appellant maintains the submission in [72] of his written submissions that the jurors' more probable understanding of question five was [redacted].

**14** In both *Biggs*[8] and *Nanan*,[9] only a unanimous verdict could be returned. In both cases, the communication of the foreperson unambiguously indicated that the jury had reached its verdict unanimously.[10] That was plainly a "miscommunication" of a certain kind, but the only *relevant* miscommunication was one relating to the communication of the jury's *verdict*, not the fact of unanimity. Evidence from jurors as to whether there had been a miscommunication regarding the jurors' unanimity was, in both cases, treated as involving an impermissible inquiry into jury deliberations. *Biggs* and *Nanan* establish that an incorrect statement to the effect that the jury's verdict was "unanimous", when in fact it was by simple majority, does not relevantly constitute an error in communication *of the verdict*.

**15** In a case such as the present, where unanimity was not required but a special majority of 10 out of 12 jurors was required, an announcement that the jury has reached a verdict of not guilty "by majority" conveys that the jury had resolved to deliver a verdict of not guilty *because* that verdict was supported, in deliberations, by ten or more jurors.

**16** In the present case, the evidence (on the respondent's submission) is [redacted] That is an error of just the same kind as occurred in *Biggs* and *Nanan*. The agreement of all the jurors to the verdict is evidenced by their remaining silent when it was delivered in open court. [redacted], their evidence to that effect is inadmissible for the same reason that the jurors' evidence was inadmissible in *Nanan*.

**17** The "verdict" can only be "guilty" or "not guilty"; it is not "unanimous guilty", "unanimous not guilty" or "majority not guilty". And there is absolutely no reason why the whole of the jury cannot have joined in the decision to deliver a not guilty verdict (whatever verdicts they may have favoured individually). The foreperson's answer to the question as to whether at least ten of them agreed on that verdict should, perhaps, have caused the jurors to realise, at that point, that they had agreed upon the verdict on a basis that was incorrect as a matter of law. Had they done so, then at that time, acting as a jury, they might have corrected the verdict. But they did not do so and evidence of individual jurors, after the fact, cannot be admitted to show that in fact they supported the verdict of not guilty due to a misunderstanding of the basis on which such a verdict could properly be delivered.

**18** The question "is that the verdict of 10 or more of you?" does, strictly speaking, inquire as to the deliberations of the jury,[11] in just the same way as the question as to whether a jury's verdict is unanimous. The evident purpose of asking those questions is to draw the jurors'

---

8 *Biggs v Director of Public Prosecutions (WA)* (1997) 17 WAR 534.

9 *Nanan v The State (Trinidad and Tobago)* [1986] 1 AC at 866.

10 In both *Biggs* and *Nanan*, the foreperson expressly affirmed that the verdicts were unanimous, in answer to a direct question by the Judge's associate (in *Biggs* (1997) 17 WAR 534 at 537) or the clerk of the court (in *Nanan* [1986] 1 AC at 866).

11 Contra Respondent's Written Submissions at [37].

attention to the requirement of unanimity or special majority, and to allow any juror to voice an objection.

**19** As the respondent acknowledges at [26] of its written submissions, a jury which "votes" 7:5 in favour of a verdict may resolve to deliver that verdict and announce that it is the "unanimous" verdict of the jury. That is what occurred in *Biggs* and *Nanan*, and an inquiry into whether the jury was *actually* unanimous was held to be an inquiry into deliberations. In the present case, if the foreperson had answered (just as "incorrectly") that the jury were *unanimously* agreed on a verdict of "not guilty" to murder then, on the authority of *Biggs* and *Nanan*, evidence tending to show whether all twelve jurors in fact supported that verdict would be in admissible. But, on the respondent's case, because [redacted], such evidence can be adduced from the jurors. The distinction which the respondent seeks to draw conveniently fits the facts of the present case but has no sensible basis in principle.

Discretion

**20** The respondent claims that there was no discretion to be exercised in this case, because here it has sought to characterise what happened as an abuse of process.[12] However, abuse of process is a recognised ground for reopening civil judgments. Decisions of that kind are discretionary, even when the application to reopen or set aside is based upon an allegation (or proof) that there *has* been an abuse of process.[13]

**21** The situation is different according to whether the Court is being asked to take action to *prevent* an abuse of its process (eg, by staying proceedings that are an abuse) or to "remedy", *ex post facto*, what is said to have been an abuse of process. The passage from *R v Carroll*[14] on which the respondent relies was directed to the former case and related specifically to the power to stay. In the case of an application to reopen, the discretionary considerations referred to in the appellant's written submissions are relevant.

**22** If the respondent is correct in its contention that the decision is not discretionary, then it would not matter whether the respondent's application to set aside the not guilty verdicts in this case was made three months, three years or three decades after the verdicts were delivered. Such a radical conclusion reveals a false premise.

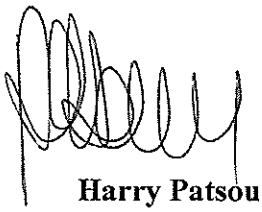
20 May 2016

---

[12] Respondent's Written Submissions at [82]-[83].

[13] See, eg, *Players Pty Ltd (in Liq) v Clone Pty Ltd* [2015] SASC 133 at [11] and [69] per Hargrave A-J, citing *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134. Cases where malpractice and fraud have grounded the setting aside of a perfected judgment are properly seen as instances of the courts responding to abuses of their process: see *Clone Pty Ltd v Players Pty Ltd (in Liq)* [2012] SASC 12 at [99]-[105] per Kourakis J.

[14] (2002) 213 CLR 635 at 657 [74] per Gaudron and Gummow JJ.



**Harry Patsouris**
Patsouris and Associates Lawyers
Phone (08) 8232 1993
Fax (08) 8232 1970
Email Hpatsouris@austlegal.com
Solicitor for the Appellant