HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, GAGELER AND KEANE JJ

MARK SHARNE SMITH APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Smith v Western Australia
[2014] HCA 3
12 February 2014
P51/2013

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 17 January 2013.*

3. *Remit the appellant's appeal and application to the Court of Appeal to be heard and determined in accordance with the reasons of this Court.*

On appeal from the Supreme Court of Western Australia

Representation

C P Shanahan SC with A L Troy for the appellant (instructed by Legal Aid WA)

J McGrath SC with L M Fox for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Smith v Western Australia

Criminal law – Evidence – Exclusionary rule – Where appellant convicted upon verdict of jury – Where note suggesting juror physically coerced into changing verdict found in jury room after jury discharged – Whether evidence of unlawful coercion of juror by fellow juror admissible – Whether Sheriff should be ordered to conduct inquiry.

Words and phrases – "exclusionary rule", "free and frank deliberation", "physical coercion".

Criminal Appeals Act 2004 (WA), s 30(3)(c).
Criminal Code (WA), s 123.
Juries Act 1957 (WA), ss 56A, 56B.

1 FRENCH CJ, CRENNAN, KIEFEL, GAGELER AND KEANE JJ. It is a general rule of the administration of criminal justice under the common law that once a trial has been determined by an acquittal or conviction upon the verdict of a jury, and the jury discharged, evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict[1].

2 The question which arises in this case is whether that rule precludes a court of appeal from receiving and acting upon evidence from a juror that he or she was subject to physical coercion by another juror in relation to his or her verdict.

The proceedings

3 The appellant was convicted in the District Court of Western Australia (Curthoys DCJ) upon the verdict of a jury of two counts of indecently dealing with a child under the age of 13 years.

4 The jury's verdict was delivered on 17 January 2012. Verdicts of guilty on each count were announced by the foreman of the jury in the presence and hearing of the other members of the jury. After the verdict on each count was announced, the jury was asked, in accordance with the usual practice, whether the verdict was the verdict of them all, to which the foreman replied in the affirmative. The trial judge recorded verdicts of guilty on each charge and the jury was discharged.

5 On 18 January 2012, the matter came before the trial judge again to deal with a question in relation to bail pending sentence. On that occasion, the trial judge informed counsel that a note in an envelope addressed to the judge had been found on the table in the jury room after the jury had been discharged. The note, which did not identify its author, 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 [sic]."

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1 *Nanan v The State* [1986] AC 860 at 872; *R v Mirza* [2004] 1 AC 1118; *Re Matthews and Ford* [1973] VR 199 at 209; *Minarowska* (1995) 83 A Crim R 78 at 84-85; *Medici* (1995) 79 A Crim R 582 at 591-592; *Millward* [1999] 1 Cr App R 61 at 65.

6 The trial judge stated that, because the verdict had already been entered, there was nothing he could do about it. The trial judge remarked that his curiosity had been aroused when the verdict was delivered. He said: "One of the jurors, it was probably obvious to you who it was, was somewhat upset afterwards". His Honour was of the view that the juror who was upset may have been the one who left the note[2]. His Honour also remarked to counsel that the foreman "was a little slow" to confirm that the verdict was the verdict of all jurors. Further, Curthoys DCJ observed that the jury's departure was "unusually noisy".

7 On 2 March 2012, the appellant was sentenced to a period of imprisonment of 12 months for each of the two counts, to be served concurrently.

The decision of the Court of Appeal

The appeal

8 The appellant appealed against his conviction on the ground that the "trial miscarried due to a juror being physically coerced into changing his verdict to one of guilty." This ground of appeal engaged s 30(3)(c) of the *Criminal Appeals Act* 2004 (WA), which requires the Court of Appeal to allow the appeal if, in its opinion, "there was a miscarriage of justice."

9 The Court of Appeal (Martin CJ, McLure P and Mazza JA) unanimously dismissed the appeal.

10 Martin CJ (with whom Mazza JA agreed[3]) began[4] with the formulation of the exclusionary rule by Atkin LJ in *Ellis v Deheer*[5]:

> "[T]he Court does not admit evidence of a juryman as to what took place in the jury room, either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he believed its effect to be."

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2 His Honour referred to this juror as a male person.

3 *Smith v The State of Western Australia* [2013] WASCA 7 at [54].

4 [2013] WASCA 7 at [10].

5 [1922] 2 KB 113 at 121.

11 Martin CJ observed[6] that "the rationale behind the rule has been expressed as the need to protect the finality of decisions and to protect jurors from coercion or pressure in the jury room."

12 Martin CJ accepted that the exclusionary rule may not apply in relation to evidence disclosing extrinsic influences upon jury deliberations[7], but cautioned that the line between that which is extrinsic and that which is intrinsic is not easily drawn[8].

13 Martin CJ was sceptical of the probative value of the note as evidence of misconduct on the part of a juror. His Honour said that the content of the note and the evidence of its discovery were "so replete with uncertainty and ambiguity that any conclusions of fact drawn from it must necessarily be speculative"[9]; "[i]t is not known who wrote the note … [or] whether it was written before or after the verdict was delivered"[10]. His Honour also raised the possibility that "the author of the note was referring to a form of pressure or intimidation" less serious or sinister than might be thought to be suggested by the note, observing that it is common for jurors to experience inter-personal pressure in the course of their deliberations, and the possibility that some jurors might be disposed to describe that pressure as coercion[11].

14 Martin CJ concluded that "[f]or these various reasons, it is impossible for the note to sustain a conclusion of fact to the effect that the processes of the jury were so irregular as to give rise to a miscarriage of justice"[12]. Martin CJ had earlier said that "to the extent that the note is capable of sustaining any

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6 [2013] WASCA 7 at [10].

7 [2013] WASCA 7 at [16].

8 [2013] WASCA 7 at [20].

9 [2013] WASCA 7 at [34].

10 [2013] WASCA 7 at [35].

11 [2013] WASCA 7 at [37].

12 [2013] WASCA 7 at [39].

conclusion to the effect that the deliberations of a juror were subjected to improper interference, the note falls squarely within the exclusionary rule."[13]

15 McLure P agreed[14] with the reasons of the Chief Justice, save that her Honour favoured a broader view of the rationale for the exclusionary rule which included the promotion of free and frank deliberation among jurors, the protection of jurors from harassment and the invasion of their privacy, and the maintenance of public confidence in the jury system[15].

The application for an inquiry

16 Before the hearing by the Court of Appeal, the appellant had also filed an application for an order that a copy of the juror's note be provided to the parties and to the Court on a provisional basis with the admissibility of the note to be determined at the hearing of the appeal. The application also sought an order that the Sheriff should make inquiries of, and take an affidavit or statement from, the juror who wrote the note – assuming that the identity of that juror could be established – and for that evidence to be provided to the Court of Appeal. The Court of Appeal dismissed this application[16].

17 In dismissing the application, Martin CJ again noted "the speculative nature of any inferences of fact drawn from the note and the circumstances of its discovery"[17]. His Honour said that:

> "the note provides an entirely insecure foundation for the authorisation of what would necessarily be wide-ranging and intrusive inquiries into the deliberations of the jury, which would involve the interrogation of all twelve members of the jury well after delivery of their verdict and perhaps their cross-examination."

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13 [2013] WASCA 7 at [38].

14 [2013] WASCA 7 at [50]-[53].

15 *Shrivastava v The State of Western Australia [No 2]* [2011] WASCA 8 at [63].

16 [2013] WASCA 7 at [48]-[49].

17 [2013] WASCA 7 at [48].

18 In this passage, one may note that his Honour's scepticism as to the evidentiary value of the note and his view of the scope of the exclusionary rule are mutually reinforcing rather than separate and distinct grounds for dismissing the application.

The parties' submissions

19 The appellant submitted that the Court of Appeal erred in failing to appreciate that the exclusionary rule does not operate to preserve the secrecy of criminal conduct, even if it occurs in the jury room.

20 Section 123 of the *Criminal Code* (WA) ("the Code") provides:

"Any person who –

(1) Attempts by threats or intimidation of any kind … to influence any person, whether a particular person or not, in his conduct as a juror in any judicial proceeding, whether he has been sworn as a juror or not; or

(2) Threatens to do any injury … to any person on account of anything done by him as a juror in any judicial proceeding; …

is guilty of a crime, and is liable to imprisonment for 5 years."

21 The appellant argued that this limit on the scope of the exclusionary rule is reflected in the provisions of the *Juries Act* 1957 (WA) ("the Juries Act")[18]. Section 56B of the Juries Act relevantly provides:

"(1) A person who discloses protected information commits an offence if the person is aware that, in consequence of the disclosure, the information will, or is likely to, be published.

...

(2) Subsection (1) does not prohibit disclosing protected information –

...

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18 cf *Minarowska* (1995) 83 A Crim R 78 at 86.

(e) to a prosecuting officer or a police officer for the purpose of an investigation concerning an ... alleged offence relating to jury deliberations or a juror's identity".

22 Section 56A(1) of the Juries Act provides that "protected information" includes "statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations".

23 The respondent argued in support of the reasoning of Martin CJ, noting that s 123 of the Code makes no reference to "coercion" as distinct from "intimidation", and urging that a juror who is a party to robust deliberations may subjectively, but mistakenly, perceive that he or she has been subjected to coercion.

24 The respondent accepted that, if there was evidence of physical violence between jurors (described with sufficient particularity), then that violence may be regarded as an extrinsic event outside the scope of the exclusionary rule. In this case, however, the note was not sufficient evidence of such an event.

25 The respondent emphasised the importance of the value of finality in the administration of justice, submitting that, although the trial judge observed some unusual behaviour by the jury during and immediately after the delivery of the verdict, there was no evidence of actual dissent by any of the jurors when the verdict was taken.

26 The respondent also supported the view of Martin CJ that there are substantial practical impediments to an inquiry, arguing that, by the time the note was discovered, the jury had been discharged; and secondly, that the note provided an insecure foundation for the instigation of an intrusive inquiry into the jury's deliberations.

The limits of the exclusionary rule

27 The exclusionary rule does not deny the admissibility of evidence "extrinsic" to the jury's deliberations. What is "extrinsic" for this purpose is somewhat unsettled in that the description has been used to refer, both to a source of evidence other than the jurors themselves, and to events extraneous to the deliberative process. Evidence of irregularity has been said to be admissible where the evidence comes from a source other than the members of the jury[19].

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19 *Vaise v Delaval* (1785) 1 TR 11 [99 ER 944].

Evidence has also been said to be extrinsic where it concerns events which occurred outside the jury room or the jury box[20]. In this latter regard, in *R v Mirza*[21], Lord Hobhouse of Woodborough noted that statements in the cases which refer to the confidentiality of the "jury box" were coloured by the experience that the jury was traditionally enclosed and segregated so that it was natural to regard the deliberations of the jurors as contained within the jury room.

28 What is "extrinsic", and therefore outside the exclusionary rule, is not a question which can always be answered by a mechanical application of rules about the source of evidence or the location of an event. In *R v Young*[22], for example, the Court of Appeal of England and Wales admitted evidence from a juror as to irresponsible behaviour in relation to the consideration of the guilt of the accused (the use of a ouija board to consult the deceased alleged victim of the accused) which occurred in the jurors' overnight accommodation.

29 As Martin CJ rightly appreciated[23], it is preferable to seek an understanding of the limits of the exclusionary rule in an understanding of its rationale, rather than to focus upon the place where an irregular incident occurred (which may be quite fortuitous), or upon the fact that the source of evidence of the incident is a juror, given that in cases of the most egregious misconduct the only source of the evidence will often be the jurors themselves.

30 As to the rationale for the exclusionary rule, in *Minarowska*, Gleeson CJ said[24]:

> "[T]he underlying policy [of the exclusionary rule] aims to preserve the secrecy of jury deliberations, and to maintain the integrity and finality of a formally expressed verdict".

31 This description of the purpose of the exclusionary rule is consistent with that to be gleaned from the modern cases in Australia, Canada and the United

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20 *Phipson on Evidence*, 15th ed (2000) at [24-32].

21 [2004] 1 AC 1118 at 1173.

22 [1995] QB 324.

23 [2013] WASCA 7 at [10].

24 (1995) 83 A Crim R 78 at 87.

Kingdom[25]. There is some variety in the way the rationale for the rule is expressed in the cases, but it is sufficient for the purposes of the discussion which follows to proceed on the basis that the rationale for the rule lies in the preservation of the secrecy of a jury's deliberations to ensure that those deliberations are free and frank so that its verdict is a true one and to ensure the finality of that verdict.

32 It is convenient now to consider how the rationale for the exclusionary rule informs the limits of its operation in the circumstances of the present case.

Free and frank deliberations

33 In *R v Mirza*[26], Lord Slynn of Hadley, a member of the majority of their Lordships who upheld the application of the exclusionary rule in that case (which concerned allegations by one juror of racial prejudice on the part of the others), accepted that "[i]t is of particular importance, as the courts have accepted, that evidence of bribery or influence outside the trial procedure may be admitted in the Court of Appeal so as to justify that court interfering with the jury's decision." It is difficult to see why his Lordship's observation should not apply with equal force to the case of a bribe offered to a juror by a fellow juror in the course of the trial. Unlawful influence upon a juror is no less inconsistent with free and frank deliberation by that juror, and the integrity of his or her verdict, because it emanates from another juror.

34 Similarly, free and frank deliberation by jurors would not be encouraged or protected by applying the exclusionary rule to a case where the very conduct which a juror seeks to bring to the attention of the court is unlawful harassment by a fellow juror calculated to prevent the conscientious discharge of the juror's duty.

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25 *Re Matthews and Ford* [1973] VR 199 at 209-211; *Medici* (1995) 79 A Crim R 582 at 591-593; *Nanan v The State* [1986] AC 860 at 871; *R v Pan* [2001] 2 SCR 344 at 373-375 [49]-[53]; *R v Mirza* [2004] 1 AC 1118 at 1133-1134 [13], 1144 [47], 1161-1162 [113]-[114].

26 [2004] 1 AC 1118 at 1145 [51].

35 Indeed, to insist on the application of the exclusionary rule in such a case would tend to defeat, rather than to advance, the purpose of the rule. In *R v Myles*[27], Pincus JA said:

> "If one of the jurors were credibly alleged to have conveyed to the others, in the jury room, threats of physical retaliation if they acquitted an accused, it is inconceivable that that could not be gone into by way of inquiry. It seems evident, also, that if the inquiry disclosed that the verdict had been arrived at as a result of such intimidation the Court would have the right to upset it."

36 Unlawful physical coercion exerted by one juror upon another cannot properly be regarded as a part of the course of free and frank deliberation by the jury. It does not unduly strain language to characterise the intimidatory influence of a rogue juror as extrinsic to the deliberations of the jury, because such misconduct is calculated to prevent free deliberation by the jury.

37 In addition, jurors cannot sensibly be said to have an expectation that they may, with impunity, commit a crime in the jury room, secure in the knowledge that the authorities will turn a deaf ear to any complaint. In this regard, it is telling, and hardly surprising, that there is no case in which the exclusionary rule has been applied to prevent the reception by a court of evidence of a criminal offence committed by a juror against a fellow juror.

38 It is instructive to reflect that the considerations which favour the preservation of confidentiality of communications by legal professional privilege do not prevent the giving of evidence of the commission of an offence by a legal professional against his or her client. Relevantly, Gleeson CJ, Gaudron, Gummow and Hayne JJ said in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[28] that:

> "The notion that privilege attaches to communications made between client and lawyer for the purpose of engaging in contraventions of the Act should not be accepted. A communication the purpose of which is to 'seek help to evade the law by illegal conduct' is not privileged." (footnotes omitted)

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27 [1997] 1 Qd R 199 at 208.

28 (2002) 213 CLR 543 at 557 [24]; [2002] HCA 49.

39 It may be acknowledged that legal professional privilege and the exclusionary rule serve different ends of public policy. The point is that, in the case of each rule, the strong considerations of public policy which justify preserving the secrecy of communications associated with the administration of justice may not be invoked to throw a protective cloak of secrecy over criminal conduct.

Finality

40 Lord Devlin, writing extra-judicially in 1956[29], said:

> "All the jury must be in court when the foreman is asked to stand up and give their verdict so that it may be given in the presence of them all. And when he has given it the clerk of the court says: 'And that is the verdict of you all?'; and thereafter if no juryman dissents the jury is discharged and it is *finis rerum* [the end of things]. The court will not listen to any juryman who has second thoughts or allow any of them to assert thereafter that he was not a consenting party to the verdict. How otherwise could there be finality?"

41 Lord Devlin's question has considerable rhetorical force; but the facts of the present case prompt another question: what if a member of the jury seeks to assert not only that he did not consent to the verdict, but that his apparent consent was procured by physical coercion by another member of the jury? Dorne Boniface, writing in 2008, recognised the threat posed to the integrity of the system of the administration of justice by an absolute refusal on the part of the court to entertain such an allegation[30]:

> "A blanket rule justified on the basis of finality of the jury's verdict is … unsustainable. By refusing outright to inquire into genuine and serious allegations of misconduct, not only is the integrity of the jury dishonoured, so is the integrity of the criminal justice system."

42 In *Ras Behari Lal v The King-Emperor*[31], Lord Atkin, delivering the advice of the Judicial Committee of the Privy Council, said that evidence from a

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29 *Trial By Jury*, (1956) at 48.

30 "Juror misconduct, secret jury business and the exclusionary rule", (2008) 32 *Criminal Law Journal* 18 at 37.

31 (1933) LR 60 Ind App 354 at 359.

juror that he did not have a sufficient understanding of the English language to be able to understand the proceedings was not excluded by the rule and afforded a ground for setting aside the verdict. Lord Atkin said:

> "The question whether a juror is competent for physical or other reasons to understand the proceedings is not a question which invades the privacy of the discussions in the jury box or in the retiring room. It does not seek to inquire into the reasons for a verdict."

43 His Lordship went on to conclude: "Finality is a good thing, but justice is a better."[32] This decision, which was referred to with evident approval by the Judicial Committee in 1986 in *Nanan v The State*[33], supports the view that the need to protect and preserve the finality of trial by jury as a justification for the exclusionary rule loses its force where the evidence in question does not go to the substance of the jury's deliberations, but, rather, to demonstrate the disruption of the deliberative process.

44 *R v Emmett*[34] supports Boniface's view that a "blanket rule is unsustainable". In that case, after the verdict had been taken, two jurors had sworn affidavits to the effect that "a sheriff's officer wrongly intruded into the jury's deliberations, took part therein and put pressure upon the jury to come to a verdict and even expressed an opinion that the accused were guilty."[35] As Lee J said: "[f]or the court not to inquire into the matter would be for the court to condone the exposure of the jury to influence in arriving at its verdict".

45 If public confidence in the system of criminal justice is to be deserved, criminal misconduct calculated to prevent free and frank deliberation by a jury must not be kept secret lest it become endemic. In such cases, the application by the courts of the exclusionary rule to preserve finality would be contrary to the first duty of the courts to preserve the integrity of the system of criminal justice which they administer.

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32 (1933) LR 60 Ind App 354 at 361.

33 [1986] AC 860 at 872.

34 (1988) 14 NSWLR 327.

35 (1988) 14 NSWLR 327 at 335.

46 The conduct described in the note in the present case tends to cast a shadow over the administration of justice in this case in a way that lawful but irresponsible behaviour by a juror, careless of his or her oath, does not. The risk that a juror may not be true to his or her oath because of his or her personal eccentricities[36] is a risk which is inherent in a system of trial by jury, whereas the risk of the intimidation of jurors by unlawful threats of violence from other jurors is not.

47 It is also necessary to acknowledge the practical reality that the opportunity for jurors to speak out if their verdict is misrepresented by the foreperson at the time of delivery cannot be relied upon as a fail-safe mechanism which obviates the need to address a real question as to subornation if it arises after the verdict has been taken. It would hardly be surprising if a juror, whose will has been so far overborne by illicit pressure or influence as to vote for a verdict contrary to his or her oath, were to sit mute when the verdict is taken as a result of the continuing effects of that pressure or influence.

Conclusion as to the scope of the exclusionary rule

48 It is consistent with the rationale for the exclusionary rule to conclude that evidence by a juror that unlawful pressure or influence has been applied to him or her by another juror in relation to his or her verdict falls outside the scope of the rule.

49 It is necessary now to turn to consider whether the conclusion of the Court of Appeal to the contrary has led to a miscarriage of justice in this case.

Miscarriage of justice

50 A court should be careful not to jump to the conclusion that the line has been crossed between robust debate and unlawful coercion; but where there is an allegation by a juror capable of belief that an incident has occurred which could be regarded as unlawful intimidation, a court of appeal is warranted in entertaining that allegation as part of its consideration of whether a miscarriage of justice has occurred.

51 The Court of Appeal erred in proceeding on the footing that it was prevented by the exclusionary rule from considering whether a miscarriage of justice had occurred at trial. To dismiss the appeal on the basis that the note was

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36 *R v Mirza* [2004] 1 AC 1118 at 1174-1175 [151]-[152].

not sufficient "to sustain a conclusion of fact to the effect that the processes of the jury were so irregular as to give rise to a miscarriage of justice"[37] was to proceed on an erroneous basis.

The proper approach

52 The first point to be made here is that the question with which this case is concerned does not stand on the same plane as an issue raised by the parties for decision at trial; it is a question which, though it may affect the way in which the controversy between the parties should be resolved, is a question as to the integrity of the trial process. The institutional integrity of the system of justice is at stake in a way that is not the case where the issue is solely one between the parties.

53 The appellant did not seek to contend that the verdict upon which he was convicted was not reasonably open to the jury on the evidence. But as was explained in *Weiss v The Queen*[38], even if a court of appeal is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt, "there may be cases where it would be proper to allow the appeal and order a new trial" where in the course of the trial there has been a "serious breach of the presuppositions of the trial".

54 If there is evidence capable of belief which gives rise to reasonable ground for suspicion that one juror has exercised unlawful intimidation over another, then, on the face of things, there has been a serious breach of the presuppositions of the trial. That breach casts a shadow of injustice over the verdict. In *Webb v The Queen*[39], Mason CJ and McHugh J said that:

> "the test to be applied in this country for determining whether an irregular incident involving a juror warrants or warranted the discharge of the juror or, in some cases, the jury is whether the incident is such that,

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37 [2013] WASCA 7 at [39].

38 (2005) 224 CLR 300 at 317-318 [43]-[46]; [2005] HCA 81. See also *AK v Western Australia* (2008) 232 CLR 438 at 457 [59]; [2008] HCA 8; *Cesan v The Queen* (2008) 236 CLR 358 at 386 [89], 393-395 [123]-[129]; [2008] HCA 52; *Handlen v The Queen* (2011) 245 CLR 282 at 298 [47]; [2011] HCA 51; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [29]; [2012] HCA 14.

39 (1994) 181 CLR 41 at 53; [1994] HCA 30.

notwithstanding the proposed or actual warning of the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially."

55 The other members of the Court agreed with the test so formulated[40], although Brennan and Deane JJ differed from the majority in their view of the result of the application of the test in that case. This test should have been applied to determine whether a miscarriage of justice occurred in this case[41]. If the note was capable of giving rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that a juror has not discharged his task because of unlawful coercion, the appeal should have been allowed unless other evidence put the integrity of the verdict beyond question. If the shadow of injustice over the verdict could not be dispelled, the proper course for the Court of Appeal would have been to allow the appeal, quash the conviction and order a new trial.

56 We now turn to consider whether the note was capable of giving rise to such an apprehension or suspicion.

The evidentiary value of the juror's note

57 The note did not become part of the record in consequence of being tendered by either party; but neither party objected to receipt of the note as part of the record. In the proceedings in the Court of Appeal and in this Court, no objection was taken to the note on the ground that it was hearsay. Given these circumstances, the question is not whether it is inadmissible as hearsay, but whether it has any probative value[42].

58 Having regard to the undisputed provenance of the note, the inference is fairly open that it was written by a juror before the verdict was taken. On that

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40 (1994) 181 CLR 41 at 57 per Brennan J, 71 per Deane J, 87-88 per Toohey J.

41 *Chaouk v The Queen* [1986] VR 707; *R v Emmett* (1988) 14 NSWLR 327 at 334-335, 339; *Medici* (1995) 79 A Crim R 582 at 593.

42 *Walker v Walker* (1937) 57 CLR 630 at 636, 638; [1937] HCA 44.

basis it is probative of the state of mind of the juror who wrote it[43], and of the reason for that state of mind[44].

59 It may be acknowledged that, as Martin CJ thought[45], it is possible that the author of the note did not accurately describe the pressure to which he claimed to have been subjected; but it is not possible to exclude a reasonable suspicion that the note described conduct which was an offence under s 123 of the Code. As has been said earlier, if a court of appeal is unable to exclude a real suspicion that a juror has been improperly influenced, then the conviction cannot be allowed to stand.

60 Earlier in the course of these reasons, it was said that a court should be careful not to jump to the conclusion that the line has been crossed between robust debate between jurors and the unlawful coercion of a juror. It is appropriate to emphasise that cautionary observation by repeating it here.

61 Having said that, the juror's note was capable of creating a reasonable suspicion that criminal conduct influenced the verdict of a juror contrary to s 123 of the Code. In this regard, it is important that the note and the circumstances in which it was produced to the court did engage the serious attention of the trial judge, to whom the note was addressed. His Honour readily made the connection between the note and the unusual behaviour of the jury which he had observed. It would appear that his Honour was sufficiently concerned by the note, and by the circumstances which he observed, that he would have been disposed to take action if he had not been of the view that his hands were tied because the trial had been concluded.

62 An inquiry might be conducted by the Sheriff under the supervision of the Court of Appeal in the exercise of its appellate jurisdiction. It may be noted that, under s 156(1) of the *Supreme Court Act* 1935 (WA), the Sheriff is charged "with the … execution of all … commands of the Court which are directed to him, and shall make such return of the same to the Court together with the manner of the execution thereof as he is thereby required".

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43 *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733 at 751-752; *Bull v The Queen* (2000) 201 CLR 443 at 478-479 [121]; [2000] HCA 24.

44 *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134; [1979] HCA 2; *Bull v The Queen* (2000) 201 CLR 443 at 479 [122].

45 [2013] WASCA 7 at [34]-[38].

Inquiry

63 The shadow of injustice cast on the verdict by the note cannot be dismissed on the basis that the note itself and the paucity of evidence of its provenance are insufficient to create a suspicion that, as a matter of fact, the author of the note was overborne in the performance of his duties as a juror. The question is whether it is possible to dispel the shadow of that suspicion. In this regard, the difficulties involved in fairly resolving this question should not be exaggerated.

64 As to the identity of the author of the note and when it was written, the remarks of the trial judge on 18 January 2012 referred to above suggest that there might be no practical difficulty at all in establishing these matters. Further, since the jury was discharged after delivering its verdict, it is unlikely the jurors returned to the jury room where the note was found and, therefore, it seems likely that it was written before the verdict was taken. But it is neither necessary nor desirable to speculate on the facts where they are able to be known[46].

65 Any doubt or ambiguity as to the true meaning of the note might be resolved relatively easily by inquiry of the juror who made the note. An inquiry may reveal, either that the "physical coercion" referred to in the note was no more than robust debate, or that whatever pressure was described, it had, in truth, no real effect upon the decision of the juror who wrote the note. It may be, for example, that the juror who wrote the note changed his mind about the verdict – and about sending the note to the judge – after he had written it.

66 Next, it cannot be assumed that the inquiry would be "wide-ranging and intrusive … into the deliberations of the jury, [involving] the interrogation of all twelve members of the jury"[47]. In *Webb v The Queen*[48], Brennan J explained that a "possibility" that a juror may have been exposed to a "prejudicial communication" which "could not be excluded" was an irregularity in procedure which was "sufficient by itself to warrant the setting aside of a conviction, although there was no other ground shown for apprehending that the jury had not

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46 *Willis v The Commonwealth* (1946) 73 CLR 105 at 109; [1946] HCA 22; *Johnson v Perez* (1988) 166 CLR 351 at 368-369; [1988] HCA 64.

47 cf [2013] WASCA 7 at [48].

48 (1994) 181 CLR 41 at 58.

reached its verdict impartially." Similarly, in *R v Mirza*[49], Lord Rodger of Earlsferry said:

> "Since proof of the improper extrinsic influence will be sufficient by itself to make the jury's verdict unsafe, no question of admitting evidence as to actual deliberations of the jurors need arise."

67 Finally, it is to be noted that the respondent did not suggest that the passage of time means that it would now be futile to order such an inquiry; but the practicability of an inquiry, given the lapse of time since the verdict, is a matter for determination by the Court of Appeal.

Orders

68 The appeal to this Court should be allowed and the orders of the Court of Appeal of the Supreme Court of Western Australia made on 17 January 2013 should be set aside.

69 The appellant's appeal and application to the Court of Appeal should be heard and determined in accordance with these reasons.

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49 [2004] 1 AC 1118 at 1178 [161]-[162].