

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
EDELMAN, STEWARD, GLEESON AND JAGOT JJ

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HCF

APPELLANT

AND

THE QUEEN

RESPONDENT

*HCF v The Queen*  
[2023] HCA 35  
*Date of Hearing: 14 April 2023*  
*Date of Judgment: 15 November 2023*  
B50/2022

## ORDER

*Appeal dismissed.*

On appeal from the Supreme Court of Queensland

### Representation

J R Hunter KC with S A Lynch for the appellant (instructed by Legal Aid Queensland)

C W Heaton KC with N W Crane for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

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



## CATCHWORDS

### HCF v The Queen

Criminal practice – Appeal – Miscarriage of justice – Juror or jury misconduct – Where following trial by jury appellant convicted of six sexual offences – Where after entry of verdicts juror delivered note causing trial judge to authorise Sheriff to conduct investigation under s 70(7) of *Jury Act 1995* (Qld) – Where investigation revealed conduct involving juror undertaking internet research about definitions of and sentences for certain offences, juror informing other members of jury about research, and other members of jury not informing trial judge – Where conduct contrary to directions of trial judge – Whether conduct gave rise to miscarriage of justice.

Words and phrases – "capacity to prejudice", "discharge a juror", "disobedience", "double might", "fair-minded lay observer", "independent research", "integrity of the jury system", "integrity of the trial process", "internet research", "irregularity", "juror misconduct", "jurors", "jury directions", "jury trial", "misbehaviour", "miscarriage of justice", "practical injustice", "procedural fairness", "proviso", "reasonable apprehension of bias", "substantial miscarriage of justice".

*Criminal Code* (Qld), s 668E.

*Jury Act 1995* (Qld), ss 50, 53, 54, 56, 60, 69A, 70.



1 GAGELER CJ, GLEESON AND JAGOT JJ. The appeal to this Court is to be resolved by deciding whether there has been a miscarriage of justice in the appellant's conviction, following a trial by a jury, of six sexual offences out of 19 counts on an indictment. The alleged miscarriage arises from an undisputed irregularity in the conduct of the jury which came to light after the entry of the verdicts.

2 Beech-Jones CJ at CL recently provided a convenient summary concerning those errors or irregularities that will amount to a miscarriage of justice in observing that, if the error or irregularity "is properly characterised as a 'failure to observe the requirements of the criminal process in a fundamental respect' then it would follow that the conviction would not stand regardless of any assessment of its potential effect on the trial", but otherwise there is no miscarriage unless the error or irregularity is "prejudicial in the sense that there was a 'real chance' that it affected the jury's verdict ... or 'realistically [could] have affected the verdict of guilt' ... or 'had the capacity for practical injustice' or was 'capable of affecting the result of the trial'"<sup>1</sup>.

3 This observation is to be understood in the context of its focus, being the statutory prescription to an appellate court in an appeal against conviction, in the present case embodied in s 668E(1) of the *Criminal Code* (Qld), that the court "shall allow the appeal if it is of opinion ... that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal". The focus is not the common form proviso, in the present case embodied in s 668E(1A) of the *Criminal Code*, that the appellate court "may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

4 The appellant did not put his case on his appeal to this Court on the basis that the undisputed irregularity in the conduct of the jury, in and of itself, involved a miscarriage of justice. The appellant, rather, put his case on the basis that the undisputed irregularity gave rise to what the appellant described as a "legitimate or reasonable apprehension" that this jury might not otherwise have approached its function in accordance with the directions it was given.

5 The respondent sought to meet the appellant's case on the basis that the primary question whether a miscarriage of justice occurred was one of prejudice

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1 *Zhou v The Queen* [2021] NSWCCA 278 at [22], citing *Hofer v The Queen* (2021) 274 CLR 351 at 364-365 [41], 366-367 [47], 390 [118], 391-392 [123] and *Edwards v The Queen* (2021) 273 CLR 585 at 609 [74]. See also *AK v The Queen* [2022] NSWCCA 175 at [2]-[5].

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in the sense that it involved asking whether there was a "real chance" that the irregularity impacted on the jury's verdict. If such prejudice was established, the respondent sought to invoke the proviso.

6 *Smith v Western Australia*<sup>2</sup> establishes that the question whether a miscarriage of justice occurred because of an irregularity in the conduct of a jury or juror is to be determined by applying the test stated by Mason CJ and McHugh J in *Webb v The Queen*<sup>3</sup>. That test was stated in terms of whether the irregularity "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". However, it is apparent from the assimilation in *Webb* of the test for reasonable apprehension of bias on the part of a judge with the test for reasonable apprehension of bias on the part of a juror<sup>4</sup>; the reference in *Smith* to the other members of the Court in *Webb* agreeing with Mason CJ and McHugh J<sup>5</sup>; and the extension in *Smith* of that test to all forms of juror misconduct or irregularity, that the test should be understood in terms of whether a fair-minded lay observer might reasonably apprehend that the jury (or juror) might not have discharged or might not discharge its function of deciding an accused's guilt according to law (which includes but is not limited to the requirement of impartiality), on the evidence, and in accordance with the directions of the judge. The "double might" test was confirmed as the test for reasonable apprehension of bias (including on the part of a jury or juror) in *Ebner v Official Trustee in Bankruptcy*<sup>6</sup>.

7 If the irregularity gives rise to such a reasonable apprehension, then there has been a "failure to observe the requirements of the criminal process in a fundamental respect"<sup>7</sup>, in that "the integrity of the trial process"<sup>8</sup> has been undermined. In such event, regardless of any potential effect on the trial, there has

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2 (2014) 250 CLR 473 at 486 [54]-[55].

3 (1994) 181 CLR 41 at 53.

4 (1994) 181 CLR 41 at 47, 52-53, 57, 67-69, 75, 87.

5 (2014) 250 CLR 473 at 486 [55].

6 (2000) 205 CLR 337 at 344 [6].

7 *Hofer v The Queen* (2021) 274 CLR 351 at 391 [123], quoting *Maher v The Queen* (1987) 163 CLR 221 at 234.

8 *Smith v Western Australia* (2014) 250 CLR 473 at 485 [52].

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been a miscarriage of justice which is inherently substantial and there is accordingly no scope for the application of the proviso<sup>9</sup>.

8 While the irregularity in *Webb* involved conduct of a juror that called into question the juror's impartiality, and in *Smith* involved alleged coercion by one juror of another juror, the "double might" test of whether a fair-minded lay observer might reasonably apprehend that the jury (or juror) might not have discharged or might not discharge its function impartially ("the reasonable apprehension test") is not to be confined to any particular class of irregularity of juror conduct; the "double might" test is sufficiently liberal to subsume the range of potential miscarriages of justice by reason of jury (or juror) misconduct or irregularity irrespective of the legal label that might otherwise apply to that misconduct or irregularity.

9 In *Smith*, reference had been made in the decision under appeal<sup>10</sup> to the test in *R v Marsland*<sup>11</sup> as applied in *R v Rudkowsky*<sup>12</sup> and *R v K*<sup>13</sup>. In *K*, Wood CJ at CL<sup>14</sup> distinguished *Webb* on the basis that it concerned possible juror bias whereas in *K* the irregularity was that several jurors had conducted internet searches from which they ascertained that the accused had previously been charged with the murder of his second wife, the proceeding being a retrial of the accused on the charge of the murder of his first wife. Wood CJ at CL said the circumstances of the internet searches and information obtained as a result of them were analogous to cases of documents other than evidence being in a jury room<sup>15</sup>. On this basis, his Honour characterised the irregularity as "procedural" and applied the test derived from *Marsland* as applied in *Rudkowsky* that for a procedural irregularity not to give rise to a miscarriage of justice the court must be satisfied that "the

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9 *Lee v The Queen* (2014) 253 CLR 455 at 471-472 [47]-[48].

10 *Smith v Western Australia* (2013) 226 A Crim R 541 at 548 [31]-[32].

11 Unreported, Court of Criminal Appeal of New South Wales, 17 July 1991.

12 Unreported, Court of Criminal Appeal of New South Wales, 15 December 1992.

13 (2003) 59 NSWLR 431.

14 Grove and Dunford JJ agreeing at 450 [95], [96].

15 *R v K* (2003) 59 NSWLR 431 at 444 [54].

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irregularity has not affected the verdicts, and that the jury would have returned the same verdicts if the irregularity had not occurred"<sup>16</sup>.

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The distinction drawn in *K*, and the test derived from *Marsland*, have been applied to jury or juror misconduct in a number of intermediate appellate court decisions, with a range of variations of verbal formulae<sup>17</sup>, as has the test in *Smith*<sup>18</sup>. In *Mathews v Western Australia*<sup>19</sup>, Martin CJ, in dealing with a juror who had sought and obtained information about the accused, considered that the circumstances could not be characterised as a case of either lack of juror impartiality or procedural irregularity<sup>20</sup>. Rather, the circumstances involved aspects that fell within each of those categories<sup>21</sup>. His Honour applied both tests and concluded that, on either test, the same result had to be reached – the facts would have given rise to a reasonable apprehension or suspicion on the part of a fair-minded lay observer that the juror did not discharge his function impartially and the court could not be satisfied that the procedural irregularity did not affect

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16 *R v K* (2003) 59 NSWLR 431 at 446 [70]. See also at 446 [68], 447-448 [72]-[74].

17 eg, *R v Skaf* (2004) 60 NSWLR 86 at 98-100 [242]-[247], 102 [267], 103-104 [274]-[276]; *R v Forbes* (2005) 160 A Crim R 1 at 7 [29]; *Qing An v The Queen* [2007] NSWCCA 53 at [23]; *Folbigg v The Queen* [2007] NSWCCA 371 at [11]-[19]; *R v Brown* [2012] QCA 155 at [24]; *R v Wilton* (2013) 116 SASR 392 at 397 [23]; *R v DBG* (2013) 237 A Crim R 581 at 586-587 [27]; *Mathews v Western Australia* (2015) 257 A Crim R 55 at 57-60 [93]-[103], 76-77 [210]; *R v Martinez* [2016] 2 Qd R 54 at 63 [32]; *Marshall v Tasmania* (2016) 31 Tas R 236 at 242-245 [6]-[9], 255-258 [46]-[52]; *Nadjowh v The Queen* [2019] NTCCA 6 at [14]; cf *R v Chaouk* [1986] VR 707 at 712; *R v Emmett* (1988) 14 NSWLR 327 at 339; *Domican [No 3]* (1990) 46 A Crim R 428 at 448; *Medici* (1995) 79 A Crim R 582 at 593; *R v Myles* [1997] 1 Qd R 199 at 203-204, 209.

18 eg, *Bahrami v The Queen* (2017) 265 A Crim R 11 at 22-23 [54], 27-28 [80]-[84]; *Lane v The Queen* [2017] NSWCCA 46 at [74], [80]-[86]; *Divine v Western Australia* [2019] WASCA 49 at [15]-[16], [48]-[55]; *Murphy v The Queen* [2020] VSCA 111 at [82], [86]; *R v SDP* [2022] QCA 17 at [23]-[30].

19 (2015) 257 A Crim R 55.

20 (2015) 257 A Crim R 55 at 57-60 [93]-[103], 76-77 [210], with Buss and Mazza JJA agreeing at 77 [212], [213].

21 *Mathews v Western Australia* (2015) 257 A Crim R 55 at 57 [94], 75 [205].

the verdict, in the sense that the jury would have returned the same verdict if the irregularity had not occurred<sup>22</sup>.

11           Conceptual coherence requires that the test derived from *Marsland*, and the range of verbal variations on it, be reconciled with the test formulated in *Webb*, applied in *Smith*, and confirmed in *Ebner*. The reconciliation needs to be in favour of the test formulated in *Webb*. Irregular conduct by a jury or juror, whether described as procedural or otherwise, involves a miscarriage of justice if a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not discharge its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge. If the jury or juror misconduct would give rise to such a reasonable apprehension then, *for that reason*, the misconduct will involve a "failure to observe the requirements of the criminal process in a fundamental respect"<sup>23</sup>. In such a case, satisfaction of the reasonable apprehension test means that the "shadow of injustice over the verdict"<sup>24</sup> cannot be dispelled, that the trial is "incurably flawed"<sup>25</sup>, that there has been a "serious breach of the presuppositions of the trial"<sup>26</sup>, and that "the irregularity [is] so material that of itself it constitutes a miscarriage of justice without the need to consider its effect on the verdict"<sup>27</sup>.

12           There may be no practical difference between the test formulated in *Webb* and the test derived from *Marsland* were application of the common form proviso focused solely on the effect of an irregularity on the actual jury in the trial. If the reasonable apprehension test were satisfied, it may then be impossible to conclude that the irregularity did not affect the verdict and the proviso would not be available. However, this Court's rejection in *Weiss v The Queen*<sup>28</sup> of the utility of considering the effect of an irregularity on the actual jury in the trial (referred to as the "this jury" test) in the application of the common form proviso negates that

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22 *Mathews v Western Australia* (2015) 257 A Crim R 55 at 76 [207]-[208].

23 *Hofer v The Queen* (2021) 274 CLR 351 at 391 [123], quoting *Maher v The Queen* (1987) 163 CLR 221 at 234.

24 *Smith v Western Australia* (2014) 250 CLR 473 at 486 [54].

25 *Cesan v The Queen* (2008) 236 CLR 358 at 385 [87].

26 *Smith v Western Australia* (2014) 250 CLR 473 at 486 [53].

27 *TKWJ v The Queen* (2002) 212 CLR 124 at 147 [73].

28 (2005) 224 CLR 300 at 313-315 [34]-[38].

form of reconciliation by assimilation. The test as formulated in *Webb* and confirmed in *Ebner* must prevail.

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Accordingly, in all cases of jury or juror misconduct, what is required to establish a miscarriage of justice, and what will also establish a substantial miscarriage of justice, is that a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not have discharged or might not discharge its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge. Although the terms have been used interchangeably in this context, the test is best expressed in terms of a reasonable "apprehension" rather than a reasonable "suspicion"<sup>29</sup>. A suspicion is "a state of conjecture or surmise where proof is lacking"; it is "more than a mere idle wondering"; "it is a positive feeling of actual apprehension or mistrust"<sup>30</sup>. To be reasonable, a suspicion or apprehension requires a positive feeling of actual apprehension or mistrust which has an objective basis in fact<sup>31</sup>. To apply the reasonable apprehension test therefore requires first that such relevant facts as can be inferred from the available evidence be found on the balance of probabilities<sup>32</sup>. In undertaking that necessary preliminary fact-finding, it is useful to record the truism that "[o]ne does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed"<sup>33</sup>; inference requires "something more than mere conjecture, guesswork or surmise"<sup>34</sup>.

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29 *Webb v The Queen* (1994) 181 CLR 41 at 68; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6].

30 *George v Rockett* (1990) 170 CLR 104 at 115, quoting *Hussien v Chong Fook Kam* [1970] AC 942 at 948 and *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303.

31 *Lordianto v Commissioner of the Australian Federal Police* (2019) 266 CLR 273 at 308 [89], citing *George v Rockett* (1990) 170 CLR 104 at 115.

32 eg, *Smith v Western Australia [No 2]* (2016) 263 A Crim R 449 at 462 [53], 471 [386].

33 *Jones v Dunkel* (1959) 101 CLR 298 at 305.

34 *Cross on Evidence*, 13th Aust ed (2021) at 416 [9055].

14 In the circumstances of the present case, where the issue has arisen only after conviction, the question of miscarriage of justice may therefore be expressed in these terms:

"On the facts to be found on the balance of probabilities, might a fair-minded and informed member of the public reasonably apprehend that the jury or a juror might not have discharged the function of deciding the appellant's guilt according to law, on the evidence, and in accordance with the directions of the judge?"

15 The evidence available for the purpose of fact-finding is affected by the common law rule excluding evidence of the jury's deliberations. However, the limits of that common law rule are informed by its underlying policy to "maintain the integrity and finality of a formally expressed verdict"<sup>35</sup>. The rule does not apply to evidence extrinsic to the deliberations of the jury<sup>36</sup> and may, of course, be modified by statute<sup>37</sup>. It was common ground in the appeal that a report of the Sheriff under s 70(7) of the *Jury Act 1995* (Qld) was properly admitted into evidence. This appeal, accordingly, provides no opportunity to decide questions relating to the scope of the exclusionary rule in the light of the reasoning in *Smith*<sup>38</sup>.

16 Evaluation of the available evidence from the perspective of a fair-minded and informed member of the public must take account of the requirement of s 50 of the *Jury Act* that "[t]he members of the jury must be sworn to give a true verdict, according to the evidence, on the issues to be tried". Apprehension of a violation of that oath is not lightly to be inferred.

17 We will turn now to the background to the appeal, to the course of the trial, and to the circumstances which subsequently revealed the undisputed irregularity in the conduct of the jury.

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35 *Minarowska* (1995) 83 A Crim R 78 at 87, quoted in *Smith v Western Australia* (2014) 250 CLR 473 at 481 [30]. See also *Smith v Western Australia* (2014) 250 CLR 473 at 481 [29], 481-482 [33], 485 [48]; *NH v Director of Public Prosecutions (SA)* (2016) 260 CLR 546 at 590-591 [105].

36 *Smith v Western Australia* (2014) 250 CLR 473 at 480 [27].

37 eg, *Agelakis v The Queen* [2020] NSWCCA 72 at [25]-[31].

38 (2014) 250 CLR 473. See, eg, *Mathews v Western Australia* (2015) 257 A Crim R 55 at 60 [104].

### **Background to the appeal**

18 The appellant was charged with 25 counts, each concerning an alleged sexual offence against one of two complainants, referred to as K and E, including when K and E were under 16 years of age. The appellant is K and E's uncle. The counts involved offences alleged to have been committed between December 1989 and September 2001. The appellant was about 25 to 37 years old during the charge period; K was about six to 18 years old during the period.

19 The trial judge directed acquittals of the appellant on counts 8, 10, 11, 12, 13 and 23. Of the remaining 19 counts, the appellant was convicted on six counts and acquitted of 13 counts. The counts on which the appellant was convicted all related to K. Those counts were:

- (a) count 1 (maintaining a relationship of a sexual nature with K, a child under 16 years, between 31 December 1989 and 19 September 1999 with two circumstances of aggravation, namely, (i) unlawfully and indecently dealing with K, a child under 16 years; and (ii) wilfully and unlawfully exposing K, a child under 16 years, to an indecent act by himself);
- (b) counts 3 and 4 (unlawfully and indecently dealing with K, a child under 16 years, between 31 December 1994 and 20 September 1996);
- (c) count 5 (wilfully and unlawfully exposing K, a child under 16 years, to an indecent act by himself, between 31 December 1994 and 20 September 1996);
- (d) count 14 (unlawfully and indecently dealing with K, a child under 16 years, between 18 September 1997 and 19 September 1998); and
- (e) count 17 (the alternative verdict of unlawful carnal knowledge of K, between 18 September 1997 and 20 September 1999)<sup>39</sup>.

20 The counts on which the appellant was not convicted were:

- (a) a circumstance of aggravation of count 1 (rape of K during the maintaining of the relationship of a sexual nature with K, a child under 16 years);
- (b) count 2 (maintaining a relationship of a sexual nature with E, a child under 16 years, between 9 August 1994 and 10 August 2000);

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39 *R v HCF* [2021] QCA 189 at [1]-[3].

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- (c) count 6 (unlawfully and indecently dealing with E, a child under 16 years, between 9 August 1994 and 1 January 1998);
- (d) count 7 (unlawfully and indecently dealing with K, a child under 16 years, and under 12 years, on 25 December 1994);
- (e) count 9 (rape of E and unlawful carnal knowledge of E, between 9 August 1995 and 10 August 1997);
- (f) count 15 (unlawfully and indecently dealing with K, a child under 16 years, between 18 September 1997 and 19 September 1998);
- (g) count 16 (wilfully and unlawfully exposing K, a child under 16 years, to an indecent act by himself, between 18 September 1997 and 19 September 1998);
- (h) count 17 (rape of K and unlawful carnal knowledge of K, between 18 September 1997 and 20 September 1999);
- (i) count 18 (rape of K and unlawful carnal knowledge of K, between 31 December 1998 and 1 January 2000);
- (j) count 19 (wilfully and unlawfully exposing K, a child under 16 years, to an indecent act by himself, between 9 August 1997 and 10 August 2000);
- (k) count 20 (rape of K and unlawful carnal knowledge of K, between 9 August 1997 and 10 August 2000);
- (l) count 21 (wilfully and unlawfully exposing E, a child under 16 years, to an indecent act by himself, between 9 August 1997 and 10 August 2000);
- (m) count 22 (unlawfully and indecently dealing with E, a child under 16 years, between 9 August 1997 and 10 August 2000);
- (n) count 24 (unlawfully procuring K, without her consent, to witness an act of gross indecency by himself, between 9 August 1997 and 10 August 2000);  
and
- (o) count 25 (unlawfully and indecently assaulting K, between 18 September 2000 and 19 September 2001).

The jury found the appellant not guilty on these counts, other than a circumstance of aggravation of count 1 (rape of K during the maintaining of the relationship of a sexual nature with K, a child under 16 years) and count 17 (rape of K, between

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18 September 1997 and 20 September 1999), in respect of which the jury was unable to reach a verdict.

21 The day after the entry of the jury verdicts, a juror delivered a note to the Acting Deputy Registrar of the District Court of Queensland, concerning the jury's deliberations. As will be explained, this note caused the trial judge to authorise the Sheriff of Queensland to conduct an investigation under s 70(7) of the *Jury Act*. On the following day, the trial judge sentenced the appellant on the six verdicts of guilty (for count 1 to nine years' imprisonment; for count 3 to 12 months' imprisonment; for counts 4 and 5 to two and a half years' imprisonment; for count 14 to six months' imprisonment; and for count 17 to four years' imprisonment, with all sentences to be served concurrently).

22 The appellant appealed against the convictions and sought leave to appeal against the sentence. By the time of the hearing before the Court of Appeal of the Supreme Court of Queensland, the Sheriff had provided a report of her investigation. The appellant's appeal against his convictions alleged a miscarriage of justice on two grounds: first, by reason of a juror conducting internet investigations and the other jurors not reporting this conduct to the trial judge; and, second, by reason of the same juror not disclosing a stated bias to the trial judge. The appellant's appeal against sentence was on the ground that the sentence was manifestly excessive. The Court of Appeal dismissed the appeal against the convictions and refused leave to appeal against the sentence.

23 The appellant was granted special leave to appeal on three grounds. In the event, during the hearing, the appellant pursued a single ground of appeal, namely, that the Court of Appeal erred in dismissing the appellant's appeal against his convictions on the basis that there had been no miscarriage of justice by reason of a juror conducting internet investigations and the collective misconduct of the other jurors in not reporting that to the trial judge. The appellant submitted that those circumstances gave rise to a non-speculative inference about the jurors' failure to obey judicial directions. The respondent maintained that if, contrary to its case, there was a miscarriage of justice, the proviso should be applied. As explained, given that the applicable test is the reasonable apprehension test, there is no scope for application of the proviso in this case.

### **The trial**

24 The trial started on Tuesday, 13 October 2020. After the jury was empanelled, the trial judge made what he described as "introductory remarks" to the jury. The trial judge's introductory remarks included that the jurors must only discuss the case amongst themselves and not with anyone else. The trial judge continued, saying:

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"In the same way, it's important that you not get on the internet and look anybody up ... Other members of the juries that I've had have looked up people involved in the trial. They've looked up legal principles ... Don't do it. If you've got a problem, put it in a note, give it to the bailiff. He can give it to me. I can, if necessary, discuss it with [counsel] and I can give you appropriate directions.

... Don't do the things that I've urged you not to do. As I say, it's an offence at law to look up anything about the defendant. It's an offence by way of contempt of court if you look up anything about any of the witnesses or about any of the people or legal principles because I've given you clear directions about that issue so don't run the risk of that happening. I'm sorry to have gone on about it so long, but it's a real problem with – particularly with electronic searches that are available now and effects [sic] potentially the fairness of criminal trials ...

Can I also say this: that if anybody on the jury lets you know that he or she has looked up anything on the internet or has spoken to their family about the case, just quietly give the bailiff a note saying there's something I want to discuss. I can get you in here and find out what's going on and I can decide how to deal with it, so if one person disobeys that direction, I hope that the others can, by dealing with it in that matter, overcome it.

...

There have been cases where trials have been aborted and convictions have been quashed. Retrials have been ordered because juries have made such private investigations, so don't view or visit the location where events took place. Don't consult any source, whether it's a newspaper or a dictionary or reference material or the internet or any other source of information. Don't conduct your own research on any matters of law."

25 The Crown then opened the case. The complainant K gave evidence. K's evidence, including cross-examination, continued from Tuesday, 13 October until the morning on Wednesday, 14 October 2020. A series of other witnesses gave evidence for the rest of 14 October 2020. On Thursday, 15 October 2020, due to problems with production of the transcript of evidence, there were discussions between the trial judge and counsel about legal issues in the absence of the jury. On Friday, 16 October 2020, these discussions continued. Thereafter, on that day, the trial judge directed acquittals on counts 8, 10, 11, 12, 13 and 23. The Crown prosecutor and counsel for the appellant then addressed the jury. The trial judge summed up to the jury, finishing the summing up before lunch on Friday, 16 October 2020, and the jury retired for deliberations.

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26 In his summing up, the trial judge directed the jury in these terms:

"In respect of each of the 19 charges ... You must reach your verdict on the evidence and only on the evidence ...

If you've heard or read or otherwise learned anything about this case or any other similar cases out of the courtroom, exclude that information from your consideration. Have regard only to the testimony and the exhibits put before you and the admissions made since the trial began. You should ensure that no external inference plays a part in your deliberations."

27 The transcript records that the jury sent notes to the trial judge during the afternoon of Friday, 16 October 2020. The jury asked in the notes: (a) what would happen in the event of a hung jury; (b) about the meaning of reasonable doubt; and (c) about dates relating to count 5. The trial judge instructed the jury: (a) that it was far too early to talk about the consequences of a hung jury at that time; (b) about the meaning of reasonable doubt; and (c) that count 5 had been changed to a charge relating to when K was under 16 years, not under 12 years. The jury again retired for further deliberations.

28 The jury continued deliberating on Monday, 19 October 2020. In the afternoon of 19 October 2020, the jury sent another note to the trial judge. The trial judge then gave further instructions to the jury: (a) about whether a child under 16 years could consent to intercourse in the context of counts 9, 17, 18 and 20; (b) about what was carnal knowledge including in the context of counts 17 and 18; (c) that if the jury could not agree beyond reasonable doubt that the four counts of rape were committed without the consent of the relevant complainant they could not convict the appellant of the rape counts, but could convict of the alternative unlawful carnal knowledge counts; and (d) about the offence of maintaining an unlawful sexual relationship with a child under 16 years. Later in the afternoon of 19 October 2020 the jury asked another question. The trial judge provided further instructions on the charges of maintaining an unlawful sexual relationship with a child under 16 years – counts 1 and 2 – and the circumstances of aggravation relating to those charges. By 4.23 pm on 19 October 2020 the jury had not yet reached agreement. The jury asked another question, and the trial judge then gave further instructions to the jury to the effect that it was important that serious criminal matters be resolved, if possible, by unanimous jury verdict. The trial judge also allowed the jury to go home and reconvene the following morning, Tuesday, 20 October 2020.

29 The jury's deliberations continued throughout Tuesday, 20 October 2020. The jury asked another question in the afternoon. The trial judge gave further instructions to the effect that consent was not relevant to the charges of unlawful carnal knowledge and was relevant only to the charges of rape and as to the manner

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in which the verdicts should be given if the jury wanted to acquit on a rape charge but convict on an alternative unlawful carnal knowledge charge. The jury again retired. The jury returned shortly afterwards to deliver its verdicts.

### **The subsequent revelation of the irregularity**

30 On Wednesday, 21 October 2020, a juror hand delivered a note to the Acting Deputy Registrar. The note read:

"Issue for the Judge – Jury Issue – (Keep or throw away)

1. At the beginning of the trial – one juror adamantly stated that he would not convict, as he had a legal dealing regarding his interactions with a 13 yr. old child when he was young. He openly and honestly disclosed that to us.
2. On Monday this week, during deliberations, he discussed some willingness to a verdict of carnal knowledge – AND that this was based on his internet research on the weekend – w.r.t lighter sentencing for such.
3. After he and others realized from their discussions sentencing was not significantly different – he restated his absolute opposition to either.
4. Based on jury polling, his vote would not alter the ability to obtain a unanimous decision – but both his background & his external actions gives me concern."

31 As noted, the trial judge directed an investigation under s 70(7) of the *Jury Act*. The Sheriff's report of the investigation, dated 18 March 2021, recorded that the Sheriff sent a letter to each juror. The letter referred to the trial in which the person served as a juror between 13 and 20 October 2020 and said that s 70(7) "provides that if there are grounds to suspect that a person may have been guilty of bias, fraud or an offence related to the person's membership of a jury or the performance of functions as a member of a jury, the court before which the trial was conducted may authorise" (a) an investigation of the suspected bias, fraud or offence; and (b) the seeking of disclosure of jury information for the purposes of the investigation. The Sheriff's letter continued in these terms:

"I am writing to you to ascertain whether you wish to formally advise me of any information concerning whether any person may have demonstrated bias, fraud or an offence related to the person's membership of a jury or the performance of functions as a member of a jury."

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32 Six jurors, including one reserve member who was not part of any deliberations of the jury, responded to the Sheriff's letter. Eight jurors did not respond. The Sheriff's report summarised the responses.

33 A juror, referred to as juror A, who was the author of the note to the trial judge, responded by saying:

- "• 'Despite repeated statements by the judge that jurors must resist using the internet on this matter, the juror stated, that over the weekend, on two occasions, he had purposefully researched "rape" and "carnal knowledge" – definitions and custodial sentences for such. He used these sentencing durations to argue that a potential conviction could have severe personal consequences to defendant, and said, based on this, he did not believe that 20 year sentences were warranted on this "hearsay" charges over 30 years ago.'
- 'The juror's behaviour demonstrated that his personal experiences informed his decision process significantly, and his blatant disregard for direction on internet use suggested even further his bias. He appeared to be "on a mission" to support the defendant in any way possible. My personal impression was that he was not so much "conspiring" with the defendant but a means to somehow justify his past issues. In conclusion, the juror's behaviour, in my opinion, demonstrated significant bias, but there were a small minority number of jurors who supported his views, over time, and most probably this would not have affected the totality of decisions.'"

34 A juror, referred to as juror B, responded by saying that a male juror (referred to as juror X) had "supposedly acknowledged he had indeed had some sort of incident occur where he was accused of sexual assault himself". In respect of the internet research issue, juror B said:

- "• 'Juror X stated that he had researched the charge of carnal knowledge online, and as a result of what he perceived to be excessive severity in the potential sentencing outcome, he stated he was no longer willing to convict. Immediately, I brought everyone's attention to this, and I said very explicitly "It's not appropriate for you to base your decision on what you think the sentence will be – you can't do that.'"

35 The report of juror B's response continued:

- "• [Juror B] seems to summarise the events by saying that 'because I had identified his bias, he had withdrawn his protest, and thus it

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seemed that the ultimate conclusion of the trial was to continue as it otherwise would have. Simply put, it seemed inconsequential."

36 A juror, whom we will call juror C, responded to the Sheriff's letter by referring to a male juror having "indicated from the beginning that he did not believe the evidence and that the [appellant] was not guilty on all charges". Juror C did not refer to a juror having conducted internet research or having said anything about internet research.

37 A juror, whom we will call juror D, responded that he was "not aware of any demonstrated bias, fraud or offence from any person's membership of the jury panel".

38 A female juror, whom we will call juror E, responded that on "the first occasion the jury entered the jury room together, a male juror announced to the others that he would not find the defendant guilty, regardless of the evidence". While juror E thought this announcement "shocking", it did not bother juror E "enough to contemplate discussions with the judge. It was after all the first morning". The report of juror E's response continued in these terms:

- "• [Juror E] offers that at no time did she think she should have discussed the male juror's disclosure with the judge, nor does she think she was in breach of her obligations as a member of the jury.
- There were no issues after that. The male juror 'did not indicate any bias and neither did any other panel members'.
- 'This jury member did not follow through on his threat and the final jury verdict is testament to this'."

39 The "first occasion the jury entered the jury room together", as referred to by juror E, was during the morning of Tuesday, 13 October 2020. The "weekend", as referred to by juror A, was the weekend of 17 and 18 October 2020 before the jury reconvened on Monday, 19 October 2020.

### **A miscarriage of justice?**

40 The appellant did not contend before this Court that any miscarriage of justice was occasioned by the circumstance that juror X, at the beginning of the trial (that is, before the evidence had been heard), said that he would not convict the appellant. The sole ground of appeal pursued in this Court focused instead on the combination of conduct involving: (a) juror X undertaking internet research about the definitions of and sentences for rape and unlawful carnal knowledge; (b) juror X informing the other members of the jury about this research; and (c) the other members of the jury not informing the trial judge of this conduct of juror X,

all contrary to the directions of the trial judge. As noted, the appellant's case was not that this combination of conduct, in and of itself, involved a miscarriage of justice. Rather, the appellant contended that a miscarriage of justice was to be inferred from the combination of conduct giving rise to a legitimate, non-speculative, concern about the willingness of the jury to obey judicial directions generally.

41 Because the conduct in the present case did not come to the notice of the trial judge until after the jury delivered its verdicts, no occasion arose for the trial judge to consider discharging juror X (who conducted and informed other members of the jury of his internet research) or the jury as a whole (who did not inform the trial judge about those matters).

42 The power to discharge juror X or the jury before the entry of a verdict would have involved ss 56 and 60 of the *Jury Act*. Section 56(1)(a) provides that a judge may, without discharging the whole jury, discharge a juror, after the juror has been sworn, if "it appears to the judge (from the juror's own statements or from evidence before the judge) that the juror is not impartial or ought not, for other reasons, be allowed or required to act as a juror at the trial". Section 60(1) provides that if "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".

43 If the trial judge had been aware of the conduct before the verdicts were entered, the trial judge would have had a power of discharge under both ss 56(1)(a) and 60(1), the criterion for the exercise of which would have been whether discharge of the juror or the jury as a whole was necessary to maintain the fairness of the trial, having regard to all relevant circumstances, including "the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact"<sup>40</sup>. If the trial judge had been called on to decide whether to exercise the power, the trial judge could have questioned juror X and other members of the jury, if appropriate, to assist in deciding if each member remained capable of discharging their function in accordance with their oath or affirmation as a juror to "give a true verdict, according to the evidence, on the issues to be tried, and not to disclose anything about the jury's deliberations except as allowed or required by law"<sup>41</sup>. The trial judge also could have assessed whether giving further directions to the jury would

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40 *Crofts v The Queen* (1996) 186 CLR 427 at 440. See also *Wu v The Queen* (1999) 199 CLR 99 at 103-104 [9]-[10].

41 *Jury Act*, s 50.

ameliorate any risk of a reasonable apprehension that the jury might not discharge its function according to law, on the evidence, and in accordance with the directions of the judge.

44 The respondent acknowledged in argument on the appeal that it was "almost inevitable" that the trial judge would have discharged the whole jury had the conduct come to his attention before verdicts were entered in order to avoid a potential miscarriage of justice. The respondent's acknowledgement led the appellant's senior counsel to ask rhetorically "if it is reasonable at that stage of the trial to infer that this jury ... might not comply with judicial directions, then why is it unreasonable to infer now that we know that [the jury] did not comply with those directions?". The answer is that to reason in that way would conflate two separate questions, the first of which is now hypothetical and the second of which is the one to be answered.

45 The first question is: the evidence of the conduct remaining as it is, but the verdicts not yet having been entered, would the trial judge have discharged the jury? Answering this first, hypothetical, question would have involved making a prospective – that is, forward-looking – assessment of the risk of the occurrence of a miscarriage of justice by reason of the reasonable apprehension test. In the case of juror misconduct, the reasonable apprehension test, that a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not discharge its function as required, must be applied to the facts as then known and with due recognition of the difficulty of a trial judge in eliciting all relevant evidence from questioning of the juror or jury<sup>42</sup>. A proper exercise of power in such a prospective assessment would generally result in discharge of the jury if, by reason of the nature and extent of the misconduct, there was *any* real risk of a miscarriage of justice occurring (that is, any risk of satisfaction of the "double might" test for the requisite reasonable apprehension) that could not be ameliorated by further directions. The focus would be whether, despite any further direction, it was appropriate to discharge the jury or a juror because otherwise the trial realistically might miscarry<sup>43</sup>.

46 The second question is: the verdicts having been entered, and forming part of the available material, and all directions having been given, has a miscarriage

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42 *Webb v The Queen* (1994) 181 CLR 41 at 52.

43 If a trial judge does not discharge a jury and a verdict of guilty is entered, any appeal must be against conviction and not the trial judge's decision not to discharge the jury. See, eg, *Maric v The Queen* (1978) 52 ALJR 631 at 634; 20 ALR 513 at 520; *Webb v The Queen* (1994) 181 CLR 41 at 90; *Patel v The Queen* (2012) 247 CLR 531 at 551 [67].

of justice in fact occurred? This is the question now to be answered. It cannot be answered by a prospective, forward-looking, assessment of the risk that the trial realistically might miscarry. It is to be answered by a retrospective assessment of whether conduct found to have occurred in fact and on the balance of probabilities means that a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not have discharged its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge. This retrospective assessment must take into account all relevant facts as found on the balance of probabilities (if not subject to the common law exclusionary rule), including as to the nature and extent of the misconduct and any findings and warnings by the trial judge. Indeed, in applying the reasonable apprehension test following the "public ventilation" of an irregularity during the course of the trial it has been said that the fair-minded and informed member of the public "would give considerable weight" to a trial judge's warning about the matter and conclusions and findings<sup>44</sup>.

47 There should be no quibbling about the terms of the trial judge's directions in this case. Taken as a whole, they were clear – the jury was directed not to look up anything about the case on the internet and that if any jury member told another juror that they had done so, that juror should inform the trial judge via the bailiff.

48 For the conduct of juror X (in conducting and informing the jury of his internet research) and of the jury as a whole (in not informing the trial judge about that conduct of juror X) to satisfy the reasonable apprehension test, however, more would be required than the undoubted fact that the conduct contravened directions of the trial judge. As Martin CJ noted in *Mathews v Western Australia*, apart from the dissenting judgment of Pullin JA in *Hansen v Western Australia*<sup>45</sup>, it is not apparent that any case decides that mere disobedience by a jury or juror of a trial judge's directions, in and of itself, is sufficient to give rise to a miscarriage of justice. The cases in which juror misconduct has resulted in the setting aside of the verdict have included consideration of the potential effect of the misconduct on the jury's discharge of its function, with the most important considerations being the nature of the inquiries made and/or of the information obtained by the jury or juror<sup>46</sup>. These considerations also inform the assessment of the possible reasonable apprehension of the fair-minded and informed member of the public as to whether the jury (or juror) (after conviction) might not have discharged or (before conviction) might not discharge its function of deciding an accused's guilt

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44 *Webb v The Queen* (1994) 181 CLR 41 at 53. See generally at 52-56.

45 [2010] WASCA 180 at [32]-[37].

46 (2015) 257 A Crim R 55 at 59-60 [103].

according to law, on the evidence, and in accordance with the directions of the judge.

49 The appellant's case of undisputed misconduct giving rise to a legitimate concern or apprehension of subsequent further misconduct in not applying the trial judge's directions depended on the appellant's contention that the conduct of juror X (in undertaking the internet research and informing the other members of the jury about it) and the other members of the jury (in not reporting juror X's conduct to the trial judge) was done in knowing and intentional disobedience of the trial judge's directions. The difficulty with this argument of the appellant is that a finding (on the balance of probabilities) of such wilful disobedience is not open for juror X, let alone the other members of the jury.

50 It will be recalled that the directions were given orally on Tuesday, 13 October 2020. Openings, evidence, legal discussions in the absence of the jury, closings, and the summing up then occurred up to the lunch adjournment of Friday, 16 October 2020. Juror X did the internet research over the weekend of 17 and 18 October 2020. The internet research did not concern the appellant or any witness. It concerned the definitions of and differences in sentencing between rape and unlawful carnal knowledge generally.

51 Juror X's conduct might have been in wilful disobedience of the trial judge's directions. Equally plausible, however, is that juror X did not appreciate that internet research – not about the appellant, any witness, or the particular case or the charges, but about the definitions of and sentences for rape as compared to unlawful carnal knowledge – was contrary to the trial judge's directions.

52 As to the state of mind of the other members of the jury, it is relevant that nothing in the Sheriff's report suggests that when juror X told the other jurors about his internet research on Monday, 19 October 2020, any of them took the view that the conduct of juror X needed to be reported in order not themselves to have been in contravention of the trial judge's directions.

53 Juror A said in his note to the trial judge on 21 October 2020 that juror X's "external actions" (meaning, we infer, the internet research) caused him "concern" and said in response to the Sheriff some months later that juror X's internet research had been in "blatant disregard" of the trial judge's directions. It could not be inferred that juror A was other than conscientious and intent on complying with his obligations as a juror. Juror A apparently considered that juror X had disobeyed the trial judge's directions but also apparently did not consider that juror X's disobedience of the trial judge's directions required juror A immediately to notify the trial judge about juror X's conduct if juror A was not himself to contravene the trial judge's directions. Juror A's note to the trial judge and response to the Sheriff contained strong criticism of juror X. They contained no hint of confession or

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recognition of misconduct on his own part or on the part of any other juror, let alone wilful disobedience of the trial judge's directions.

54 The evidence, such as it is, about juror B's response to juror X's disclosure on Monday, 19 October 2020, is equally telling. Juror B, like juror A, is the kind of person who was willing to answer the Sheriff's letter months after the events in question. It could not be doubted that juror B was conscientious in respect of complying with legal obligations. None of this supports an inference that juror B was engaged in wilful disobedience of the trial judge's directions. The proper inference is that juror B genuinely believed that his intervention (by telling the members of the jury that the decision could not be based on what they thought the sentence might be) had resolved the matter, making its occurrence "inconsequential".

55 As noted, the letters in response to the Sheriff's letter from jurors C and D do not refer to the internet research or subsequent discussions about it among the jury members. Nothing of relevance can be drawn from those responses. Juror E's response focused on juror X's announcement at the outset that he would not convict. The report records that juror E said there were "no issues after that". Accordingly, nothing can be drawn from juror E's response. Otherwise, the jurors did not respond to the Sheriff's letter. Again, silence is neutral.

56 The facts to be found on the balance of probabilities, extrinsic to the jury's actual deliberations about the verdicts to be reached, are that: (a) juror X did internet research about the definitions of and sentences for rape and unlawful carnal knowledge and told the other jury members about it; (b) at least some members of the jury discussed it and decided that juror X's view that sentences for unlawful carnal knowledge were lighter than for rape was not correct; (c) juror B told the jury as a whole "very explicitly '[i]t's not appropriate for you to base your decision on what you think the sentence will be – you can't do that'"; (d) juror B believed the issue was resolved on that basis and therefore was inconsequential; (e) before the verdicts were delivered, juror A did not consider that he had to or should inform the trial judge of any aspect of juror X's conduct; and (f) however, juror A remained concerned by juror X's conduct as a whole, prompting him to deliver the note to the trial judge the day after the verdicts were given.

57 No finding of fact on the balance of probabilities can be made that the conduct of any juror was in wilful disobedience of the trial judge's directions. In particular, it cannot be found on the balance of probabilities either that juror X acted in wilful disobedience of the trial judge's directions or that any other member of the jury acted in wilful disobedience of the trial judge's directions.

58 For these reasons, to the extent that the appellant's argument rested on the misconduct being in wilful disobedience of the trial judge's directions, no positive

inference of wilfulness can be drawn. In the process of fact-finding required before the application of the reasonable apprehension test, it cannot be reasoned that there is a reasonable apprehension that juror X was wilfully disobedient; added to a reasonable apprehension that the other jurors were wilfully disobedient; added to a reasonable apprehension that this jury was unwilling to follow the trial judge's directions in some other respect, leading to a reasonable apprehension that juror X and other members of the jury were not faithful to their sworn function of rendering a true verdict according to law, on the evidence, and in accordance with the directions of the judge.

59 This is not to suggest juror X and other members of the jury did not contravene the trial judge's directions. They did. Juror X should not have conducted the internet research. When juror X disclosed he had conducted the internet research, the other members of the jury, to the extent they did discuss the substance of the research, should not have done so. Instead, they should have informed the trial judge in accordance with the trial judge's directions. Therefore, the jury's conduct is properly described as misconduct and irregular.

60 Once the element of wilfulness is put to one side, what is left is the facts of disobedience of the trial judge's directions. What other inference can be drawn from those facts on the balance of probabilities? The direction the trial judge gave to the jury on Friday, 16 October 2020, before the jury started its deliberations to the effect that it should "ensure that no external inference" played a part in its deliberations should not be overlooked. The conduct which occurred in the jury room on Monday, 19 October 2020, provides no foundation for inferring that the jury, and even ultimately juror X, did not comply with that direction. The more likely explanation for the jury's failure then to report the conduct of juror X to the trial judge is that the jury failed fully to appreciate the true import of the trial judge's earlier directions about internet research extending to the definition of the offences or sentencing unconnected to the facts of the immediate case.

61 What follows, as a matter of inferential reasoning, is that the jury's failure fully to appreciate the true import of the trial judge's directions about internet research enabled the jury to discuss the sentencing issue without realising that doing so also contravened the trial judge's directions and to not report juror X's internet research to the trial judge, again without realising that doing so also contravened the trial judge's directions.

62 What does not follow, as a matter of inferential reasoning, is that juror X or other members of the jury failed to understand or failed to apply, still less were unwilling to apply, the trial judge's other directions. Failure of a jury or juror to fully appreciate and therefore apply a procedural direction about what is to occur in the course of a hearing does not, without more, provide a foundation for a positive feeling of actual apprehension or mistrust on the part of a fair-minded and

informed member of the public that the jury or juror might have failed fully to appreciate and therefore apply a substantive direction about how a verdict is to be rendered. On this basis, the assumption, which is "fundamental to the criminal jury trial"<sup>47</sup>, that jurors understand and conform to a trial judge's directions<sup>48</sup> continues to apply to the jurors in the present case other than in the proven respect of the identified misconduct.

63 The verdicts provide no more information other than that they belie juror X's initial and subsequent assertions that he would not convict the appellant of any offence. The jury acquitted the appellant of all charges relating to E and acquitted or could not reach a verdict in respect of all charges that the appellant raped K. Count 1, for example, discloses that the jury convicted the appellant of maintaining a relationship of a sexual nature with K, a child under 16 years, between 31 December 1989 and 19 September 1999, but could not reach a verdict on count 1 to the extent it charged that the appellant raped K during this sexual relationship. Count 17, for example, discloses that the jury convicted the appellant of unlawful carnal knowledge of K, between 18 September 1997 and 20 September 1999, but could not reach a verdict on count 17 to the extent it charged that the appellant raped K during this period. Count 18, for example, discloses that the jury acquitted the appellant of rape of K and unlawful carnal knowledge of K, between 31 December 1998 and 1 January 2000.

64 The reasons nothing can be drawn from this are as follows.

65 First, apart from the fact the jury acquitted the appellant or could not reach a verdict in respect of all rape charges against K, there is no consistent pattern as the jury both convicted and acquitted the appellant of charges of unlawful carnal knowledge of K relating to different periods of time.

66 Second, the issue of consent, being the essential difference between rape and unlawful carnal knowledge, was not the subject of cross-examination of K but was the subject of the Crown prosecutor's submissions and of directions by the trial judge. K's credibility was also in issue, it being part of the appellant's case that she had a motive to lie about the appellant. In the Crown's opening, the Crown prosecutor told the jury that, for rape, the jury had to be satisfied that penetration was without consent. In his summing up, the trial judge returned to consent being an essential element of rape, saying both that it was the appellant's case that

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47 *Gilbert v The Queen* (2000) 201 CLR 414 at 425 [31].

48 eg, *Demirok v The Queen* (1977) 137 CLR 20 at 22.

penetration did not occur but also that the Crown had to prove that K did not consent if it did occur.

67 Third, in the course of its deliberations, on 19 October 2020, the jury asked whether a child under 16 years could consent. The trial judge directed the jury that it was possible for a child under 16 years to consent to intercourse and again directed that the jury had to be satisfied beyond reasonable doubt that the appellant penetrated, relevantly, K's vagina, and that K did not consent to that penetration, to convict the appellant of rape. The trial judge said, for example, that whether "in the circumstances, there was a lack of consent is a matter for you to determine".

68 Fourth, the trial judge returned to the issue of consent arising from another jury question about unlawful carnal knowledge on 20 October 2020, explaining that if the jury did not agree that the Crown had proved beyond reasonable doubt that, relevantly, K did not consent to the penetration, then the appellant could not be convicted of rape and the jury had to consider the unlawful carnal knowledge charges.

69 What is left then is the undisputed misconduct of juror X in undertaking the internet research about the definitions of and sentences for rape and unlawful carnal knowledge and of the other jurors in not reporting these matters to the trial judge as directed. Might a fair-minded and informed member of the public reasonably apprehend that the jury might not have discharged its function as required? The "objective nature and extent"<sup>49</sup> of this misconduct, which is all that exists in this case, might provide a basis upon which someone might speculate that the jury might not have discharged that function as required. In our opinion, it provides no basis to conclude that a fair-minded and informed member of the public might reasonably apprehend that this jury might not have discharged its function according to law, on the evidence, and in accordance with the directions of the judge.

## **Conclusion**

70 The appellant's convictions of the six sexual offences have not been demonstrated to involve a miscarriage of justice. The appeal should be dismissed.

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49 *Smith v Western Australia [No 2]* (2016) 263 A Crim R 449 at 466 [364].

71 EDELMAN AND STEWARD JJ. When many or all members of a jury disobey the clear directions of the trial judge on an important matter is it possible to say that the accused person has received a trial "where rules of procedure and evidence are strictly followed"? The disobedience by the jury in this case involved:

- (1) internet research by one juror, in contravention of the trial judge's directions, concerning sentences for offences with which the appellant was charged;
- (2) the juror sharing that research with other jurors and, despite at least one juror recognising it to be in "blatant disregard" of the trial judge's directions, the jury nevertheless discussing the sentencing practices, with at least some members reaching conclusions on the sentencing practices; and
- (3) every member of the jury disobeying the trial judge's direction to report any internet research in a note to the bailiff.

72 Neither counsel had any opportunity to make submissions to the trial judge about directions on the issues of sentencing that the jury had discussed. Nor did the trial judge have the opportunity to address or inquire of the jury about the issue. The behaviour of the jury members was not merely misconduct which cast a pall over their deliberations. It also involved a serious denial of procedural fairness to both the appellant and the Crown. As senior counsel for the appellant rightly said, if the trial judge had found out about the behaviour of *one* juror engaging in internet research and the failure of the jury to report it, it is likely that the whole trial would have been aborted. The Director of Public Prosecutions also rightly accepted that this was "almost inevitable". Any remaining doubt would be removed if the trial judge had also discovered that the sentencing matters researched had been discussed by the whole jury, with at least two members of the jury believing that the juror who had engaged in the prohibited research had engaged in discussions with other jurors about sentencing practices and had reached a conclusion that the sentences for two of the offences were not significantly different.

73 The trial judge did not discover these matters and the trial was not aborted. There is not merely a real chance that the jury did not decide the appellant's guilt or innocence by strictly following the rules of procedure and evidence in accordance with the directions of the trial judge. It is known that the jury did not.

74 By reason of the behaviour of the jury, a miscarriage of justice took place. Whether or not that miscarriage of justice was "substantial", so as to invite the application of the proviso to the common form criminal appeal statute<sup>50</sup>, is a matter that is appropriate to be considered on remitter to the Court of Appeal of the

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50 *Criminal Code* (Qld), s 668E(1A).

Supreme Court of Queensland. The consideration of the proviso requires the whole of the record to be examined by the court in order to assess whether, notwithstanding the miscarriage of justice, the accused was proved to be guilty beyond reasonable doubt<sup>51</sup>. This Court does not have the whole record before it. This Court has not heard submissions on the whole record. It is, therefore, not appropriate for this Court to attempt to determine the case by reference to the proviso. Nor should this Court attempt to decide the appeal by collapsing the proviso considerations into an assessment of whether a miscarriage of justice occurred.

### Miscarriage of justice

75 It is necessary to commence with explanation of the operation of the concept of "miscarriage of justice". Section 668E(1) of the *Criminal Code* (Qld) follows a standard form for appeals by which a Court of Appeal must allow an appeal for reasons including "the wrong decision of any question of law" or "that on any ground whatsoever there was a miscarriage of justice". Section 668E(1A) contains the proviso to s 668E(1) in the common form which includes the provision that the Court may nevertheless dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred". In *Weiss v The Queen*<sup>52</sup>, six members of this Court held that a miscarriage of justice was "any departure from trial according to law, regardless of the nature or importance of that departure". A trial according to law required regularity of both the procedure and the substance of the trial<sup>53</sup>. If an irregularity occurred, an appeal could only be dismissed if the Court concluded that the miscarriage was not *substantial*. The law was thus settled for 16 years.

76 In *Hofer v The Queen*<sup>54</sup>, Kiefel CJ, Keane and Gleeson JJ cited *Weiss* but seemed to place a qualification on the principle by saying that a miscarriage of justice "includes any departure from a trial according to law *to the prejudice of the accused*". The additional six words present some difficulty. Are they merely an example of one situation that a miscarriage of justice "includes"? Do they introduce a new qualification upon the principle set out in *Weiss* despite the

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51 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

52 (2005) 224 CLR 300 at 308 [18] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ (emphasis in original).

53 *Weiss v The Queen* (2005) 224 CLR 300 at 314 [36] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

54 (2021) 274 CLR 351 at 364 [41] (emphasis added).

footnote citing *Weiss*? If they introduce a new qualification then is "the prejudice of the accused" to be assessed by reference to what their Honours described as a "real chance" that the departure might have affected the result<sup>55</sup>? If so, does that approach effectively collapse a substantial miscarriage of justice (which the Crown bears the onus to negate) into a miscarriage of justice (which an appellant bears the onus to show)? Or should a "real chance" be understood in the way Gageler J explained the reasoning of their Honours: a description of only a "meaningful potential or tendency to have affected the result of the trial"<sup>56</sup>?

77 In *Hofer*, Gageler J also appeared to place a qualification on *Weiss* but in different language. His Honour said that *Weiss* should not "be taken to mean that an error or irregularity which could not have affected the result of the trial will amount to a miscarriage of justice"<sup>57</sup> and that there would not be a miscarriage of justice by the introduction of inadmissible evidence unless that evidence "might have affected the verdict"<sup>58</sup>. At a later point his Honour went so far as to suggest that a miscarriage of justice ordinarily required an appellate court to be satisfied that there was "*a significant possibility* that the acts or omissions of which complaint is made affected the outcome of the trial"<sup>59</sup>, although his Honour also said that all that was required was that "the irregularity had the meaningful *potential or tendency* to have affected the result of the trial"<sup>60</sup>.

78 The approach taken by Gordon J in *Hofer* cleaved most closely to the terms of *Weiss*. The only qualification that her Honour recognised upon when an irregularity would constitute a miscarriage of justice was where the irregularity "*could* have had no effect on the outcome of the trial"<sup>61</sup>. In other words, the focus is only upon whether the irregularity had a capacity to affect the outcome rather than whether it might or might not have actually done so. In short, the irregularity

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55 *eg Hofer v The Queen* (2021) 274 CLR 351 at 366-367 [47] per Kiefel CJ, Keane and Gleeson JJ.

56 *eg Hofer v The Queen* (2021) 274 CLR 351 at 390 [118].

57 *Hofer v The Queen* (2021) 274 CLR 351 at 383 [102].

58 *Hofer v The Queen* (2021) 274 CLR 351 at 385 [106], citing *R v Gibson* (1887) 18 QBD 537 at 540-541 per Lord Coleridge CJ, as quoted in *Weiss v The Queen* (2005) 224 CLR 300 at 307 [16] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

59 *Hofer v The Queen* (2021) 274 CLR 351 at 388 [115] (emphasis added).

60 *Hofer v The Queen* (2021) 274 CLR 351 at 390 [118] (emphasis added).

61 *Hofer v The Queen* (2021) 274 CLR 351 at 393 [130] (emphasis added).

must be an injustice even if it is an insubstantial one. There can be no miscarriage of justice without injustice. We had taken the same approach in *Edwards v The Queen*<sup>62</sup>, saying that there must be a "capacity for practical injustice" or something "capable of affecting the result of the trial". The concern is the capacity of the irregularity to cause prejudice to the jury's consideration of the defendant's case.

79 Whether or not all of these verbal formulations can be reconciled is a matter that must be left for another case, and for the consideration of all members of this Court after proper submissions on the point. It suffices for the purpose of this appeal to make four observations.

80 First, whether or not a literal reading of their Honours' reasons in *Hofer* might support such a qualification on the *Weiss* principle, we do not understand Kiefel CJ, Keane and Gleeson JJ or Gageler J to have intended to collapse the test for the proviso into the test for a miscarriage of justice. That would have been a radical, ahistorical step to have taken and one that, with the appellant bearing the onus to establish a miscarriage of justice but not a substantial miscarriage of justice, could be productive of great injustice.

81 Secondly, and consequentially, in proving a miscarriage of justice the appellant is not required to establish that the result of the trial might have been different or, in the paraphrase of the proviso described in *Weiss*<sup>63</sup>, to establish that the appellant was deprived of a "chance which was fairly open ... of being acquitted" or a "real chance" of acquittal. Any such test would, almost by definition, involve collapsing the test for the proviso into the test for a miscarriage of justice by adopting a paraphrase of the statutory language of the proviso and applying that paraphrase as the test for a miscarriage of justice. The expression of the test for a miscarriage of justice in some cases as whether there was a "'real chance' that [the irregularity] affected the jury's verdict"<sup>64</sup> should not be understood in this way.

82 Thirdly, the approach that we took in *Edwards*, and which Gordon J took in *Hofer*, presently appears to us to be the simplest means of avoiding any perception that the test for the proviso had been collapsed into that for a miscarriage of justice.

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62 (2021) 273 CLR 585 at 609 [74] (emphasis in original).

63 *Weiss v The Queen* (2005) 224 CLR 300 at 313 [32]-[33] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

64 *Zhou v The Queen* [2021] NSWCCA 278 at [22] per Beech-Jones CJ at CL (with whom Davies and Wilson JJ agreed), citing *Hofer v The Queen* (2021) 274 CLR 351 at 364-365 [41], 366-367 [47] per Kiefel CJ, Keane and Gleeson JJ, 390 [118] per Gageler J.

Any irregularity that, in and of itself, has the capacity to prejudice the jury's consideration of the defendant's case will be a miscarriage of justice irrespective of whether the result might, or might not, have been different. There will generally be an irregularity that has the capacity of prejudicing the jury's consideration of the defendant's case where, as Kiefel CJ, Keane and Gleeson JJ said in *Hofer*, contrary to the "long tradition of criminal law" there is a failure to ensure that "rules of procedure and evidence are strictly followed"<sup>65</sup>.

83 Fourthly, where the allegation of irregularity is an allegation of apprehended bias by a juror or jurors then it is appropriate to apply a test for apprehended bias to determine whether the allegation is made out. If it is made out, then by virtue of being an instance of apprehended bias, the irregularity would always be a substantial miscarriage of justice<sup>66</sup>. But to apply the test for apprehended bias to other instances of irregularity by jurors (which includes but is not limited to misconduct or misbehaviour) creates a gloss on the meaning of a "miscarriage of justice" in s 668E(1) of the *Criminal Code* and could be potentially productive of grave injustice, so that in every instance of irregular jury behaviour or misbehaviour the appellant is required to prove that the conduct is so serious that it meets the demands of a *substantial* miscarriage of justice, failing which an appellate court would have no choice but to conclude that it is no miscarriage of justice at all. The effect of such an approach also would create the very curious result that in instances where the conduct of the jury amounts to a denial of procedural fairness to an accused, there would be no miscarriage of justice unless the appellate court were satisfied that the different test for apprehended bias had also been met.

84 Like irregularities that do not involve the behaviour of jurors, there is almost an infinite variety of irregular behaviour or misbehaviour by jurors that might occur. Some irregular behaviour or misbehaviour will be so trivial that it will have no capacity to prejudice the jury's consideration of the defendant's case. Some irregular behaviour or misbehaviour will be so serious that it will always constitute a *substantial* miscarriage of justice. But, in many cases (of which this case is one), the irregular behaviour or misbehaviour will have a capacity to prejudice the jury's consideration of the defendant's case and the onus will fall to the Crown to satisfy

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65 (2021) 274 CLR 351 at 364-365 [41]. See also *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

66 *Smith v Western Australia* (2014) 250 CLR 473 at 486 [54] per French CJ, Crennan, Kiefel, Gageler and Keane JJ. See also *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419 at 459 [188] per Edelman J; 409 ALR 65 at 113.

the appellate court of the proviso by establishing that despite this capacity for prejudice there was no substantial miscarriage of justice.

### A judge's directions to a jury

85 As Lord Griffiths observed in *R v H*, the reason why criminal cases are heard by juries rather than by a judge alone is that "our society prefers to trust the collective judgment of 12 men and women drawn from different backgrounds to decide the facts of the case rather than accept the view of a single professional judge"<sup>67</sup>. But society's preference is based upon a number of critical assumptions about how a jury will undertake its solemn task. One of these is that members of a jury will obey, without qualification in any way, the directions of the trial judge.

86 The critical importance of the jury system in Australia was recently reaffirmed in *Hoang v The Queen*, when, in a unanimous judgment, this Court said<sup>68</sup>:

"The jury is 'the fundamental institution in our traditional system of administering criminal justice'. 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 innocence."

87 In *Gilbert v The Queen*, Gleeson CJ and Gummow J thus said<sup>69</sup>:

"The system of criminal justice, as administered by appellate courts, requires *the assumption*, that, as a general rule, juries understand, and follow, the directions they are given by trial judges."

88 In the same case, McHugh J observed that unless juries "act on the evidence and in accordance with the directions of the trial judge", there is simply no point in having trial by jury<sup>70</sup>. In the full passage from which this proposition emerges, his Honour said<sup>71</sup>:

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67 [1995] 2 AC 596 at 613.

68 (2022) 96 ALJR 453 at 457 [12] per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ; 399 ALR 631 at 634-635 (footnotes omitted; emphasis added).

69 (2000) 201 CLR 414 at 420 [13] (emphasis added).

70 (2000) 201 CLR 414 at 425 [31].

71 (2000) 201 CLR 414 at 425 [31]. See also *R v Panozzo* (2003) 8 VR 548 at 555 [28] per Vincent JA (with whom Buchanan JA and Harper A-JA agreed).

"The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one – accused, trial judge or member of the public – could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials."

89 To similar effect, Keane JA said in *R v D'Arcy* of the juror's oath<sup>72</sup>:

"[T]he law proceeds upon the assumption that jurors may be relied upon to determine issues of guilt or innocence in accordance with their sworn oath. The administration of criminal justice necessarily depends upon the compliance by jurors with directions from the trial judge to base their verdict on the evidence given before them on the trial and to disregard information otherwise acquired."

90 In the State of Queensland, the juror's oath is in the following form<sup>73</sup>:

"You will conscientiously try the charges against the defendant (or defendants) [\*or the issues on which your decision is required] and decide them according to the evidence. You will also not disclose anything about the jury's deliberations other than as allowed or required by law. So help you God."

91 The foregoing reflects the obligation imposed upon juries by s 50 of the *Jury Act 1995* (Qld) that they must give a "true verdict, according to the evidence, on the issues to be tried". A "true verdict" is necessarily one made in accordance with the validly made directions of the trial judge<sup>74</sup>.

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72 [2005] QCA 292 at [28] (with whom McMurdo P and Dutney J agreed) (footnote omitted).

73 *Oaths Act 1867* (Qld), s 22.

74 *R v Glennon* (1992) 173 CLR 592 at 603 per Mason CJ and Toohey J.

92 The *Jury Act* contains a number of provisions designed to protect the integrity of the jury system. For example, pursuant to s 54, a person cannot communicate with any juror whilst the jury is being "kept together" (save in certain exceptional cases). Pursuant to s 56, a judge may, amongst other things, discharge a juror (without the need to discharge the entire jury) if it appears to that judge "that the juror is not impartial or ought not, for other reasons" be allowed to act as a juror, or becomes incapable of continuing to act as a juror. Pursuant to s 60(1), if a jury cannot agree on a verdict, or the judge considers there are "other proper reasons" for discharging the jury, then the judge may discharge the jury without giving a verdict. Pursuant to s 69A(1), a juror in a criminal trial must not inquire about the defendant until the jury has given its verdict or the juror is discharged by the judge. Pursuant to s 70(2), a person must not publish to the public "jury information" (defined, relevantly, in s 70(17) to refer to information about statements made, opinions expressed, arguments advanced or votes cast, in the course of a jury's deliberations). Pursuant to s 70(3), a person must not seek from a juror the disclosure of jury information, and pursuant to s 70(4), a juror must not disclose jury information if it is likely to be, or will be, published to the public. An exception to s 70(2)-(4) exists where the disclosure is made to the court "to the extent necessary for the proper performance of the jury's functions"<sup>75</sup>. Pursuant to s 70(7), if there are grounds to suspect that a person may have been guilty of "bias, fraud or an offence" relating to that person's membership of a jury or performance of functions as a member of a jury, the court may authorise an investigation of that matter and, for that purpose, seek disclosure of jury information. If a member of a jury holds an equivalent suspicion about a fellow jury member, that person may disclose that suspicion to the Attorney-General or to the Director of Public Prosecutions<sup>76</sup>.

93 Putting to one side those directions by a trial judge that might be described as purely administrative, or concerning matters that might be regarded as more trivial, the foregoing provisions reflect the vital importance of the directions of the trial judge in ensuring that the jury system works with integrity. That was the case with the directions given by the trial judge here.

94 The trial judge told the jurors not to "get on the internet and look anybody up" and not to look up "legal principles", which direction was emphasised by the phrase "[d]on't do it". These were clear directions about matters designed to maintain the integrity of the jury system. Indeed, the trial judge gave several directions about not conducting "your own research on any matters of law". The same observation may be made about the trial judge's direction that if one member of the jury were to disobey a direction, the other jurors were to give a note to the

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75 *Jury Act*, s 70(5)-(6).

76 *Jury Act*, s 70(8).

bailiff so that the trial judge could then examine the matter. To emphasise the criticality of these directions the jurors were told that non-compliance would be an "offence by way of contempt of court".

95 As already mentioned, "a person is entitled to a trial where rules of procedure and evidence are strictly followed"<sup>77</sup>. This proposition is derived from the reasons of Fullagar J in *Mraz v The Queen*<sup>78</sup>, in which his Honour was discussing the application of the proviso following a misdirection by the trial judge. His Honour explained that a trial where the rules of procedure and evidence are strictly followed is an entitlement of an accused person consistent with the "long tradition of the English criminal law"<sup>79</sup>. Without such strict compliance justice will miscarry unless (under the proviso) the Crown can "make it clear that there is no real possibility that justice has miscarried"<sup>80</sup>.

96 Three further observations should be made. First, it does not follow that every failure to follow a judge's directions will constitute a miscarriage of justice for the purposes of s 668E(1) of the *Criminal Code*. There must be some impact upon justice for the failure to constitute a miscarriage of justice. A departure which is trivial or meaningless, or is of no real moment – such that it is incapable of causing prejudice to the jury's consideration of the defendant's case – would not be an irregularity that would constitute a miscarriage of justice.

97 Secondly, given the usual gravity of a judge's directions, it would be a rare case in which a juror's or jury's disobedience did not constitute a miscarriage of justice. Indeed, that should be the assumed starting point when considering jury recalcitrance. Whether, following an application of the proviso (contained, in Queensland, in s 668E(1A) of the *Criminal Code*), it might nonetheless be the case that no substantial miscarriage of justice had taken place because the Crown demonstrates that the disobedience could not have affected the result is another matter entirely.

98 Thirdly, there may also be cases where a juror's or jury's disobedience is so extremely serious or stark that it constitutes a serious departure from the prescribed

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77 *Hofer v The Queen* (2021) 274 CLR 351 at 364-365 [41] per Kiefel CJ, Keane and Gleeson JJ, citing *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J and *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69 [12] per Kiefel CJ, Bell, Keane and Gordon JJ.

78 (1955) 93 CLR 493 at 514.

79 (1955) 93 CLR 493 at 514.

80 (1955) 93 CLR 493 at 514.

processes for a criminal trial, thus inexorably giving rise to a substantial miscarriage of justice for the purposes of the proviso<sup>81</sup>. This is not such a case.

### **Three occasions of jury disobedience of directions**

99           Based upon the note handed to the Acting Deputy Registrar on 21 October 2020 and upon the Sheriff's report, the jury or members of the jury disobeyed the trial judge on three separate occasions.

100           First, the person known as juror X researched the law concerning the offences of rape and what either juror X, or the jury more generally, described as "carnal knowledge", including the sentences for these offences.

101           Secondly, juror X disclosed this prohibited information to his fellow jurors and it was the subject of discussion by juror X and other members of the jury, who reached conclusions from their discussions about the sentencing considerations for the relevant offences. Juror A said that the "sentencing durations" were used by juror X to make an argument that a potential conviction "could have severe personal consequences [for the] defendant". Juror A also said that a "small minority number of jurors ... supported [juror X's] views".

102           Thirdly, all of the members of the jury failed to bring to the attention of the trial judge what juror X had done, or that this prohibited information had, in some way and to some extent, been discussed by the jury with conclusions reached by some members of the jury.

### **Miscarriage of justice and jury misbehaviour**

103           The misbehaviour by the jury in this case was plainly a departure from that strict application of the law to which an accused is entitled<sup>82</sup>. The only issue is whether this conduct met the low threshold of practical injustice described above: an irregularity with the capacity to prejudice the jury's consideration of the defendant's case, irrespective of whether the result might, or might not, have been different.

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81   See the third category of case identified in *Baini v The Queen* (2012) 246 CLR 469 at 479 [26] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

82   *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69 [12] per Kiefel CJ, Bell, Keane and Gordon JJ.

104 The issue of jury misbehaviour was considered in *Smith v Western Australia*, where, following the discharge of a jury, a note was found on a table in the jury room which was in the following terms<sup>83</sup>:

"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]."

105 The note raised a concern about the partiality of the allegedly affected juror. This Court applied a test for apprehended bias which had been formulated by Mason CJ and McHugh J in *Webb v The Queen*<sup>84</sup>. The test, described as the "proper approach"<sup>85</sup>, was as follows<sup>86</sup>:

"[T]he 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, 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."

106 The test of "reasonable apprehension or suspicion" that a juror has not, or the jury has not, discharged its task impartially is entirely apt where the nature of the misbehaviour or irregularity is that it might give rise to a reasonable apprehension of bias or partiality. But no conclusion could be reached on the point by this Court in *Smith* because the note had been prepared by an unidentified person and it was not known whether it was true that a juror had been physically coerced. A reasonable suspicion would mean that there was something with a capacity to prejudice the jury's consideration of the defendant's case. Accordingly, this Court remitted the matter to the Court of Appeal of the Supreme Court of Western Australia for further hearing and determination. The Court of Appeal conducted an inquiry into what had occurred and found that there had in fact been

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83 (2014) 250 CLR 473 at 476 [5].

84 (1994) 181 CLR 41 at 53.

85 *Smith v Western Australia* (2014) 250 CLR 473 at 485 [52] per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

86 *Smith v Western Australia* (2014) 250 CLR 473 at 486 [54] per French CJ, Crennan, Kiefel, Gageler and Keane JJ, quoting *Webb v The Queen* (1994) 181 CLR 41 at 53 per Mason CJ and McHugh J.

no coercion<sup>87</sup>. There was, therefore, by definition, no need to inquire into whether there was any reasonable suspicion of coercion and therefore any reasonable apprehension of partiality. Had coercion, or a reasonable suspicion of coercion, been found then the "integrity of the trial process" would have been compromised<sup>88</sup>. There would have been a substantial miscarriage of justice without any further inquiry into whether the coercion or reasonably suspected coercion might have affected the result<sup>89</sup>.

107 This Court in *Smith* should not, however, be taken to have suggested that the only form of irregular conduct or misbehaviour by a juror or jurors that is capable of being a miscarriage of justice is that conduct which raises a reasonable apprehension or suspicion of bias or partiality or which demonstrates actual bias or partiality. The integrity of the criminal justice system is not confined to the minds of the jurors. Indeed, on one view, internet research acted upon by a juror will rarely demonstrate apprehended or actual bias or partiality, although there might be grave procedural unfairness to an accused person. For instance, it is arguable that in a trial involving an issue, and expert evidence, about the weapon used for a murder there would be no more reasonable apprehension of bias concerning a juror who conducts internet research into the nature and effect of the alleged murder weapon than there would be concerning a juror who brings that background knowledge with them to the jury room. But the use of that untested specialist knowledge by the jury would be a miscarriage of justice by a denial of procedural fairness. The test of "reasonable apprehension or suspicion" would not be apt. Nor is it apt in this case. The irregularity is clear. The question is whether, having regard to its nature and character, it has the capacity to prejudice the jury's consideration of the defendant's case and thereby result in practical injustice.

108 The law's great concern to secure the integrity of the jury system can be seen in the decision of the Full Court of the Supreme Court of Victoria in *R v Chaouk*<sup>90</sup>, to which reference was made with approval in *Smith*<sup>91</sup>. In *Chaouk*, whilst in the course of its deliberations, the jury adjourned overnight to

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87 *Smith v Western Australia [No 2]* (2016) 263 A Crim R 449 at 464-465 [348] per Martin CJ, 472 [430] per McLure P, 472 [432] per Mazza JA.

88 *Smith v Western Australia* (2014) 250 CLR 473 at 485 [52] per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

89 *Smith v Western Australia* (2014) 250 CLR 473 at 486 [54] per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

90 [1986] VR 707.

91 *Smith v Western Australia* (2014) 250 CLR 473 at 486 [55].

accommodation which had been provided. The trial judge directed that the jurors were to "stay together". For that purpose, a jury keeper was to accompany each of four taxis used to transport the jurors to and from their accommodation. However, that did not take place with one taxi, which carried the foreman and three other jurors unescorted by a jury keeper. The trial judge was told about what had taken place and a submission was made that he should not "receive" the jury's verdicts of guilty. The judge inquired of the foreman whether the case had been discussed in the taxi; he was told that it had not. On that basis he declined to discharge the jury. On appeal there was held to have been a miscarriage of justice.

109 The decision in *Chaouk* was not one that was merely concerned with a lack of apprehended or actual bias or partiality of a particular jury. It was a broader, systemic, concern to ensure the integrity of a jury's verdict in that case that led to the common law rule that upon entering into deliberations there must be no communication, or risk of communication, between outsiders and the jury<sup>92</sup>. In *Chaouk* that rule had been breached. Kaye J said<sup>93</sup>:

"[I]t was not necessary or relevant to consider whether the irregularity did in fact prejudice the accused. The test for the Court where an irregularity of the nature of a transgression of the common law rule has taken place was stated by Sir John Barry in *R v Hodgkinson* [1954] VLR 151, at p 156 to be to make up its mind 'whether the incident was of such a character that, if the verdict is allowed to stand, justice would not appear to be done or that the incident was likely to give rise to a reasonable suspicion concerning the fairness of the trial'".

110 Kaye J concluded that there was a miscarriage of justice, even in the face of the answer given by the foreman to the trial judge. A reasonable bystander might well, his Honour said, have speculated as to what was said in the taxi. As a result, even if there had been no reasonable apprehension of bias or partiality of any member of the jury the infringement was a miscarriage of justice; indeed so serious

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92 See, eg, *R v Ketteridge* [1915] 1 KB 467; *R v Neal* [1949] 2 KB 590; *R v Taylor* [1950] NI 57; *R v Hodgkinson* [1954] VLR 140; *R v Alexander* [1974] 1 WLR 422; [1974] 1 All ER 539; *R v Gay* [1976] VR 577; *Dempster* (1980) 71 Cr App R 302; cf *Jury Act*, ss 53 and 54.

93 *R v Chaouk* [1986] VR 707 at 712. Fullagar J agreed with Kaye J, as did Hampel J.

that it was, without more, a substantial miscarriage of justice. In so concluding, Kaye J followed this passage from the judgment of Porter LJ in *R v Taylor*<sup>94</sup>:

"An accused person might justly ask how was he to test whether or not the jury had heard anything outside which might influence them in their deliberations when the only persons who could give evidence on the matter were persons who themselves – albeit quite unconsciously – were involved in the irregularities. Nor, indeed, is the matter one which concerns the individual prisoner alone. That the due and orderly administration of justice should be maintained is a concern of the whole community. We take it that the duty of a Court is not only to ensure, as far as possible, the due administration of justice in the individual case, but also to preserve the due course of the procedure generally."

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Contrary to the approach in *Smith* and *Chaouk* there is a line of decisions from the Court of Criminal Appeal of New South Wales which apply a different test to determine whether the misbehaviour of a juror or jury constitutes a miscarriage of justice. That test requires the appellant to satisfy the court that the irregularity has affected the verdict so that the jury would not have returned the same verdict if the irregularity had not occurred<sup>95</sup>. Although some of those cases might have been decided the same way by reference to the correct test, the test for a miscarriage of justice that was applied was one that is, itself, capable of producing miscarriages of justice. It is the wrong test precisely because it obliges an appellant to do the very work which the Crown must do when applying the proviso. When applying the proviso the onus is on the Crown or the State to

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94 [1950] NI 57 at 80 (with whom Black LJ agreed). In *R v Chaouk* [1986] VR 707 at 714, Kaye J erroneously attributed this quotation to the case of *R v Ketteridge* [1915] 1 KB 467.

95 *R v Marsland* (unreported, Court of Criminal Appeal of New South Wales, 17 July 1991) at 14 per Gleeson CJ (with whom Lee CJ at CL and Hunt J agreed); *R v Rudkowsky* (unreported, Court of Criminal Appeal of New South Wales, 15 December 1992) at 6-7 per Gleeson CJ (with whom Cripps JA and McInerney J agreed); *R v K* (2003) 59 NSWLR 431 at 446-447 [68]-[70] per Wood CJ at CL (with whom Grove and Dunford JJ agreed); *Qing An v The Queen* [2007] NSWCCA 53 at [22]-[23] per Beazley JA (with whom Hislop J agreed); *Folbigg v The Queen* [2007] NSWCCA 371 at [17]-[19] per McClellan CJ at CL (with whom Simpson and Bell JJ agreed). See also *Benbrika v The Queen* (2010) 29 VR 593 at 644 [213] per Maxwell P, Nettle and Weinberg JJA; *Marshall v Tasmania* (2016) 31 Tas R 236 at 242-245 [6]-[9] per Estcourt J, 256-258 [49]-[52] per Brett J (with whom Tennent J agreed).

demonstrate that "no substantial miscarriage of justice has actually occurred"<sup>96</sup>. There is no onus on the appellant once the appellant has demonstrated the existence of an irregularity that gives rise to practical injustice.

112 An illustration of the danger of imposing too difficult a task on an appellant can be seen from one of the cases in this line: *Folbigg v The Queen*<sup>97</sup>. In that case a juror obtained impermissible information from the internet showing that the appellant's father had killed her mother. The Court of Criminal Appeal did not ask whether the juror's intentional, and prohibited, research had led to the discovery of material that had the capacity to prejudice the jury's consideration of the defendant's case, irrespective of whether the material might, or was likely to, actually have been used in that way. Instead, applying the wrong test, the Court of Criminal Appeal placed itself in the position of the jury (but not the position of the juror who had deliberately disobeyed the directions) and considered whether the information would have actually influenced the jury's consideration of whether the appellant killed her own children<sup>98</sup>. That effectively reversed the usual onus and treated the requirement for a miscarriage of justice as though it were a requirement for a substantial miscarriage of justice. In summary, determining whether jury misbehaviour has resulted in practical injustice does not require an appellant to demonstrate that the irregularity in fact caused any actual prejudice<sup>99</sup>. The focus is on whether the incident was of such a character or nature that it gave rise to a capacity to prejudice the jury's consideration of the accused's case, thus casting a shadow of injustice over the verdict<sup>100</sup>. The presence of that capacity is sufficient to demonstrate that the irregularity constitutes a miscarriage of justice.

### Practical injustice

113 The jury's disobedience here supports, at the very least, a conclusion that there was a capacity for prejudice to the jury's consideration of the appellant's case. This is so for four reasons.

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96 *Criminal Code*, s 668E(1A).

97 [2007] NSWCCA 371.

98 *Folbigg v The Queen* [2007] NSWCCA 371 at [52]-[55] per McClellan CJ at CL (with whom Simpson and Bell JJ agreed).

99 *R v Chaouk* [1986] VR 707 at 712 per Kaye J; *R v Emmett* (1988) 14 NSWLR 327 at 339 per Enderby J; *Smith v Western Australia* (2014) 250 CLR 473 at 486 [55] footnote 51 per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

100 *Smith v Western Australia* (2014) 250 CLR 473 at 486 [54] per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

114 *First*, the nature and quality of the acts of disobedience could not be characterised as merely trivial or of no moment. The jury was emphatically directed not to undertake independent research on the internet concerning the law. Juror X violated that direction. The jurors were, in the clearest of terms, told to report this type of disobedience to the court. None did so until after the appellant was convicted. Instead, some of the jurors engaged in discussion with juror X on the subject of his research and conclusions were reached following those discussions. According to the Sheriff's report, some jurors were conscious of their acts of disobedience, but formed their own excuse for ignoring the trial judge. For example, juror B thought that juror X's conduct "seemed inconsequential". These circumstances alone establish not only that there was a *capacity* for prejudice to the jury's consideration of the appellant's case by a failure of the jury strictly to follow the rules of procedure and evidence in accordance with the directions of the trial judge but that there was *actual* prejudice.

115 *Secondly*, the conduct of juror X cannot be disregarded on the basis that it seemingly favoured the position of the appellant. One cannot be sure that it did in fact have that effect. It is true that the appellant was not ultimately convicted on any of the charges of rape (which was the subject of the prohibited research and the improper position taken in discussions by juror X). But as Fullagar J said in *Mraz v The Queen*<sup>101</sup>, just as "'too favourable' directions can only too often be veritable gifts from the Greeks", so too prohibited conduct that appears favourable to an accused person might also be a Trojan horse. It is impossible to know whether an agreement to acquit on some charges, reached following unreported discussions concerning material that was expressly prohibited and was important to at least one juror, had any effect on the agreement of the jurors to convict of other charges.

116 The conduct of juror X, and the discussions of the jury on the subject matter researched, may, for example, have encouraged the jury to convict the appellant on what it might have perceived as an offence with a similar sentence to rape. Nor, given the serious departure from the directions on the part of all of the jurors, can we be confident that there were no other acts of disobedience which were never disclosed. The need to maintain the integrity of the jury system cannot justify any speculation about this matter or the making of hopeful assumptions. The foregoing is supported by the fact that the majority of jurors (eight in total) simply did not respond in any way to the Sheriff's letter seeking information. We have no idea what they thought about juror X's conduct and we have no insight into what they discussed with him. All we know is that, like other jurors, they may also have participated in discussion concerning the prohibited issues, and they also disobeyed the trial judge's directions by failing to report the conduct of juror X.

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101 (1955) 93 CLR 493 at 514.

117 *Thirdly*, as explained at the outset of these reasons, the Director of Public Prosecutions very properly conceded that even without the discussion of the prohibited internet research by some members of the jury, if the conduct of juror X had been disclosed to the trial judge, before the jury had given its verdicts, it was "almost inevitable" that the "whole jury would have been discharged". That concession was correctly made<sup>102</sup>. This emphasises and reflects the seriousness of what had occurred. Of course, the issue posed by this appeal, set out above, is not directed at answering how the power to discharge a juror<sup>103</sup> or the jury<sup>104</sup> might have been exercised, had the note to the bailiff been given before the appellant's conviction. But once it is accepted that the trial judge would have had sufficient "proper reasons", to use the language of s 60(1) of the *Jury Act*, to discharge the jury, then (to say the least) it would be odd to conclude that what had happened did not otherwise have the capacity to prejudice the jury's consideration of the appellant's case.

118 In written submissions filed after the hearing, the Director of Public Prosecutions went further. He conceded, again properly, that the disobedience by the jury was capable of casting a "shadow of injustice over the verdict". The Director nonetheless submitted that it was possible to dispel this shadow by, amongst other things, the contents of the Sheriff's report. But, for the reasons explained above, the contents of the Sheriff's report only reinforce that shadow.

119 *Fourthly*, there is the subject matter of what was discussed following juror X's disclosure. Based on what juror A said to the Sheriff, those discussions included the range of sentences available for rape and "carnal knowledge". Unless otherwise obliged by statute, a judge should never tell the jury about possible sentencing outcomes. The question of sentencing is a matter for the judge and not the jury. As this Court said in *Lucas v The Queen*<sup>105</sup>:

"[T]he jury are not concerned with the consequences which may follow upon their verdict whether it be a verdict of guilty of the offences charged

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102 See, eg, *Director of Public Prosecutions v Lehrmann [No 5]* (2022) 373 FLR 253.

103 Pursuant to s 56 of the *Jury Act*.

104 Pursuant to s 60 of the *Jury Act*.

105 (1970) 120 CLR 171 at 174-175 per Barwick CJ, Owen and Walsh JJ. See also *GAS v The Queen* (2004) 217 CLR 198 at 211 [30] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; *R v Isaacs* (1997) 41 NSWLR 374 at 377-378 per Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ.

or a special verdict of not guilty on the ground of insanity. In our opinion, the judge is not bound to tell them ... of the possible results of their verdict."

120 More recently, in *Cheung v The Queen*, Gleeson CJ, Gummow and Hayne JJ said<sup>106</sup>:

"The decision as to guilt of an offence is for the jury. The decision as to the degree of culpability of the offender's conduct, save to the extent to which it constitutes an element of the offence charged, is for the sentencing judge. If, and in so far as, the degree of culpability is itself an element of the offence charged, that will be reflected in an issue presented to the jury for decision by verdict. In such an event, the sentencing judge will be bound by the manner in which the jury, by verdict, expressly or by necessary implication, decided that issue. But the issues resolved by the jury's verdict may not include some matters of potential importance to an assessment of the offender's culpability. That is not unusual. It is commonplace."

121 The general rule applies to counsel as well. As King CJ said in a well-known passage from *R v Costi*<sup>107</sup>:

"In the summing up the learned trial judge attributed to counsel for the defence a reference in his address to the jury to the maximum penalty for the offence charged. The text of counsel's address to the jury was not before this Court and I am therefore not in a position to verify the attribution. If counsel referred to the penalty, he was not entitled to do so. It is improper for counsel to refer in the presence of the jury to the maximum penalty prescribed by law for the offence charged or to make any other reference to penalty. This is a well-established rule of practice and observance of it must be insisted upon. If counsel improperly refers to penalty in the course of an address to the jury, it is the duty of the trial judge to intervene immediately in order to stop counsel and to remind the jury that they are not concerned with penalty."

122 Juror X and other jurors should not have discussed the penalties for rape and "carnal knowledge". That was an entirely extraneous consideration. It denied procedural fairness to both the appellant and the Crown. Moreover, the Court is in no position to know whether this, in any way, infected the pathway by which the jury reasoned to a conviction of guilt or a finding of acquittal in respect of each count. In the context of the other three matters set out above, it is not possible to

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**106** (2001) 209 CLR 1 at 9 [5].

**107** (1987) 48 SASR 269 at 272.

have any confidence that all members of the jury cast aside, or ignored entirely, their knowledge of the possible sentencing outcomes. On this matter alone, it must therefore follow that the jury's misbehaviour was capable of prejudicing its consideration of the appellant's case.

123 The fact that some of the jurors who responded to the Sheriff did not seem to think that what had occurred would have made a difference to the outcome of the trial justifies no contrary conclusion. Thus, juror A thought that it "most probably ... would not have affected the totality of [the] decisions". Further, as already mentioned, juror B thought that what had happened "seemed inconsequential". Another juror recalled no "bias, fraud or offence" and another did not "think she was in breach of her obligations as a member of the jury". The foregoing represents no more than untested opinions held by only six jurors, some of whom did not acknowledge the wrongful nature of their disobedience of the trial judge's directions. It in no way removes the inference arising from the three serious acts of disobedience that there was, at the very least, a capacity of the impugned conduct to prejudice the jury's consideration of the appellant's case.

### **Outcome**

124 The appeal must be allowed. There has been a miscarriage of justice for the purposes of s 668E(1) of the *Criminal Code*. The Crown made very few submissions to support the application of the proviso in s 668E(1A) of the *Criminal Code*. Although the Court of Appeal referred to the absence of any "substantial" miscarriage of justice, the Crown was rightly, if tentatively, of the view that the reference to "substantial" was a slip and the Court of Appeal had dismissed the appeal on the basis that there was no miscarriage for the purposes of s 668E(1); there was thus no need to consider the proviso and it was not considered.

125 The Crown nonetheless, but faintly, invited this Court to consider the application of the proviso in s 668E(1A). In the absence of any independent assessment of the evidence by the Court of Appeal below, and in the absence of any serious submissions being made about this issue in this appeal, this Court should not itself consider the proviso. The proper course of action is for that issue to be remitted to the Court of Appeal for its consideration.

126 The orders should be:

- (1) The appeal be allowed.
- (2) Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 3 September 2021.
- (3) Remit the matter to the Court of Appeal for further hearing and disposition in accordance with the reasons of this Court.

