

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

QUY HUY HOANG

APPELLANT

AND

THE QUEEN

RESPONDENT

Hoang v The Queen
[2022] HCA 14
Date of Hearing: 16 March 2022
Date of Judgment: 13 April 2022
S146/2021, S147/2021, S148/2021 & S149/2021

ORDER

1. *The appeal in each matter be allowed in part.*
2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 3 August 2018 and, in its place, order that:*
 - (a) *the appeal be allowed in part;*
 - (b) *the appellant's convictions on Counts 4 and 6 to 12 be set aside;*
and
 - (c) *a new trial be had on Counts 4 and 6 to 12.*
3. *In relation to Counts 1 and 5, remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales to consider whether:*
 - (a) *to affirm or vary the appellant's sentence under s 7(1) of the Criminal Appeal Act 1912 (NSW);*

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- (b) *to remit the matter to the District Court of New South Wales under s 12(2) of the Criminal Appeal Act 1912 (NSW); or*
- (c) *to await the outcome of any new trial on Counts 4 and 6 to 12.*

On appeal from the Supreme Court of New South Wales

Representation

G A Bashir SC with D L Carroll and G E L Huxley for the appellant
(instructed by AA Criminal Lawyer)

D T Kell SC with E S Jones for the respondent (instructed by Office of the
Director of Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Hoang v The Queen

Criminal practice – Jury trial – Where s 53A(1)(c) of *Jury Act 1977* (NSW) provided for mandatory discharge of juror where juror engaged in misconduct in relation to trial – Where misconduct included conduct constituting offence against *Jury Act* – Where offence against s 68C(1) of *Jury Act* for juror to make inquiry for purpose of obtaining information about any matters relevant to trial – Where evidence led as to Working with Children Check – Where evidence subject of submissions and referred to in summing up – Where jury note disclosed juror had searched internet for requirements of Working with Children Check – Where trial judge took verdicts which jury indicated they had reached unanimous verdict on before discharging juror – Whether information subject of inquiry about matter relevant to trial – Whether inquiry made for purpose of obtaining information about that matter – Whether mandatory discharge of juror required.

Words and phrases – "constitution and authority of the jury", "discharge of jurors", "jury deliberations", "making an inquiry", "mandatory discharge", "matters relevant to the trial", "misconduct in relation to the trial", "purpose of obtaining information", "true verdict according to the evidence".

Jury Act 1977 (NSW), ss 53A, 53B, 55DA, 68C.

- 1 KIEFEL CJ, GAGELER, KEANE, GORDON AND EDELMAN JJ. In New South Wales, a juror in a jury trial takes an oath, or makes an affirmation, that they will give a true verdict according to the evidence¹. From the time a juror is sworn in as a juror, and until they are discharged by the court², they must not *make an inquiry* for the purpose of obtaining information about *any matters relevant to the trial*³. "[M]aking an inquiry" includes conducting any research, for example, by using the internet⁴.
- 2 Section 53A of the *Jury Act 1977* (NSW) relevantly provides that a court "must discharge a juror if, *in the course of any trial* ... the juror has engaged in misconduct in relation to the trial"⁵ (emphasis added). "[M]isconduct", in relation to a trial, relevantly means "conduct that constitutes an offence against [the *Jury Act*]"⁶. It is an offence against the *Jury Act* for a juror to *make an inquiry* for the purpose of obtaining information about a matter relevant to the trial⁷.
- 3 The appellant, Mr Hoang, was tried in the District Court of New South Wales on an indictment charging him with 12 counts of sexual offences against children: five counts of aggravated indecent assault⁸ (counts 1, 6, 8, 9 and 10); two counts of aggravated acts of indecency⁹ (counts 2 and 3) and five counts of aggravated sexual intercourse¹⁰ (counts 4, 5, 7, 11 and 12). There were five

1 *Jury Act 1977* (NSW), s 72A.

2 *Jury Act*, s 68C(2).

3 *Jury Act*, s 68C(1).

4 *Jury Act*, s 68C(5)(b).

5 *Jury Act*, s 53A(1)(c).

6 *Jury Act*, s 53A(2)(a).

7 *Jury Act*, s 68C(1).

8 *Crimes Act 1900* (NSW), s 61M(2).

9 *Crimes Act*, s 61O(1).

10 *Crimes Act*, s 66A(2).

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complainants. The offences were alleged to have been committed whilst the appellant was a mathematics tutor between 1 January 2007 and 31 July 2014. The appellant pleaded not guilty to all charges.

4 The trial judge gave directions to the jury at the start of the trial, both orally and in writing, that jurors were not to search the internet for anything relevant to the trial. As part of its case, the Crown led evidence that the appellant did not hold a Working with Children Check¹¹. Character evidence was adduced by the appellant to counter that evidence, and his counsel made submissions about that evidence, which the trial judge then referred to in her summing up.

5 During the course of jury deliberations, the jury provided a note to the trial judge stating that they had reached agreement on eight of the 12 counts and had varying degrees of agreement about the other counts. The jury continued to deliberate until approximately 4pm that day, at which time they were sent home.

6 The jury returned the following morning. At approximately 12.30pm, the jury foreperson sent the trial judge a note which stated¹²:

"This morning a juror disclosed that yesterday evening they google/looked up on the internet the requirements for a working with children check. The juror had previously been a teacher and was curious as to why they themselves did not have a check. They discovered the legislation, which was only introduced in 2013.

I myself have completed a working with children course and so already know this information but it had not been discussed in the jury room.

11 See *Child Protection (Working with Children) Act 2012* (NSW), s 5(1) definition of "working with children check clearance", Pt 3.

12 See *Jury Act*, s 75C(1), which relevantly provides that a juror who "has reasonable grounds to suspect any irregularity" – defined in sub-s (4)(a) to include "the commission ... of an offence under [the] Act" – "in relation to the performance of [another] juror's functions as a juror ... may disclose the suspicion and the grounds on which it is held to the court".

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This information discovery of a juror making their own enquiry I do not feel has had an impact, however I understand my duty to notify you of this as per the written instructions at the commencement of this trial."

7 Upon the trial judge being informed of the inquiry, her Honour proceeded to take the eight verdicts referred to in the jury note from the previous day as well as two further verdicts which, that afternoon, the jury indicated they had reached a unanimous verdict on. The jury returned verdicts of not guilty in respect of counts 2 and 3 and guilty verdicts in respect of counts 4 and 6 to 12. The trial judge then discharged the juror for misconduct under s 53A(1)(c) of the *Jury Act*. The remaining jurors then continued to deliberate in respect of the remaining two counts (counts 1 and 5). Unanimous guilty verdicts were later delivered with respect to those counts. Two weeks after the last verdict was delivered, the trial judge delivered reasons for discharging the juror.

8 The appellant applied for leave to appeal against his convictions to the Court of Criminal Appeal of the Supreme Court of New South Wales. The three proposed appeal grounds relevantly related to the juror's conduct in conducting the search and whether that search constituted misconduct within the meaning of s 53A(1)(c) of the *Jury Act* and, if so, whether the juror should have been discharged prior to taking the first ten verdicts.

9 In the Court of Criminal Appeal, the Crown accepted that if the juror's conduct in conducting the search constituted misconduct within the meaning of s 53A(1)(c) of the *Jury Act*, the juror should have been discharged prior to taking the ten verdicts. However, the Crown contended that the evidence did not establish that the juror's conduct constituted misconduct and contended that the trial judge was in error in finding to the contrary. In particular, the Crown submitted that the juror did not make the inquiry "for the purpose" of obtaining information about a matter relevant to the trial but did so for her own personal purpose.

10 The appeal was dismissed (N Adams J, with whom Hoeben CJ at CL agreed; Campbell J dissenting). The majority held that the requirement in s 68C(1) that the inquiry be for a specified "purpose" requires a finding of the juror's intention in making the inquiry or the reason why the inquiry was made. The majority found that the juror made the inquiry for the purpose of "satisfying herself as to why she did not require a Working with Children Check" and, as that was not a matter that was relevant to the trial, the juror had not engaged in misconduct. The majority also held that, although the trial judge may have tentatively formed the view that there was misconduct prior to taking the verdicts, "the decision that later discharged the juror was made *after* the point in time at

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which it [was] alleged that the obligation to discharge was enlivened" (emphasis in original).

- 11 As will be explained, the appeals must be allowed. On the proper construction of s 68C(1), read with s 53A(1)(c), the juror had engaged in misconduct by making an inquiry for the purpose of obtaining information about a matter relevant to the trial and the trial judge was in error in taking the ten verdicts before discharging that juror.

Jury trial and the *Jury Act*

- 12 The jury is "the fundamental institution in our traditional system of administering criminal justice"¹³. It is, in a criminal trial, the method by which laypeople selected by lot perform, under the guidance of a judge, the fact-finding function of ascertaining guilt or innocence¹⁴. The *Jury Act* regulates a wide range of matters concerned with jury trials. It, along with other legislation, sets the parameters of that method of trial and regulates the process¹⁵. The provisions governing "the constitution and authority of the jury as the tribunal of fact in a criminal trial are mandatory"¹⁶. A failure to comply with them "may render a trial a nullity, at least in the sense that the conviction produced cannot withstand an appeal"¹⁷.

- 13 Part 9 of the *Jury Act* sets out a range of offences in relation to jurors¹⁸. These appeals are concerned with s 68C(1), which prohibits a juror in any criminal

13 *Brown v The Queen* (1986) 160 CLR 171 at 197; see also 178.

14 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375. See also *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

15 *Maher v The Queen* (1987) 163 CLR 221 at 229.

16 *Maher* (1987) 163 CLR 221 at 233.

17 *Maher* (1987) 163 CLR 221 at 233, quoted in *Katsuno v The Queen* (1999) 199 CLR 40 at 59 [32]. See also *R v Wood* (2008) 186 A Crim R 454 at 463 [33].

18 Including potential jurors supplying false or misleading information (s 62) or failing to attend for jury service (s 63) and other offences such as personation of jurors

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proceedings making an inquiry for the purpose of obtaining information about any matters relevant to the trial except in the proper exercise of their functions as a juror. A judge may compulsorily examine a juror on oath "to determine whether a juror has engaged in any conduct that may constitute a contravention of section 68C"¹⁹.

14 Part 7A, headed "Discharge of jurors", then provides powers to and imposes duties upon a court to discharge a juror, or a jury, in certain circumstances. Section 53A(1)(c) imposes a mandatory duty upon a court to discharge a juror if, in relation to a trial, they have engaged in misconduct, being, relevantly, conduct that constitutes an offence against the *Jury Act* – including an offence against s 68C.

15 Section 53B operates in different circumstances. It provides the court with a discretion to discharge a juror in certain circumstances including: if in the judge's opinion the juror is likely to become unable to serve as a juror before the delivery of a verdict because of ill health or incapacity²⁰; if it appears to the court that the juror cannot "give impartial consideration to the case"²¹; if the juror "refuses to take part in the jury's deliberations"²²; or if it appears to the court that, "for any other reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act as a juror"²³. It is not engaged in this case.

(s 67), disclosing the identity or address of a juror (s 68) and soliciting information from or harassing a juror (s 68A).

19 *Jury Act*, s 55DA(1). "If there is reason ... to suspect that the verdict of a jury in a trial of any criminal proceedings may be, or may have been, affected because of improper conduct by a member or members of the jury, the sheriff may, with the consent of or at the request of the Supreme Court or District Court, investigate the matter and report to the court on the outcome of the investigation": *Jury Act*, s 73A(1).

20 *Jury Act*, s 53B(a).

21 *Jury Act*, s 53B(b).

22 *Jury Act*, s 53B(c).

23 *Jury Act*, s 53B(d). If a juror is discharged in criminal proceedings under Pt 7A, the court must discharge the jury if it is "of the opinion that to continue the trial ... with the remaining jurors would give rise to the risk of a substantial miscarriage of justice": *Jury Act*, s 53C(1)(a).

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The trial

- 16 Specific aspects of what transpired during the appellant's trial need to be addressed in some detail – in particular, the Working with Children Check evidence and how it was dealt with during the trial, and then what steps were taken by the trial judge in response to the note from the foreperson.

Evidence and addresses in relation to Working with Children Check

- 17 Late in the trial, Detective Senior Constable Paul was called by the Crown and gave evidence that he had made an inquiry with the State Office of the Children's Guardian as to whether the appellant had a Working with Children Check. He said that he was familiar with the Working with Children Check system. He agreed with the Crown Prosecutor that "if you are a teacher or if you work on the grounds around a school or if you are a police officer and you are working with children, you have to get clearance pursuant to [the] *Children and Young Persons Protection Act* ... that you are cleared and licensed to work ... with children ... [a]nd the Department keeps a register of people with such a grant of permission". Detective Senior Constable Paul said he had received correspondence from the "Office of Public Guardian" stating that there was no record of the appellant on the register under his name and date of birth.

- 18 As the Court of Criminal Appeal unanimously stated, the relevance of this evidence was at best obscure. Indeed, the legislation referred to in that evidence was the *Child Protection (Working with Children) Act 2012* (NSW), which commenced on 15 June 2013²⁴ and applied to only part of the period identified in the indictment. In any event, for reasons which are not apparent, that evidence was led by the Crown Prosecutor without objection in the presence of the jury. Detective Senior Constable Paul was not cross-examined about that evidence.

- 19 Defence counsel, however, sought to counter that evidence. Two days later, David Nguyen gave character evidence on behalf of the appellant. Mr Nguyen gave evidence that he was a family friend of the appellant, that he was a private English tutor and that the appellant referred work to him. He gave evidence that the appellant had taken out an advertisement in his name in relation to private tutoring, and that the appellant had suggested that students who called in response to that advertisement in relation to mathematics tutoring should be referred to the

24 *Child Protection (Working with Children) Act*, s 2 read with New South Wales, *Commencement Proclamation*, 2013 No 154, 24 April 2013.

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appellant. Mr Nguyen gave evidence that he did not have any formal qualifications in tutoring, and that he did not have a "Working With Children Certificate". He said that "at least 90% of undergraduate students have tutored at some point. A lot of my friends tutor and, yeah, none of us have that qualification".

20 In his closing address to the jury, the Crown Prosecutor did not refer to the Working with Children Check evidence. However, the Crown Prosecutor said to the jury that the evidence disclosed that the appellant had "his own risk plan" to avoid detection. The Crown Prosecutor said that certain classified advertisements the appellant had placed – which were "not in his name", had "false" addresses, and in relation to which he sought to "have someone else take the phone call" – were part of a "sophisticated pretence", which was "bold and sexually driven", that he was "a respectable, well regarded, successful teacher of some fame in terms of his students", when in fact he was tutoring children as part of a "system" he built around himself "so he didn't even need to really think about anything that might be a barrier between him and his sexual gratification".

21 The next day, defence counsel addressed this issue squarely in his closing address. Counsel referred to and disparaged the Crown's reliance on the classified advertisements, characterising the Crown's submission as being that there was "some dark mystery, some fraud or ruse played out to get the accused into houses where he [could] tutor". Immediately following those submissions, defence counsel referred to the evidence of Mr Nguyen, describing him as an "intelligent young man" who would have "impressed you as an impartial witness". He made the following remarks in relation to the Working with Children Check evidence:

"You remember the evidence late in the trial again from Detective Paul in relation to the inquiries that were made with the State Office of the Children's Guardian as to whether the accused had a working with children certificate. He didn't. *It sounded bad at the time.* Then we found out from David Nguyen, a capable young man, he is studying to be a doctor and working as a private tutor, he tells us that 90 per cent of undergraduate students have tutored at some point and lots of his friends are tutors and none of them have that qualification." (emphasis added)

It is significant, as Campbell J said in the Court of Criminal Appeal, that defence counsel ("who must be taken to have a better feel for the potential significance of the evidence lead at the trial" than an appellate court) "thought it pertinent to remind the jury of the evidence on this topic".

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22 In her summing up to the jury, the trial judge referred to the Crown's reliance on the classified advertisements. Her Honour noted that the Crown had referred to how the appellant was "purporting to be respectable and regarded as a successful teacher, that the [advertisements] were not in his name or addresses, they were false and by someone else" and that the Crown submitted the appellant "was risk averse and was trying to minimise his risk". The trial judge recorded the Crown's submission that it was "a pattern, a system". Her Honour shortly thereafter summarised defence counsel's response to that submission, which she said was to the effect of "look, there is not some dark mystery or fraud or ruse played out". That was followed by her Honour referring to Mr Nguyen's evidence and defence counsel's submission that the fact that the appellant did not have "a Working with Children's Certificate was not unusual, that most tutors in particular students do not". Both defence counsel and the trial judge not only addressed the Working with Children Check evidence but explained it.

23 As Campbell J said in the Court of Criminal Appeal, the Working with Children Check evidence was obviously on the mind of the juror who decided to make the inquiry, first, when they made the inquiry which was recorded in the note from the foreperson, and second, when they decided "to share the results of that inquiry and the reasons for making it with the rest of the jury" the following morning.

Steps taken by the trial judge

24 On reading the note from the jury foreperson, the trial judge formed the view, without the need to conduct any inquiry or examination under s 55DA of the *Jury Act*, that she was satisfied that a juror had engaged in misconduct in relation to the trial. The majority in the Court of Criminal Appeal held that the trial judge was in error in determining that there was juror misconduct warranting mandatory discharge of that juror under s 53A(1)(c) of the *Jury Act*. That conclusion is the subject of ground 1 of these appeals. It turns on the proper construction of s 68C(1), read with s 53A(1)(c).

25 That leads to the second issue in these appeals. There was no dispute before the trial judge or in the Court of Criminal Appeal that the combined effect of ss 68C(1) and 53A(1)(c) is that once the trial judge is satisfied that a juror has engaged in misconduct, "there is no course available other than to discharge [the]

juror"²⁵. In the trial judge's reasons for her approach in discharging the juror, her Honour said:

"Prior to making specific inquiries in relation to the jury note, ... I heard submissions from both counsel. Both counsel submitted that an inquiry into the juror who had made inquiries on the Internet should take place before any steps were taken to take the eight verdicts. *I declined to conduct the inquiry with the juror before taking the verdicts as I was of the opinion that I had sufficient information in [the] jury note ... that a breach had occurred.* It was therefore mandatory that that juror had to be dismissed." (emphasis added)

26 However, as we have seen, the trial judge did not dismiss the juror, and proceeded to take verdicts on ten counts and only then discharged the juror. The majority of the Court of Criminal Appeal held that mandatory discharge was not required prior to the trial judge taking the verdicts even though the trial judge was satisfied that misconduct under s 53A(1)(c) had occurred. As will be seen, that was contrary to the "mandatory" terms of the statute "which govern the constitution and authority of the jury as the tribunal of fact in a criminal trial"²⁶.

Construction of s 68C(1), read with s 53A

27 As has been explained, s 53A(1)(c) imposes a duty upon the court to discharge a juror during the course of a trial if the juror has engaged in *misconduct* in relation to the trial²⁷. Section 53A(2)(a) relevantly defines "misconduct" as an offence against the *Jury Act*.

28 Section 53A(2)(a) does not itself create an offence. It refers to "conduct that *constitutes* an offence against" the *Jury Act* (emphasis added). None of the various offences listed in the *Jury Act* (including s 68C(1)) is constituted by the specified actus reus alone. To "constitute" each offence, the conduct includes both the actus reus and the applicable mens rea. Of course, proof beyond reasonable doubt that

25 *Smith v The Queen* (2010) 79 NSWLR 675 at 681 [26].

26 *Maher* (1987) 163 CLR 221 at 233.

27 *Jury Act*, s 53A(1)(c).

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the identified conduct constitutes an offence against the *Jury Act* is not required for the purposes of s 53A(2)(a)²⁸.

29 The appellant contended that s 53A, read as a whole, applies to conduct alone, and does not include the mens rea of s 68C(1) – namely, the intention or purpose for making the inquiry. That contention is contrary to the text of s 53A(2)(a), read in context, and the "general principles of criminal responsibility"²⁹. That a judge must consider both the actus reus and the mens rea of the specified offence in determining whether a juror has "engaged in any conduct that may constitute a contravention of" s 68C(1) is reinforced by s 55DA, which recognises the possibility that, during a trial judge's inquiry of the juror, evidence may be given which has the capacity to prove that that offence has been committed. The juror cannot refuse to give such evidence³⁰, but may be given a certificate if they do give such evidence³¹, which prevents that evidence from being used against them in any subsequent proceedings instituted against them for a breach of s 68C(1)³². Further, s 53A does not, in its terms, displace any element of any of the criminal offences referred to in the section, including s 68C(1)³³.

30 In this Court, the appellant advanced three interconnected sub-grounds, each directed to establishing that the Court of Criminal Appeal erred in holding that there had been no juror misconduct. Each sub-ground depends on the proper construction of s 68C(1) of the *Jury Act*.

31 Self-evidently, there must be a juror in a criminal proceeding and that juror must make an inquiry within the meaning of s 68C(1). In the present appeals, those matters were not in dispute. The next question raised by s 68C(1) is whether the juror's inquiry – here, the Google search – was "*for the purpose of* obtaining information about ... any matters relevant to the trial" (emphasis added). Was the

28 *Smith* (2010) 79 NSWLR 675 at 681 [28], cited in *Zheng v The Queen* (2021) 104 NSWLR 668 at 682 [66].

29 *CTM v The Queen* (2008) 236 CLR 440 at 446 [5]; see also 483-484 [148].

30 *Jury Act*, s 55DA(2).

31 *Jury Act*, s 55DA(3).

32 *Jury Act*, s 55DA(4).

33 cf *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528-530, 565-568, 582, 590-591.

Google search about a matter relevant to the trial? If so, was the inquiry made by the juror for the purpose of obtaining information about that matter? One issue which divided the parties on appeal was whether the juror's stated intention or motive for "making an inquiry" is relevant.

32 What is a "matter relevant to the trial" will, of course, vary from trial to trial and it is therefore unnecessary and inappropriate to attempt to chart the metes and bounds of s 68C(1). The phrase "information about ... any matters relevant to the trial" is to be understood as including, at least, a juror acquiring information about matters of evidence given or addresses to the jury at the trial.

33 Contrary to the Crown submissions, s 68C(1) is not limited to asking whether the juror had an intention to acquire information that bears upon a juror's deliberation about a fact in issue, the elements of the offence or the issues on which the guilt of the accused depends. Nor, as the Crown submitted, is s 68C(1) limited to asking whether the juror's purpose was to obtain information "that is understood and intended by the juror" to have relevance to contested issues in the trial. The words of s 68C(1) do not permit of either construction.

34 And that is unsurprising. Asking such a question of the juror would very likely be inconsistent with central planks in the administration of criminal justice. Three of those planks should be identified. First, the trial judge must stay above the contest between the parties in a manner consistent with the judge's ultimate role of "ensuring the propriety and fairness of the trial and ... instructing the jury in the relevant law"³⁴. Second, the jury process of deliberation is fluid, not static³⁵. "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"³⁶. Third, the confidentiality of jury deliberations is a principle of the "highest significance in our justice system"³⁷. Consistently with those principles, the question prescribed by s 68C(1) is whether the juror's inquiry

34 *Ratten v The Queen* (1974) 131 CLR 510 at 517.

35 *Smith v The Queen* (2015) 255 CLR 161 at 171 [33].

36 *Smith* (2015) 255 CLR 161 at 171-172 [34].

37 *HM v The Queen* (2013) 44 VR 717 at 719 [5], cited in *Smith* (2015) 255 CLR 161 at 171 [32].

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was "for the purpose of obtaining information about ... any matters relevant to the trial", including information about matters of evidence given or addresses to the jury at trial³⁸.

35 Section 68C(1), read with s 68C(5)(b), does not extend to what might be called inadvertent searching. Section 68C(1) is directed to a juror making an inquiry *for the purpose* of obtaining information about a matter relevant to the trial. Any concern for the safety and propriety of a jury trial arising from an inadvertent search undertaken by a juror may be addressed by the trial judge under s 53A(1)(c) read with sub-s (2)(b) or, alternatively, s 53B.

36 It is for the same reasons that the mental element – making the inquiry *for the purpose* of obtaining information about a matter relevant to the trial – is not concerned with the juror's motive for making the inquiry. It is the fact of the inquiry, and that the *purpose* of the inquiry was to obtain information about a particular matter relevant to the trial, which is the subject of the prohibition. That a juror might have undertaken such an inquiry for their own purposes does not mean that, consistently with the terms of s 68C(1), the inquiry was not also made for the purpose of obtaining information about a matter relevant to the trial³⁹.

37 During the course of argument, reference was made to s 68C(4), which provides that "[a]nything done by a juror in contravention of a direction given to the jury by the judge in the criminal proceedings is not a proper exercise by the juror of his or her functions as a juror". As the Crown submitted, when s 68C(4) is engaged, as it is here because the juror undertook the Google search in contravention of the trial judge's oral and written directions, the juror cannot seek to rely upon the exception in s 68C(1), namely that the inquiry was "in the proper exercise of his or her functions as a juror". Here, the inquiry was not.

Inquiry was about a relevant matter and was for a prohibited purpose

38 In this case, the matter about which the juror made the inquiry was the Working with Children Check. Evidence had been given about that at the trial,

38 See *R v K* (2003) 59 NSWLR 431 at 450 [88]; *R v Skaf* (2004) 60 NSWLR 86 at 104 [277]; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 October 2004 at 12097.

39 cf *Zaburoni v The Queen* (2016) 256 CLR 482 at 491 [19]; *Roy v O'Neill* (2020) 95 ALJR 64 at 70 [20], 71 [29]; 385 ALR 187 at 193, 194.

and defence counsel made submissions about that evidence, which the trial judge then referred to in her summing up. One purpose of the juror making the inquiry was to obtain information that was relevant to the trial. As the note from the foreperson records, the juror Googled "the requirements for a working with children check" and "discovered the legislation, which was only introduced in 2013". That is prohibited. That information obtained by the juror by making the inquiry was not in evidence before the Court, and consideration of it by the juror was contrary to the oath or affirmation that they took when they were sworn in as a juror – to "give a true verdict *according to the evidence*" (emphasis added)⁴⁰. The fact that the juror had previously been a teacher and was curious as to why they themselves did not have a Working with Children Check was irrelevant. For those reasons, the trial judge was correct to find that the juror, in the course of the trial, had engaged in misconduct in relation to the trial, namely by making an inquiry for the purpose of obtaining information about a matter relevant to the trial within the meaning of s 68C(1).

Mandatory discharge

39 Section 53A(1)(c) relevantly provides that a court "must discharge a juror if, in the course of any trial ... the juror has engaged in misconduct in relation to the trial". As we have seen, prior to the juror engaging in the misconduct, the jury told the trial judge that they had reached a unanimous decision on the verdicts on eight counts (the following day confirmed to be counts 4 and 6 to 12). Those 11 jurors included the juror who subsequently engaged in the misconduct. However, the next day, despite being told of the juror's inquiry, the trial judge proceeded to take the eight verdicts, as well as two further verdicts which the jury that day indicated that they had reached a unanimous verdict on. The trial judge did so before discharging the juror, so that those verdicts included the verdicts of that juror. The question is whether the trial judge was correct to take those verdicts at the time she did. The answer is no.

40 As has been explained, the trial judge, immediately after she had read the foreperson's note disclosing that the juror had made the inquiry on the internet, indicated that she intended to take the verdicts prior to dealing with the issue of the juror's inquiry. During a lengthy debate with counsel, throughout which she was urged by both the Crown and defence counsel not to adopt that course, her Honour agreed that s 68C had been "breach[ed]". In her written reasons for discharging the juror, the trial judge recorded that the juror "did make an inquiry for the purposes of obtaining information about a matter relevant to the trial",

40 *Jury Act*, s 72A(1).

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that that inquiry was "specifically prohibited", that therefore s 53A was "enlivened" and that she "had no option but to discharge that juror".

41 The majority of the Court of Criminal Appeal held, and the Crown submitted before this Court, that the trial judge's views were "tentative", and that her Honour had not made a "decision at the earlier point in time that the juror was guilty of misconduct". That was an error. The only available conclusion that can be drawn from the record of the trial and, in particular, from what the trial judge said was that, before taking the ten verdicts, the trial judge was affirmatively satisfied that there had been misconduct by the juror. The trial judge was required to immediately discharge the juror before taking the ten verdicts.

42 In the Court of Criminal Appeal, the Crown conceded that "a failure by a trial judge to immediately discharge a juror upon being satisfied of juror misconduct amounts to a failure to comply with a mandatory requirement under the *Jury Act* and is as such a fundament[al] defect leaving no room for the application of the proviso in s 6(1) of the *Criminal Appeal Act*". As Campbell J observed, that concession was properly made.

43 In this Court, the Crown submitted that if the trial judge technically erred by failing to discharge the juror consequent upon any (erroneous) finding of misconduct, that was an error to which the proviso could, and should, apply. The premise for the submission – that the trial judge's finding that there was misconduct within the meaning of s 53A(1)(c) was erroneous – is incorrect. The point does not arise. If, however, the juror did engage in misconduct within the meaning of s 53A(1)(c), then the Crown accepted that the verdicts of guilty entered before the juror was discharged should be set aside. The appeals should be allowed in relation to those counts, namely counts 4 and 6 to 12.

Conclusions and orders

44 The parties did not agree what consequential orders should be made if the appeals were allowed. The appellant submitted that all convictions on all counts should be quashed and a new trial be had. Alternatively, the appellant submitted that the convictions on counts 4 and 6 to 12 should be quashed and a new trial had on those counts. The Crown contended that the alternative orders proposed by the appellant should be made.

45 The appellant's submission that all convictions should be quashed was said to arise because there was a real possibility that the verdicts on counts 4 and 6 to 12, as to which the evidence was relied on for tendency and coincidence reasoning, were taken into consideration in determining the verdicts for counts 1 and 5.

15.

That submission is rejected. The risk that the verdicts on counts 4 and 6 to 12 were relied on for tendency or coincidence reasoning was addressed by the trial judge instructing the jury that, to rely on such reasoning, the jury had to be satisfied that the acts from which a tendency could be inferred in fact occurred or that similarities in the complainants' accounts in fact existed. The jury was not told that they could reason from "verdicts of guilt". The verdicts on counts 1 and 5 should not be set aside.

46 The sentence imposed on the appellant was structured as it was by reference to his conviction on counts 1 and 4 to 12. In relation to the sentence imposed on counts 1 and 5, it is for the Court of Criminal Appeal to determine whether to affirm or vary the appellant's sentence under s 7(1) of the *Criminal Appeal Act 1912* (NSW), remit the matter to the District Court under s 12(2) of that Act or await the outcome of any new trial on counts 4 and 6 to 12.

47 For those reasons, the orders of the Court are:

1. The appeal in each matter be allowed in part.
2. Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 3 August 2018 and, in its place, order that:
 - (a) the appeal be allowed in part;
 - (b) the appellant's convictions on Counts 4 and 6 to 12 be set aside; and
 - (c) a new trial be had on Counts 4 and 6 to 12.
3. In relation to Counts 1 and 5, remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales to consider whether:
 - (a) to affirm or vary the appellant's sentence under s 7(1) of the *Criminal Appeal Act 1912* (NSW);
 - (b) to remit the matter to the District Court of New South Wales under s 12(2) of the *Criminal Appeal Act 1912* (NSW); or
 - (c) to await the outcome of any new trial on Counts 4 and 6 to 12.