HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND GORDON JJ

LESLIE GLYN SMITH APPELLANT

AND

THE QUEEN RESPONDENT

Smith v The Queen
[2015] HCA 27
5 August 2015
B18/2015

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

A Boe with P Morreau and S McGee for the appellant (instructed by Biggs Fitzgerald Pike Solicitors)

A W Moynihan QC with S J Hedge for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Smith v The Queen

Criminal law – Appeal – Appeal against conviction – Fair trial – Procedural fairness – Jury disclosed interim votes and interim voting patterns to judge – Judge did not disclose jury's interim votes or voting patterns to counsel – Judge's obligation to inform counsel of precise terms of jury's questions – Whether appellant denied procedural fairness by non-disclosure of jury's interim votes and voting patterns – Whether jury's interim votes and voting patterns relevant consideration to issue before court – Whether jury's interim votes and voting patterns relevant to discretion to permit majority verdict or discharge jury – Whether disclosure of jury's interim votes and voting patterns necessary for proper performance of jury's functions.

Criminal law – Confidentiality of jury deliberations – Directions to jury – Directions not to communicate or reveal interim votes or interim voting patterns to court – Whether appropriate for trial judge to inquire of jury as to interim votes or voting patterns.

Words and phrases – "capacity to influence the trial judge's exercise of discretion", "confidentiality of jury deliberations", "interim votes", "interim voting patterns", "necessary for the proper performance of the jury's functions", "procedural fairness".

Jury Act 1995 (Q), ss 50, 59A, 60(1), 70.

1 FRENCH CJ. I agree with Gordon J.

2 KIEFEL J. I agree with Gordon J.

3 BELL J. I agree with Gordon J.

4 GAGELER J. I agree with Gordon J.

5 GORDON J. The appellant was charged with one count of rape. He was tried in the District Court of Queensland by judge and jury. After the jury retired to consider its verdict, the trial judge received a note from the jury which disclosed interim votes of the jury and the voting pattern for each disclosed interim vote. The trial judge told counsel that the note indicated that the jury was not in total agreement but the trial judge did not disclose to counsel those interim votes or interim voting patterns. Did the failure of the trial judge to inform counsel of those interim votes and interim voting patterns constitute a denial of procedural fairness? The answer to that question is no.

6 There was no denial of procedural fairness. The interim votes and interim voting patterns of the jury were not relevant to the future conduct of the trial. What was relevant to the issue before the court about the future conduct of the trial were the jury speaker's answers, given in open court, to the trial judge's direct questions about whether allowing a majority verdict might resolve the situation and whether the jury wanted more time to consider its verdict. The appeal should be dismissed.

The facts

7 The appellant's trial began on Tuesday, 18 February 2014. There was no dispute that the appellant had sexual intercourse with the complainant. The issues for the jury were whether that intercourse was by consent and, if not, whether the appellant had an honest and reasonable, but mistaken, belief as to consent.

8 The jury retired to consider its verdict at 11.14 am on Friday, 21 February 2014. No direction was given to the jury concerning any prohibition or restriction upon the disclosure of jury deliberations to the court. The jury was told:

> "If you need any further directions on the law, again, all you need to do is ask. I ask if you have any requests that you reduce them to writing so that they can be considered before you are brought back in the court room."

9 At 3.09 pm that day, the jury was permitted to disperse and return the following Monday to resume deliberations. The trial judge said, in part:

> "You shouldn't talk to anyone at all about the case or any of the decisions you've got to make or any thoughts you've got about the case, and that also includes any one of your number, at this stage. You should only deliberate when all 12 of you are together, so, when I allow you to separate now and go home, you can't even talk about it between yourselves, all right? So simply put the case aside. Obviously, you can think about it over the weekend, but you shouldn't discuss it with anyone else."

10 On Monday, 24 February 2014, the jury resumed deliberations. The jury sent the trial judge a note. The jury sought further direction on the term "beyond reasonable doubt", the reading of part of a witness' statement and a definition of "consent". Following consultation with counsel, the trial judge dealt with those matters at 12.31 pm.

11 At 2.31 pm that day, the trial judge read to counsel a further note sent to him by the jury. The note read "[t]his jury cannot reach a consensus of opinion. Please advise." At 2.33 pm, the jury was given a *Black*[1] direction and asked to consider the matter anew.

12 At 4.20 pm, the trial judge told counsel that the jury had sent him a third note. The third note read:

> "To His Honour,
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> The jury is still not in total agreeance.
>
> - First formal vote was
>
> [redacted] for [redacted] against
>
> (Guilty)
>
> - Second formal vote was
>
> [redacted] for [redacted] against
>
> Thank you."

13 The trial judge informed counsel that the note read "[t]he jury is still not in total agreement." The trial judge told counsel that the note disclosed the jury's voting patterns, which he did not intend to publish further. The trial judge also stated that the jury had been deliberating for more than eight hours. Counsel did not disagree with that calculation or disagree with the trial judge's declaration that he did not intend to disclose the jury's voting patterns.

14 To understand why it is relevant that the jury had deliberated for more than eight hours and what the trial judge next told counsel, it is necessary to refer to some provisions of the *Jury Act* 1995 (Q) ("the Jury Act"), which governs juries in Queensland.

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1 *Black v The Queen* (1993) 179 CLR 44; [1993] HCA 71.

15 For certain criminal trials, s 59A(2) of the Jury Act permits a trial judge to ask a jury to reach a "majority verdict" if, after the "prescribed period", the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation. A "majority verdict", if the jury consists of 12 jurors, is a verdict on which at least 11 jurors agree[2]. "Prescribed period" is defined in s 59A(6) to mean:

> "(a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods –
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> (i) a period allowed for meals or refreshments;
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> (ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;
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> (iii) a period provided for the purpose of the jury being accommodated overnight; or
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> (b) the further period the judge considers reasonable having regard to the complexity of the trial."

16 After discussing the calculation of the eight hours, the trial judge told counsel of his intention to question the jury members on whether they could reach a majority verdict:

> "[I]t's open to give them the majority verdict direction. What I propose to do is to ask them whether an 11:1 vote would resolve the issue and see what their answer is to that. It may be that it won't. This is the second note I've got that they're deadlocked. … What I intend to do is tell them that there's a majority verdict option open to them now, that it is 11:1 and will that resolve the situation."

17 Neither counsel made an application for the jury to be discharged.

18 The jury returned at 4.25 pm. The trial judge said:

> "Ladies and gentlemen, because a certain period of time has passed without your ability to reach a unanimous verdict, the law now allows a majority verdict to be taken in a case like this. The majority, however, is 11:1. So I need to know, I suppose, from you whether that might resolve the situation and whether you want further time to consider, because now I can take a verdict of 11 of you. It must be an agreed verdict between 11 of you. That's the extent of the majority verdict I can take."

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2 Jury Act, s 59A(6).

19 After identifying the jury speaker, the trial judge then said:

> "Do you want more time to consider that, or – I've got the contents of your note. I haven't disclosed it, because really your voting is a matter for yourself. So the parties aren't aware of your voting, but if you want some more time, then you can have it, certainly."

20 The jury speaker responded saying "[y]ou could probably give us about half an hour and we can [indistinct]."

21 The trial judge asked the jury to retire again. He reminded the jury that a majority verdict had to be an 11:1 verdict and that that required agreement between 11 of them.

22 The jury retired at 4.26 pm. The third note was placed in an envelope and sealed. The jury returned at 4.44 pm. The jury convicted the appellant by a majority of 11:1.

The Jury Act – other relevant provisions

23 Section 70 of the Jury Act, entitled "Confidentiality of jury deliberations", provides that a person must not publish to the public "jury information": s 70(2).

24 "Jury information" is defined in s 70(17) to mean:

> "(a) information about statements made, opinions expressed, arguments advanced, *or votes cast*, in the course of a jury's deliberations; or
>
> (b) information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding." (emphasis added)

25 Section 70(3) prohibits a person from seeking from a juror or former juror the disclosure of jury information. Section 70(4) prohibits a juror or former juror from disclosing jury information if the juror or former juror has reason to believe any of the information is likely to be, or will be, published to the public.

26 Sub-sections (2)-(4) of s 70 are subject to sub-ss (6)-(17)[3]. Section 70(6) is important. It provides that "[i]nformation may be sought by, and disclosed to, the court to the extent necessary for the proper performance of the jury's functions."

27 Section 50 requires members of the jury to "be sworn to give a true verdict, according to the evidence, on the issues to be tried, and *not to disclose*

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3 Jury Act, s 70(5).

anything about the jury's deliberations except as allowed or required by law" (emphasis added). Section 70(6) is such a law.

28 Section 60(1) provides that "[i]f a jury can not agree on a verdict, or the judge considers there are other proper reasons for discharging the jury without giving a verdict, the judge may discharge the jury without giving a verdict." A decision of a judge under s 60 is not subject to appeal[4].

The Court of Appeal

29 The appellant appealed to the Court of Appeal of the Supreme Court of Queensland against his conviction. He alleged, among other things, that the trial judge should have disclosed the precise contents of the third note from the jury (including what that note said about interim votes and interim voting patterns of the jury).

30 The Court of Appeal (Holmes JA, Philippides and Dalton JJ)[5] relevantly concluded that (1) the information about interim votes and interim voting patterns in the jury's third note was neither relevant nor capable of influencing the trial judge's exercise of discretion to permit a majority verdict[6]; (2) there was no denial of procedural fairness to the appellant when the trial judge did not disclose to counsel the interim votes and interim voting patterns recorded in the third note before exercising the discretion to ask the jury to reach a majority verdict[7]; and (3) there was no need for the trial judge to discharge the jury simply because he did not propose to disclose the interim votes and interim voting patterns recorded in the third note[8].

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4 Jury Act, s 60(3).

5 *R v Smith* [2014] QCA 277.

6 *R v Smith* [2014] QCA 277 at [88].

7 *R v Smith* [2014] QCA 277 at [89].

8 *R v Smith* [2014] QCA 277 at [89].

31 In reaching those conclusions, the Court of Appeal declined[9] to follow a unanimous decision of the Victorian Court of Appeal in *LLW v The Queen*[10] and a majority decision of that Court in *HM v The Queen*[11].

Jury votes or voting patterns should not be disclosed

32 Jury deliberations should, so far as possible, remain confidential[12]. That is a principle of the highest significance in the criminal justice system[13]. When conveying to a trial judge that they are having difficulty in reaching a verdict, juries should not reveal their votes or voting patterns[14]. It would be a sensible measure for trial judges to give a direction to juries that they should not communicate or reveal to the court their votes or voting patterns in favour of conviction or acquittal, to lessen the risk of any such disclosure before delivery of a verdict[15]. And in that connection a trial judge should not inquire of a jury as to its votes or voting patterns[16].

33 The purpose of the confidentiality of jury votes or voting patterns is twofold. First, it maintains confidence in the jury system. It enables jurors to approach their task through frank and open discussion knowing that what is said in the jury room remains in that room[17]. It permits the exchange of views which contributes to the development, over time, of the individual and collective views of the jurors. That process is fluid, not static.

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9 *R v Smith* [2014] QCA 277 at [85]-[87].

10 (2012) 35 VR 372.

11 (2013) 231 A Crim R 349.

12 Jury Act, ss 50 and 70; *HM v The Queen* (2013) 231 A Crim R 349 at 352 [5]. See also *Minarowska* (1995) 83 A Crim R 78 at 84.

13 *HM v The Queen* (2013) 231 A Crim R 349 at 352 [5]. See also *Re Portillo* [1997] 2 VR 723 at 726; *R v Smith* [2005] 1 WLR 704 at 707 [7]; [2005] 2 All ER 29 at 33.

14 *R v Gorman* [1987] 1 WLR 545 at 551; [1987] 2 All ER 435 at 439.

15 *MJR v The Queen* (2011) 33 VR 306 at 319 [74]-[75]; *LLW v The Queen* (2012) 35 VR 372 at 386 [70]; *R v Smith* [2014] QCA 277 at [101].

16 *R v Rose* [1982] 1 WLR 614 at 621; [1982] 2 All ER 536 at 541; *MJR v The Queen* (2011) 33 VR 306 at 313 [41]; *Nguyen v The Queen* [2013] VSCA 65 at [25].

17 *Smith v Western Australia* (2014) 250 CLR 473 at 481 [31]; [2014] HCA 3.

34 The fluidity arises because the process is a human endeavour. The development of each juror's assessment and understanding of the questions to be answered is necessarily unique. It does not happen at the same time and in the same manner. The fluidity in the process also arises because of the nature of the jury's task. A jury is usually required to consider not only the ultimate question of whether guilt has been established beyond reasonable doubt, but also particular questions that are steps along the way to the final conclusion reflected in a verdict, or the inability to reach a verdict. As a juror's understanding of one question changes, so might their understanding of others. Indeed, until the final verdict, each juror is entitled to change their mind[18] and they do[19].

35 The second purpose of the confidentiality of jury votes or voting patterns, directly related to the first purpose, is that it protects the finality of the verdict[20]. The process by which the jury reached its verdict is not relevant[21]. It is the final verdict of the jury, or the inability of the jury to reach a verdict, that is relevant.

36 In the present appeal, the appellant submitted that he was denied a fair trial in accordance with law because procedural fairness required that the interim votes and interim voting patterns of the jury set out in the third jury note be disclosed to counsel and this was not done.

37 The balance of these reasons will consider the appellant's entitlement to a fair trial in accordance with law and then explain why the non-disclosure of the interim votes and interim voting patterns of the jury did not give rise to a denial of procedural fairness.

Accused entitled to a fair trial in accordance with law

38 An accused is entitled to a fair trial in accordance with law[22]. An accused's right to a fair trial in accordance with law is ensured, and informed, by

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18 *Black v The Queen* (1993) 179 CLR 44 at 51.

19 See, eg, *Burrell v The Queen* (2007) 190 A Crim R 148 at 218-219 [290]-[294]; *LLW v The Queen* (2012) 35 VR 372 at 378 [24]-[25], 381 [32], 383 [50], 385 [63].

20 *Smith v Western Australia* (2014) 250 CLR 473 at 481 [31].

21 Unless an exception applies: see *Smith v Western Australia* (2014) 250 CLR 473 at 480-485 [27]-[48]. Those exceptions do not arise here.

22 *Wilde v The Queen* (1988) 164 CLR 365 at 375; [1988] HCA 6; *Lee v The Queen* (2014) 88 ALJR 656 at 665 [47]; 308 ALR 252 at 263; [2014] HCA 20.

"rules of law and of practice designed to regulate the course of the trial"[23]. As stated by Mason CJ and McHugh J in *Dietrich v The Queen*[24]:

> "There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice." (footnote omitted)

39 One of the requirements of a fair trial is that the accused be accorded procedural fairness.

40 In *R v Wise*[25] Ormiston JA (with whom Brooking and Chernov JJA agreed) explained one part of procedural fairness in these terms:

> "It is an elementary rule, whether in relation to civil or criminal proceedings, that a judge shall not determine any question without affording counsel for each party an opportunity to see and comment upon any *material relevant* to the issue before the court which is *available to the judge and known not to be available to counsel*". (emphasis added)

41 There are two related aspects of this rule. First, information relevant to issues before the court which is available to the judge and known not to be available to counsel must be disclosed to counsel. The second aspect is that the accused and the prosecution must be afforded an opportunity to make submissions which bear upon questions about the future conduct of the trial. For these reasons, as Chernov JA rightly said in *Ucar v Nylex Industrial Products Pty Ltd*[26]:

> "[T]he general rule [is] that a party should be given the opportunity to respond to matters prejudicial to its interests that are known only to the

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23 *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300; [1992] HCA 57, citing *Bunning v Cross* (1978) 141 CLR 54; [1978] HCA 22, *R v Sang* [1980] AC 402 and *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29; [1989] HCA 46.

24 (1992) 177 CLR 292 at 300.

25 (2000) 2 VR 287 at 294 [20].

26 (2007) 17 VR 492 at 503 [27]. The general rule might be affected by specific legislative provisions: see, eg, *Condon v Pompano Pty Ltd* (2013) 252 CLR 38; [2013] HCA 7.

court and which might be taken into account in the determination of issues that may affect the party's property, rights or legitimate expectations."

42 It follows that if information made available to a judge is *not* relevant to an issue before the court, nor regarded by the judge as relevant, then its non-disclosure to counsel cannot be a denial of procedural fairness.

Issue and analysis

43 At least until the jury withdrew to consider its verdict, there is no suggestion that the appellant's trial was other than according to law. Did the appellant have a fair trial according to law *after* the point at which the jury retired to consider its verdict?

44 In particular, did the appellant have a fair trial according to law after the trial judge received the third note from the jury (which set out interim votes and interim voting patterns of the jury) but decided not to disclose the precise contents of that note to counsel? The answer is yes.

45 Or to put the same question another way, when the trial judge received the third note from the jury, was the trial judge obliged, before determining whether to permit a majority verdict or to discharge the jury[27], to disclose to counsel the *precise* contents of that note? The answer to that question is no.

46 Why must the questions be answered this way?

47 First, the general principle that interim votes and interim voting patterns of a jury should not be disclosed was not displaced by the Jury Act. Neither party submitted to the contrary. The Jury Act contains a number of express restrictions on the disclosure of jury deliberations and "jury information". Each juror swears an oath or affirmation "not to disclose anything about the jury's deliberations except as allowed or required by law."[28] Section 70(2) prohibits publication of "jury information" to the public. "Jury information" includes information about the votes cast in the course of a jury's deliberations[29]. And it is an offence for a

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27 Section 60(1) of the Jury Act provides the judge with a discretion to discharge the jury. That discretion is not subject to any temporal limitation. Therefore, if the prescribed period in s 59A has elapsed, the judge could consider a majority verdict or discharge of the jury: cf *R v Smith* [2014] QCA 277 at [62].

28 Jury Act, s 50.

29 Jury Act, s 70(17).

juror to disclose jury information if the juror has reason to believe any of the information is likely to be, or will be, published to the public[30].

48 Section 70(6) provides that "[i]nformation may be sought by, and disclosed to, the court *to the extent necessary* for the proper performance of the jury's functions" (emphasis added). Disclosure to the court of interim votes and interim voting patterns of the jury is not necessary for the proper performance of the jury's functions. Disclosure is not *necessary* to enable the jury to perform its role of determining whether the prosecution has established the guilt of the accused beyond reasonable doubt.

49 Disclosure is not *necessary* to enable a judge to reach a view on whether to ask the jury to consider a majority verdict under s 59A(2) or to discharge the jury under s 60(1). Neither s 59A(2) nor s 60(1) contemplates disclosure of the interim votes or interim voting patterns of the jury to the trial judge in the exercise of the discretion. The Jury Act seeks to maintain the confidentiality of a jury's interim votes and interim voting patterns, notwithstanding the availability of the judicial discretions that exist in ss 59A(2) and 60(1).

50 Second, the general principle that a jury's interim votes or interim voting patterns are not to be disclosed was *not* displaced by the accused's right to a fair trial in accordance with law[31], ensured and informed by principles of procedural fairness.

51 In considering procedural fairness in this appeal, the question to be asked and answered is whether the material – here, information about interim votes and interim voting patterns of the jury at a time prior to verdict which was available to the trial judge and known not to be available to counsel – was *relevant* to an issue before the court.

52 That information was not made relevant by the Jury Act[32]. And because of the protean and changeable character of the jury's deliberations, it was not otherwise relevant. As this Court said in *Black v The Queen*[33], it is "proper to remind the jurors that they should listen to each other's views, weigh them objectively and that an individual juror can change his or her mind if honestly persuaded that his or her preliminary view is not well founded." Precisely because a jury's votes can and do change, a statement of what a jury's votes were

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30 Jury Act, s 70(4).

31 See [38]-[42] above.

32 See [47]-[49] above.

33 (1993) 179 CLR 44 at 51.

at a time prior to verdict is not relevant. It is a statement which adds nothing to the knowledge that the jury is deadlocked or has not yet reached a verdict. Indeed, as Philippides J said in the Court of Appeal below[34]:

> "[O]ne may question the extent to which the precise voting figures may provide a useful basis for submissions. Individual jurors do not necessarily reach a particular conclusion by the same route and thus the jury figures may present a misleading picture of the extent and nature of the division of the jury. They may not reflect the true complexity of the jury's reasoning and lead to a type of second-guessing of the jury's deliberations."

53 After the delivery of the third note, what was relevant were the jury speaker's responses to the trial judge's questions, asked in open court and set out at [18]-[20] above, about whether allowing a majority verdict might resolve the situation and whether the jury wanted more time to consider its verdict. The length and complexity of the trial, as well as the time the jury had already spent deliberating, were also relevant considerations. Information as to interim votes or interim voting patterns of the jury prior to verdict was not relevant. Counsel were therefore not denied any opportunity to make any submission about any relevant matter.

Capacity of voting patterns to influence a trial judge

54 The appellant submitted that the information about interim votes or interim voting patterns of the jury at a time prior to verdict had a capacity to influence the trial judge's exercise of discretion to either allow a majority verdict or to discharge the jury. That submission should be rejected. The trial judge knew that the jury was deadlocked. When the trial judge asked the jury whether allowing a majority verdict might resolve the situation and whether the jury wanted more time to consider its verdict, the trial judge did not know what the result was going to be. At that point in time, the conduct of the trial judge and counsel was dependent on the jury speaker's response to those questions and to the other jurors' reactions to the jury speaker's responses. It was not dependent on, or affected by, what had been disclosed in the third note.

55 Moreover, in this appeal, information as to interim votes or interim voting patterns of the jury prior to verdict – information which, as has been explained, was not relevant to the exercise of the discretion – was not taken into account by the trial judge. The trial judge told the jury that he had not disclosed the precise contents of the note containing that information, "because really your voting is a matter for yourself." From this statement it should be inferred that the trial judge

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34 *R v Smith* [2014] QCA 277 at [99].

rightly disregarded the information that the jury had given as to its votes or voting patterns prior to verdict. There was no denial of procedural fairness.

Extent of numerical split

56 The redactions to the third jury note mean that the extent of the numerical split disclosed to the trial judge is not known. However, the extent of the numerical split disclosed does not and cannot alter these conclusions. Even if disclosure of interim votes or interim voting patterns of a jury prior to verdict indicated that, at some point in its deliberations, the jury was split 11:1, that fact (and its disclosure) would not be relevant to and would not have the capacity to influence any decision the judge has to make about the future conduct of the trial. Without much further and more detailed information about the state of the jury's deliberations (which it is impermissible to seek), the note tells the judge no more than that, at some point in its deliberations, the jury was not in unanimous agreement. It says nothing about the question of whether further deliberation might lead to a verdict that can be taken. To the extent that decisions of intermediate courts[35] suggest that a trial judge is required to disclose interim voting patterns in the event of an 11:1 split, those decisions are incorrect and should not be followed.

Other matters

57 In *LLW v The Queen*[36] and a majority decision in *HM v The Queen*[37], the Victorian Court of Appeal reached conclusions contrary to that reached in these reasons. The Court of Appeal's conclusions did not depend upon any relevant difference between the applicable legislative provisions. It follows from what has been said earlier that the decision in *LLW v The Queen* and the majority decision in *HM v The Queen* should not be followed.

58 None of the preceding analysis should be understood as detracting from the proposition that a trial judge must disclose to counsel the *precise* terms of any questions asked by a jury[38]. The precise questions asked by a jury will be material *relevant* to an issue before the court, and the accused and the prosecution should be afforded an opportunity to make submissions on any issues raised by those questions.

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35 See, eg, *MJR v The Queen* (2011) 33 VR 306 at 316 [56]-[59]; *Nguyen v The Queen* [2013] VSCA 65 at [17], [19], [78].

36 (2012) 35 VR 372.

37 (2013) 231 A Crim R 349.

38 *R v Black* (2007) 15 VR 551 at 555 [16].

59 The questions from the jury in this appeal demonstrate the point. The jury asked the trial judge questions concerning the term "beyond reasonable doubt" and access to part of the evidence, and a further question of law[39]. Those questions were material *relevant* to an issue before the court. Some questions from a jury are directed at the ultimate question of whether guilt has been established beyond reasonable doubt, the final conclusion being reflected in a verdict or the inability to reach a verdict. Other questions from a jury are steps along the way to that final conclusion. It is for those reasons that the precise questions are disclosed and the accused and the prosecution are afforded an opportunity to make submissions.

Conclusion and orders

60 The failure of the trial judge to inform counsel of the interim votes and interim voting patterns of the jury did not constitute a denial of procedural fairness. The central question to be answered in reaching that conclusion was whether the material – the information about the interim votes and interim voting patterns of the jury – was relevant to an issue before the court. Neither the interim votes of the jury nor the interim voting patterns of the jury were relevant to any issue before the court or regarded as such by the trial judge. The appeal should be dismissed.

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39 See [10] above.