HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

MEI QIN WU APPELLANT

AND

THE QUEEN RESPONDENT

Wu v The Queen [1999] HCA 52
30 September 1999
S22/1999

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

G D Wendler for the appellant (instructed by Van Houten Solicitors and Barristers)

T L Buddin SC with P G Berman for the respondent (instructed by Director of Public Prosecutions (New South Wales))

CATCHWORDS

Wu v The Queen

Criminal law – Practice and procedure – Jury – Failure of juror to attend due to reported illness – Juror discharged by trial judge – Trial continued without juror – Whether trial judge erred in discharging juror – Whether judge's power or discretion miscarried in the terms in which he exercised it – Whether juror incapable of continuing to act – Whether the decision to discharge a juror and the decision to continue with fewer than 12 jurors involve separate considerations.

Jury – Criminal trial – Juror discharged for reported illness – Whether the decision to discharge a juror and the decision to continue with fewer than 12 jurors involve separate considerations.

Words and phrases – "incapable of continuing to act".

Jury Act 1977 (NSW), ss 19, 22.

1 GLEESON CJ AND HAYNE J. The appellant, Mei Qin Wu, was indicted in the District Court of New South Wales on counts of kidnapping and attempted murder and two counts charged in the alternative to the counts of kidnapping and attempted murder. A jury was empanelled and the trial commenced.

2 On the tenth day of the hearing the trial judge discharged one of the jurors and the trial thereafter proceeded to verdict of the jury constituted by the remaining 11 jurors. The appellant contends that the trial miscarried because of these events. It is as well, therefore, to describe the course of events that preceded the juror's discharge. On the morning of the tenth day of hearing the trial judge said to counsel (in the absence of the jury):

> "You have heard the news I suppose. You two might not agree with this, or one of you might not, but I am tempted to discharge her. I will hear you both fully on this.
>
> This case has had unfortunate external problems. My two days off for medical reasons, it is just taking too long. We would be unlucky. This case, even at the worst case scenario, not hearing time but actual date, we should finish the case, at the worst, early May. We would be a bit unlucky to lose three. In determining these applications to discharge a juror, I have a pretty broad brush, have I not? The message I had from the Sheriff's Office was that she is not well today, she might not be well tomorrow. What do you say Mr Crown?"

Counsel for the prosecution agreed that the juror should be discharged; trial counsel for the appellant objected to that course and asked the judge to have inquiries made about how long the juror would be unable to serve. The trial judge and counsel were told by a sheriff's officer that the boyfriend of the juror had made a telephone call saying that she would not attend court that day and it seems that the message was that the juror was then unwell and may be unwell on the following day. Exactly what other inquiries were made or attempted is not entirely clear.

3 The trial judge told counsel that he proposed to discharge the juror and the jury was then brought back into court. The trial judge said to the jury:

> "Your colleague … is not well. Ladies and gentlemen, there is no magic in the number twelve. We can carry on with eleven. We are sorry to lose her, but it is my decision. I have the power to discharge in these circumstances. The Sheriff's Office have not got her home number. The message we got earlier from her friend is that she is sick and it could be tomorrow or the next day. I think time is running on, so we will carry on with eleven."

(The trial judge had earlier said to counsel in the course of the debate that occurred in the absence of the jury "What is the magic in twelve anyhow?" and on the hearing of the appeal to this Court the appellant sought to give some emphasis to these references.)

4 Sections 19 and 22 of the *Jury Act* 1977 (NSW) provide:

> "19 The jury in any criminal proceedings in the Supreme Court or the District Court is to consist of 12 persons returned and selected in accordance with this Act.
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> …
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> 22 Where in the course of any trial or coronial inquest any member of the jury dies or is discharged by the court or coroner whether as being through illness incapable of continuing to act or for any other reason, the jury shall be considered as remaining for all the purposes of that trial or inquest properly constituted if:
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> (a) in the case of criminal proceedings, the number of its members:
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> (i) is not reduced below 10,
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> (ii) is reduced below 10 but approval in writing is given to the reduced number of jurors by or on behalf of both the person prosecuting for the Crown and the accused or each of the accused, or
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> (iii) is reduced below 10 but not below 8 and the trial has been in progress for at least 2 months,
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> …
>
> and if the court or the coroner, as the case may be, so orders."

5 The appellant appealed to the Court of Criminal Appeal on the ground that the trial judge erred in discharging the juror "when such juror was not shown to be incapable of continuing with the trial within the meaning of s 22 of the *Jury Act 1977* and thereby the accused did not have a trial according to law". In this Court the appellant put the matter differently, alleging that "the trial judge's discretion" to discharge the juror miscarried and the Court of Criminal Appeal should have held that because the discretion miscarried there should be a new trial.

6 The decision to discharge a juror and the decision to proceed with a jury of less than 12 are distinct steps and often will be affected by different considerations.

The conduct of, or circumstances affecting, a single juror may require that juror's discharge. That conduct or those circumstances may not affect the other members of the jury or suggest that they cannot perform their task satisfactorily.

7 The grounds of appeal in this Court (and the relevant grounds in the Court of Criminal Appeal) attacked the decision to discharge the juror, not the decision to proceed with less than 12 jurors. In the course of the hearing of the appeal in this Court, the appellant sought leave to amend the grounds of appeal. The proposed grounds were not formulated precisely but in effect it was sought to contend either that no order had been made that the trial continue with the jury constituted by the remaining jurors or that, if an order had been made, it should not have been. No such ground was raised in the Court of Criminal Appeal and no complaint was made at the trial about these matters. In those circumstances this Court, by majority, refused leave to amend.

8 It is plainly desirable that a judge exercising the power to discharge a juror and the power to proceed with a jury of less than 12 members does so in unmistakable terms. Ordinarily that will be done by the trial judge making two separate orders: an order discharging the juror and an order that the trial proceed before the jury constituted by the remaining jurors. It might fairly be said that, in the present case, the judge's orders discharging the juror and directing continuation of the trial before the remaining jurors were not expressed but are to be inferred from what he said and the course that the trial took thereafter.

9 The decision to discharge a juror may require consideration of difficult questions of fact and degree. One example may suffice to make the point. Deciding whether an irregular incident involving a juror is such that, notwithstanding any proposed or actual warning by 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 has not discharged or will not discharge the juror's task impartially will often raise difficult questions[1]. And applying that test of reasonable apprehension to the other members of the jury may be even harder. It may be doubted, however, that it is always useful to describe the exercise of the power to discharge a juror or the jury in such a case as the exercise of a discretion by the judge. If satisfied that the incident gives rise to a reasonable apprehension or suspicion, the judge would, it seems to us, be bound to discharge those of whom the apprehension or suspicion would be held (whether that is a single juror or the whole jury). No discretion would fall to be exercised in such a case. By contrast, however, questions of discretion might be said to arise when a judge must decide between interrupting the course of a trial (for example, to allow a juror to recover

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1 See, for example, *Webb v The Queen* (1994) 181 CLR 41.

from temporary illness) and discharging the juror concerned and proceeding with the trial without interruption.

10 Questions of this kind were touched on in the course of argument of the present appeal but were not explored fully. We do not think it necessary to decide in this case whether a judge ordering the discharge of a juror (or jury) is exercising a discretion. If the trial judge was exercising a discretion in this case, no error in that exercise is demonstrated. If the trial judge was exercising a power the exercise of which depended upon certain facts or findings, the conditions for the exercise of the power existed in this case.

Discharging a juror

11 Jury service is an important obligation for those who are eligible to serve. Fulfilling that obligation will often work considerable inconvenience to individual jurors and the performance of the duties is almost always onerous. Interrupting a trial adds to those burdens.

12 Section 22 of the *Jury Act* refers to the death of a juror, the discharge of a juror "being through illness incapable of continuing to act" and the discharge of a juror "for any other reason". It is clear from the reference to "any other reason" that illness is not the only circumstance in which a juror may be discharged. Much of the argument in the present appeal proceeded from the premise that illness was the occasion for the discharge of the juror in this matter. That premise may be flawed. It is convenient, however, to examine what would follow from accepting the premise.

13 The appellant submitted that a juror was incapable of continuing to act on account of illness, only if it was shown that the juror was permanently incapacitated. Consideration of the consequences of accepting this submission reveals its error. If the only kind of incapacity contemplated by s 22 is permanent rather than temporary, it would follow that a trial must be interrupted for as long as the juror's incapacity through illness persisted. And that may be a long time: measured in weeks, if not months. That result is properly characterised as absurd. It flies in the face of the accepted nature of a trial by jury. Trial by jury is not episodic; it continues from day to day (except of course on weekends and holidays). The construction urged by the appellant would have the trial proceed in fits and starts with all the deleterious consequences that would have on the ability of members of the jury to perform their function as judge of the facts.

14 The incapacity to which s 22 refers when it speaks of a juror "being through illness incapable of continuing to act" is the incapacity of a juror to perform his or her duties as a juror. Those duties ordinarily require the juror to attend from day to day during ordinary court hours until the jury is discharged. If a juror is not present at the court when the trial is ready to proceed, the juror is unable to perform

his or her duties. If the juror is absent because of illness, the juror is unable to perform his or her duties "through illness" and that is so whether or not the juror will recover from the illness and whether that recovery will be quick or slow.

15 It may be accepted that the trial judge in this case had little information about the juror's health and had that information at second or third hand. It seems that the trial judge was acting upon what a sheriff's officer reported of a conversation with the juror's boyfriend. The transcript of proceedings suggests that some further inquiries were attempted. There is reference to trying to telephone the juror at her home and later reference to the sheriff's office having only the juror's telephone number at work. The appellant sought to attach some significance to this material and suggested that the trial judge had acted prematurely in discharging the juror *before* exhausting all available lines of inquiry and without having better information about her state of health.

16 It is not right to assume, as this part of the appellant's argument assumed, that the power to discharge a juror because the juror is ill requires in every case some elaborate factual inquiry about the juror's health. In particular, we do not consider that the trial judge in this case was bound to seek or obtain more information than he had before it was open to him to discharge the juror. It is necessary to bear steadily in mind that the juror was absent. That fact was of critical importance. It meant that the trial could not proceed before the jury constituted as it had been at the start of the trial. It follows that asking *why* the juror was absent was important only in deciding how long the interruption to proceedings would be.

17 On the information available to the trial judge it was clear not only that the juror was not present in court at the time fixed to begin proceedings for the day, but also that she did not intend to be present at all during that day. The message suggested that she may be absent for a longer time but it is enough for present purposes to note that the trial judge knew - and trial counsel did not seek to dispute - that she was to be absent for the whole of what otherwise would have been the tenth day of a trial that had already been interrupted. That day would then have been lost.

18 The appellant's submissions suggested that the trial judge's focus should have been on the absent juror: why was she absent? How long would she be away? But that is to direct attention away from the central question which the trial judge had to determine which was how best the trial of the appellant should proceed. That required attention to the fair and lawful trial of the appellant by a properly constituted jury and it also required attention to how best that trial might be conducted promptly and without delay.

19 Delay in a trial can work hardship to an accused as well as to witnesses and to jurors. No doubt some persons accused of crime will gladly put off the day of judgment, but delay in the trial of any accused leaves the accused uncertain of his

or her fate. That has long been recognised to be a considerable burden upon an accused[2]. And the courts cannot and must not shut their eyes to the consequences of delay upon others - not only to witnesses and jurors but also to all others who seek access to the courts and cannot have their cases tried because of what is happening in cases that are being tried. The fact that the juror was absent (for whatever reason) meant that the trial would be delayed. If the trial did not go ahead, the delay would affect the accused, the witnesses who would otherwise have given their evidence and the other members of the jury. It would also have delayed the start of the trial of some other accused waiting for trial (perhaps on bail, perhaps remanded in custody). All of those considerations, taken together, could properly found "any other reason" for discharging the absent juror.

20 As we have noted earlier, the appellant's argument emphasised the trial judge's statements to the effect that there is no "magic" in 12. That expression may well have had its origin in a paper of Evatt J delivered to the 1936 Australian Legal Convention[3] and mention was made of this in *R v Brownlee*[4]. There is, therefore, no reason to criticise the trial judge for using the expression as he did. Obviously, however, the statement is not meant literally.

21 It may be accepted that a criminal trial by jury in New South Wales must begin before a jury of 12. At common law if a juror died or was taken ill a fresh jury had to be sworn[5], although it seems that sometimes the 11 remaining jurors were re-empanelled and a fresh juror sworn in the place of the disabled juror[6]. But the whole purpose of s 22 is to provide that a trial can proceed before a jury despite the discharge of one or more of its members. That is, there can be a fair and lawful trial of an accused despite the discharge of a juror in the course of the proceedings.

22 In this case it is not shown that the trial judge erred in discharging the juror. There being no attack on the decision to proceed before the jury constituted by the remaining jurors, it is not necessary to examine that decision. Nevertheless, the cause for discharging the juror relating *only* to that juror and not affecting in any way the capacity of the remaining jurors to perform their task, there is no basis for doubting that it was appropriate to proceed as the trial judge did.

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2 *Jago v District Court (NSW)* (1989) 168 CLR 23.

3 "The Jury System in Australia", (1936) 10 *Australian Law Journal (Supplement)* 49 at 53.

4 (1997) 41 NSWLR 139 at 144 per Grove J.

5 *Halsbury's Laws of England*, 1st ed, vol 18, par 623.

6 *R v Beere* (1843) 2 Mood & R 472 [174 ER 353].

23 The appeal should be dismissed.

24 McHUGH J. Given the issues which were debated in the Court of Criminal Appeal and in this Court, I agree that this appeal must be dismissed for the reasons given by Gleeson CJ and Hayne J.

25 The Court refused to allow the appellant to amend her grounds of appeal, and refused to grant special leave to appeal, to argue that the learned trial judge had failed to make the order that s 22 of the *Jury Act* 1977 (NSW) plainly contemplates. The transcript shows no indication that the judge gave consideration to whether the jury of 11 persons should "be considered as remaining for all the purposes of that trial or inquest properly constituted"[7]. Certainly, he made no order to that effect. However, counsel took no point about it at the trial or in the Court of Criminal Appeal. For all we know, the learned judge may have fully considered the matter. If the point had been raised, he may have expressly made the order which s 22 requires. Because the point had not been raised at the trial or even in the Court of Criminal Appeal, the case was not one for allowing the amendment or application in this Court.

26 It is a matter of concern, however, that, before the case reached this Court, no attention may have been given to the fact that an order for a trial with a jury of less than 12 persons involves a two stage process. The first stage is concerned with the death or discharge of a juror. The second stage is whether, a juror having died or been discharged, the judge should order that the jurors remaining should "be considered as remaining for all the purposes of that trial or inquest properly constituted"[8] as the jury. That requires the judge to consider all the circumstances of the case including s 19 of the *Jury Act* which declares that the jury in criminal proceedings "is to consist of 12 persons returned and selected in accordance with this Act."

27 For hundreds of years, the common law has insisted that no person be convicted of serious crime without the unanimous verdict of 12 jurors. If even one juror died or had to be discharged, the common law required the rest of the jury to be discharged. The trial had to recommence with a new jury of 12. In various jurisdictions, including New South Wales, the dictates of expense and convenience have introduced legislative change which now authorises the judge in a criminal trial, after the death or discharge of a juror, to make an order that permits a person to be convicted by a jury of less than 12[9]. In New South Wales, a person may not be convicted by a jury of less than 10 persons ordinarily, but

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7 *Jury Act*, s 22.

8 *Jury Act*, s 22.

9 *Jury Act* 1977 (NSW), s 22; *Juries Act* 1967 (Vic), s 44; *Juries Act* 1927 (SA), s 56; *Jury Act* 1995 (Q), s 57.

the judge may order that the jury be properly constituted by as few as 8 persons if the trial has gone for at least 2 months or if the Crown and the accused consent to such an order.

28 But no-one should think that, once a juror dies or is discharged, the trial should automatically continue with the remaining jurors. Conviction by a jury of less than 12 is a denial of a long-standing right of those tried for serious crime under the common law system. Given the mandatory terms of s 19 of the *Jury Act*, some positive reason, beyond the death or discharge of a juror, must exist for the judge to make the order that the trial continue with less than 12 jurors.

29 The usual reason for exercising the power under s 22 is that the trial has proceeded for some time and that it would cause significant expense to begin again with a new jury. No doubt the circumstances of individual trials will throw up other valid reasons. And there may be countervailing reasons. It may be a case dealing with matters upon which the opinion of the community is deeply divided. In such a case, despite the time that the trial has already taken, the proper exercise of the discretion may require that the accused be retried before a jury of 12. Or the case may be one where the community has strong feelings against the crime in question and the risk of prejudice against the accused may be strong. In such a case, depriving the accused of the chance to obtain the vote of the twelfth juror may be a step that should not be taken.

30 Furthermore, although two stages are involved in the making of a s 22 order, the first stage cannot always be separated from the second stage. Before the judge discharges a juror for illness or "any other reason", the judge will usually need to consider whether exercising the power of discharge has implications for the continuation of the trial with the remaining jurors. In the case of the temporary illness of a juror, the proper course will ordinarily require the temporary adjournment of the trial rather than the discharge of the jury and the making of the s 22 order.

31 The lack of a formal order under s 22 and the trial judge's suggestion that there was "no magic in the number twelve" are matters of concern, as is trial counsel's failure to insist on a formal order under s 22 and the reasons for making it. The appellant may have been improperly deprived of her right to a jury of 12. Given the record of the trial, as manifested by the transcript, this Court could not have been satisfied that that was so.

32 Once the proposed amendment and application for special leave were refused, the appellant was confined to the substantial ground argued in the Court of Criminal Appeal – the judge erred in discharging the juror. For the reasons given by Gleeson CJ and Hayne J, that ground cannot succeed.

33 The appeal must be dismissed.

34 KIRBY J. "What is the magic in twelve anyhow?[10]" This was the question which Flannery DCJ, in the District Court of New South Wales, asked himself, and counsel, when considering whether to discharge a juror who had absented herself on the tenth day of the trial of Mei Qin Wu (the appellant).

35 The judge then proceeded to discharge the missing juror in circumstances which I shall describe. He told the remaining members of the jury that there was "no magic in the number twelve"[11]. At the end of the trial, the appellant was found guilty by the remaining jurors on counts 1 and 2 of the indictment[12]. She was convicted. Her appeal against conviction, based on her objection to the discharge of the juror and continuance of the trial with the remaining jurors, was dismissed by the Court of Criminal Appeal of New South Wales[13]. Now, by special leave, she appeals to this Court.

The circumstances of the discharge of a juror

36 The only material which this Court has to explain the circumstances in which the juror in question was discharged, is the transcript of proceedings. That transcript relates to the commencement of the tenth day of the trial of the appellant. It was placed before the Court of Criminal Appeal. No application was made before that Court to supplement the transcript by evidence deposing to the incompleteness or inadequacy of the official record of what happened at the trial[14]. Neither in that Court, nor in this Court, is this a case where there were additional facts, stated by agreement between counsel upon which this Court was invited to act. In such circumstances, the better course, established by the authority of this Court, "is to refuse to allow that transcript to be supplemented by an account of the proceedings or of any part of them given by one of the parties, or his representative"[15]. Certainly, that appears to be the practice in the appellate courts

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10 *R v Mei Qin Wu* District Court of New South Wales, Transcript, 1 April 1998 at 477.

11 *R v Mei Qin Wu* District Court of New South Wales, Transcript, 1 April 1998 at 478.

12 The indictment contained four counts. The appellant was found guilty on, and convicted of, count 1 (kidnapping) and count 2 (administering diamorphine with intent to murder that person). Verdicts were not taken on counts 3 and 4 which were charged in the alternative. She was sentenced to a minimum term of three years penal servitude with an additional term of four years.

13 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998.

14 cf *R v McGarvey (aka Garner)* (1987) 10 NSWLR 632 at 634-635; *Vakauta v Kelly* (1988) 13 NSWLR 502 at 524.

15 *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 410.

of New South Wales[16]. It is a safe practice so far as this Court is concerned, having regard to the constitutional character of an appeal to it[17]. Therefore, this appeal should be determined on the basis of the record, including any inferences that may properly be drawn that the transcript is incomplete. If the parties had suggested other omissions from the record, they had the chance to repair the defects in the courts below.

37 The record for 1 April 1998 shows that the proceedings began "in the absence of the jury". By inference (although not stated) this would have been at or about the usual court starting time, viz 10 am. Exchanges ensued between the trial judge, the prosecutor and counsel then appearing for the appellant. They began with Flannery DCJ's remark:

> "You have heard the news I suppose. You two might not agree with this, or one of you might not, but I am tempted to discharge her. I will hear you both fully on this."

There then followed the exchanges set out in the reasons of Callinan J which I will not repeat.

38 The jury were then brought back. In the jury's presence, at approximately 10.11 am when the trial had resumed, Flannery DCJ is recorded as saying:

> "Your colleague [Ms H] is not well. Ladies and gentlemen, there is no magic in the number twelve. We can carry on with eleven. We are sorry to lose her, but it is my decision. I have the power to discharge in these circumstances. The Sheriff's Office have not got her home number. The message we got earlier from her friend is that she is sick and it could be tomorrow or the next day. I think time is running on, so we will carry on with eleven."

39 This Court was not provided with the transcript of the entire trial, its concern being confined to the narrow issue presented by the discharge of the juror in the circumstances described. However, without objection, the Court did receive a summary of the trial chronology which was based on that transcript. It shows that the trial commenced on 16 March 1998. It was interrupted on 20 and 25-26 March. The court sat only for a "very short day" on 27 March for the recorded reason that the judge had sentencing matters to conclude. It recommenced on 30 March. It proceeded on 31 March. It was on the following day that the juror was discharged. The trial continued. However on 10, 13, 14 and 15 April, for reasons unexplained,

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16 cf *Builders Licensing Board v Mahoney* (1986) 5 NSWLR 96; *Vakauta v Kelly* (1988) 13 NSWLR 502 at 524.

17 *Mickelberg v The Queen* (1989) 167 CLR 259 at 266-268.

the court did not sit. It resumed on 16 April. The summing up commenced on Friday 24 April. Again the court did not sit on 27 April 1998, a Monday. The summing up concluded on 28 April 1998 on which day the jury finally retired. Later that day, they returned with their verdicts of guilty. This record shows both that the judge's prediction to the jury on the first day that the trial would take the next few weeks was accurate, and that the trial was not continuous and uninterrupted. Some days were apparently lost because of the judge's illness and others for reasons unexplained. Once a trial is commenced, interruptions of such a kind are often unavoidable. They are the concomitants of unpredictable events to which life, including the law, is heir.

The relevant legislation

40 There does not appear to have been any express reference at the trial to the legislation which governed what was to happen in the circumstances which arose following the absence of a juror. Out of respect for the powers and functions of the jury, at common law, once an accused was put in their charge, it was for a long time doubted that the jury "sworn and charged in a case of life or member" could be "discharged by the court or any other, but they ought to give a verdict"[18]. In consequence of that rule, which according to Hawkins did not apply in what he described as "cases of an inferior nature"[19], a great effort was made by the judges of *nisi prius* to secure the verdict of the jury once sworn. In England this extended, astonishingly enough, to putting the jurors, if they were unable to reach agreement, in a cart and driving them to the county boundary following the assize judge on his travels to the next county[20]. There, they were left "'without meat or drinke, fire or candle' until they were starved or frozen into agreement"[21]. It would be unthinkable to treat Australian jurors in this way. Yet this history provides the background against which successive legislative provisions must be understood, empowering judges to discharge juries and jurors and to make orders as to the consequence. In respect of juries, the common law attached very great importance to the number twelve and to maintaining that number and securing the unanimous verdict of the twelve.

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18 See *R v Hambery* [1977] QB 924 at 927.

19 Hawkins, *Pleas of the Crown*, 6th ed (1787), vol 2 at 622 cited in *R v Hambery* [1977] QB 924 at 927.

20 *R v Hambery* [1977] QB 924 at 930.

21 *Cheatle v The Queen* (1993) 177 CLR 541 at 551 citing Coke, *Institutes*, 19th ed (1832), vol 2, 227.b.[e].

41 By the nineteenth century in England a need was acknowledged to permit the discharge of the jury in cases of juror misbehaviour[22] and cases where a juror became so ill as to be unable to continue[23]. By the time of *Winsor v The Queen*[24], it was accepted that a trial judge had a power to respond to such events, notwithstanding that the jury were sworn and the accused was in their charge. However, the only power which the common law admitted was to discharge the whole jury and then only in a "case of evident necessity"[25]. That this was the view taken by the common law in England was demonstrated by a number of cases early in this century, before legislative reform[26]. If a judge discharged a juror at that time, he was obliged to discharge the entire jury as there was no jurisdiction to try a criminal case otherwise than with a jury of twelve[27].

42 In Australia, it was not until after the *Australian Courts Act* 1828 (Imp), 9 Geo IV c 83, that trial by jury in criminal cases was established[28]. The jury in such cases had initially been constituted by seven commissioned army or naval officers[29]. However, the institution of jury trial, as conducted in England, had been a constant demand of the settlers[30]. Section 40 of the *Jury Trials Act* 1832 (NSW) provided for jury trial by "twelve civil inhabitants" in a limited class of Supreme Court prosecutions. Subsequently, the *Jury Trials Act* 1839 (NSW) completely

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22 Hawkins, *Pleas of the Crown*, 6th ed (1787), vol 2 at 221.

23 *Gray v The Queen* (1844) 11 Cl & Fin 427 [8 ER 1164].

24 (1866) LR 1 QB 390.

25 Blackstone, *Commentaries on the Laws of England* (1857) vol 4 at 360 cited in *Winsor v The Queen* (1866) LR 1 QB 390 at 394 per Erle CJ. See also *R v Hambery* [1977] QB 924 at 927-929.

26 See eg *Lewis* (1909) 2 Cr App R 180; *Beadell* (1933) 24 Cr App R 39.

27 *R v Hambery* [1977] QB 924 at 928.

28 The history is described in *R v Valentine* (1871) 10 SCR (NSW) 113; *Parsons v The Queen* (1957) 97 CLR 455 at 460.

29 *Administration of Justice Act* 1823 (Imp), 4 Geo IV c 96, s 4; Bennett, "The Establishment of Jury Trial in New South Wales", (1961) 3 *Sydney Law Review* 463; cf New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, Discussion Paper No 12 (1985) at 17-24.

30 Castles, *An Australian Legal History* (1982) at 203-204; Kercher, *An Unruly Child - A History of Law in Australia* (1995) at 72-75. The importance of the transition to jury trial for civilian self-government was noted by Deane J in *Kingswell v The Queen* (1985) 159 CLR 264 at 299.

replaced military juries with civilian jurors for indictable crimes. This Act was consolidated in an 1847 Act which provided that "all crimes and misdemeanours … shall be tried by a jury consisting of twelve men"[31]. Thus, the first legislation providing for orthodox juries in Australia recognised the importance of the number twelve. It established that a jury, so constituted, was to be the ordinary mode of criminal trial. Notwithstanding later amendments to the legislation on juries[32], no change was made to the 1847 provision in New South Wales until 1929. Until that time it was not possible for a judge in New South Wales to discharge an individual juror. The judge's only authority, and then solely in a "case of evident necessity", was to discharge the entire jury.

43 It was to modify this inconvenient rule that the *Jury Act* of New South Wales was amended in 1929[33] to introduce a provision similar to that adopted in England by the *Criminal Justice Act* 1925 (UK)[34]. That Act effectively empowered a judge to discharge up to two jurors[35] and to order that the trial continue before the remaining jurors as the properly constituted jury. Until such amendment, the intention to ensure that the practice observed in England would be followed in New South Wales was reinforced by express statutory provision. This enacted that, except as otherwise provided, the jury "shall be subject, as nearly as may be, to the same rules, regulations, and manner of proceeding as were observed upon criminal trials in the Court of Queen's Bench in England before [1847]"[36]. That provision has been repealed and is not reflected in the present legislation, the *Jury Act* 1977 (NSW) ("the Act"). However, the use of the word "jury" and the ancient history and constitutional features of that institution, import, unless otherwise provided, the laws and practices of England, at least so far as these are essential to the nature and functions of a jury. The common law and judicial practice governing the discharge of juries is one aspect of that inherited law. It continues, save only to the extent that a constitutionally valid local statute has modified it.

44 Two provisions of the Act are then applicable. They are ss 19 and 22. As the terms of these provisions are contained in the reasons of other members of the Court, I will not repeat them. A number of comments can be made upon them.

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31 *Jurors and Juries Consolidation Act* 1847 (NSW), s 17.

32 *Jury Act* 1901 (NSW), s 28; *Jury Act* 1912 (NSW), s 27.

33 *Crimes (Amendment) Act* 1929 (NSW) s 19.

34 s 15.

35 ["as being through illness incapable of continuing to act …"]. It may be observed that in Victoria there has been similar legislation since 1876. See *R v Brownlee* (1997) 41 NSWLR 139 at 143 referring to the *Juries Act* (1876) 40 Vic No 560, s 86.

36 *Jury Act* 1912 (NSW) s 27(2).

Clearly, by s 19, the primary rule, reflecting the purpose of Parliament as well as jury history, is that the jury will ordinarily comprise twelve persons. The judicial power to discharge a particular juror is thus only to be exercised in a context which has appropriate regard to the rule established by s 19. The primary rule is laid down by Parliament not only for the benefit of the accused but also for the satisfaction of society. Whatever the historical origins of the requirement that a criminal jury be constituted by twelve persons, the present justification of the rule is that the number is sufficient to ensure the presence, in such a jury, of a cross-section of the community[37]. Twelve is not unwieldy. But it is a sufficient number to ensure that the accused has "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"[38]. The twelve jurors interpose "between the accused and his accuser … the commonsense judgment of a group of laymen, and … community participation and [accept] shared responsibility that results from that group's determination of guilt or innocence"[39].

45 These are features of jury trials of criminal charges in Australia to which this Court has attached significance. The jury must be "a body of persons representative of the wider community"[40]. Obviously, to the extent that the historical and statutory number of twelve is reduced, there is an equivalent reduction of the degree to which the jury may reflect the diversity of the makeup of the community in Australia. Unlike the community of village England from which jurors were historically drawn in that country, the Australian community today is highly diverse in its composition. It reflects differences of age, gender, race, ethnicity, national origin, sexuality and other grounds, as well as in life's experiences and attitudes. Such considerations would doubtless have been amongst the purposes of the New South Wales Parliament in enacting the Act and in thereafter preserving the *prima facie* rule of twelve jurors. In an age when other references to twelve were abandoned[41], the Act adhered, in the case of the jury in criminal proceedings, to the requirement of twelve.

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37 *Williams v Florida* 399 US 78 at 102 (1970).

38 *Duncan v Louisiana* 391 US 145 at 156 (1968) applied in *Williams v Florida* 399 US 78 at 100 (1970).

39 *Williams v Florida* 399 US 78 at 100 (1970).

40 *Cheatle v The Queen* (1993) 177 CLR 541 at 560; cf *Kingswell v The Queen* (1985) 159 CLR 264 at 301-302.

41 For example *Decimal Currency Act* 1965 (NSW).

46 It may be noted that, as was the case in English legislation[42], s 22 of the Act does not expressly confer on the court or a judge a power or discretion to discharge an individual juror. This is assumed to be part of the judge's powers at common law or as enjoyed from the inherent or implied powers of the court of which the judge is a member. What s 22 of the Act does is to relieve the court or judge of the obligation which then followed at common law, to discharge the entire jury so that the trial could not continue with a jury of fewer than twelve jurors. In this respect, the jury legislation of New South Wales (and Victoria[43]) differs from the comparable legislation in other Australian jurisdictions[44]. In those other jurisdictions, the statute both expressly confers the power to discharge an individual juror and permits the judge to continue the trial with the remaining jurors. In some Australian jurisdictions[45], but not in New South Wales, provision is made for reserve or additional jurors, arguably reflecting a legislative purpose, wherever possible, to maintain a jury of a minimum of twelve persons. In some jurisdictions[46], but not in New South Wales, provision is made for majority verdicts in respect of non-federal offences[47]. Despite proposals of the New South Wales Law Reform Commission[48], the Government and Parliament of New South Wales have not agreed to amend the Act to provide for reserve jurors. Nor have provisions been enacted to permit the taking of verdicts which are otherwise than unanimous. Instead, the Act has been amended to permit a verdict to be taken from a criminal jury comprising, ultimately, no fewer than eight jurors[49]. In every

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42 *Criminal Justice Act* 1925 (UK) s 15.

43 *Juries Act* 1967 (Vic), s 44.

44 *Jury Act* 1995 (Qld) s 56(1); *Juries Act* 1927 (SA), s 56; *Juries Act* 1957 (WA), s 40 and *Criminal Code* (WA) s 646; *Juries Act* (NT) s 62; *Juries Act* 1967 (ACT), s 8(2); *Criminal Code* (Tas), s 378(5).

45 *Juries Act* 1967 (Vic) ss 14A, 48A; *Jury Act* 1995 (Qld) s 34; *Juries Act* 1957 (WA), s 18(2), 18(7); *Juries Act* (NT), s 37A.

46 *Juries Act* 1967 (Vic), s 47; *Juries Act* 1927 (SA), s 57; *Juries Act* 1957 (WA), s 41; *Jury Act* 1899 (Tas), s 48(2) and *Criminal Code* (NT), s 368.

47 *Cheatle v The Queen* (1993) 177 CLR 541.

48 New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48, (1986) at 168. The Attorney-General informed Parliament that the Government had decided not to implement the recommendation for an amendment to the Act to provide for reserve jurors. New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 November 1987 at 16526.

49 The Act, s 22.

Australian jurisdiction, other than the Commonwealth itself, a verdict may be taken from a criminal jury provided there are no fewer than ten jurors[50]. But every Australian jurisdiction, by its legislation, establishes the prima facie rule of twelve[51].

47 In *Cheatle v The Queen*[52], this Court held that, under s 80 of the Constitution, in respect of a trial upon indictment of an offence against a law of the Commonwealth, the Constitution precludes the application of a State law authorising a conviction by a majority jury verdict of guilty. The counts of the indictment filed against the present appellant referred only to State offences. However, the constitutional provision, as interpreted, is yet another indication of the importance of the number twelve in the context of criminal juries in Australia. It could not be suggested that, for the saving of costs, efficiency, decimal symmetry or any other cause, the jury referred to in s 80 of the Australian Constitution is anything but a jury of twelve persons. Therein, contended the appellant, lay the "magic", in the sense of importance or relevance, of the twelve jurors. History, constitutional rights and State statutory provisions combine to require that a criminal jury must initially be, and should ordinarily remain, a jury of twelve. This, therefore, was a consideration to be given great weight. It was not, she submitted, to be dismissed as irrelevant or insignificant as the judge did in these proceedings when he discharged the absent juror.

The decision of the Court of Criminal Appeal

48 The opinion of the Court of Criminal Appeal was given by Abadee J[53]. His Honour recounted the facts and stated that the juror in question had been "discharged due to illness in accordance with s 22 of the [Act]"[54]. After citing the transcript passages referred to, he stated that the trial judge had "announced that he proposed to discharge the juror. He did this in the presence of the jury"[55].

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50 *Juries Act* 1967 (Vic), s 44; *Juries Act* 1927 (SA), s 56(2); *Jury Act* 1995 (Qld), s 57(2); *Juries Act* 1967 (ACT), s 8(3); *Criminal Code* (WA) s 646; *Criminal Code* (Tas), s 378(5); *Criminal Code* (NT), s 373.

51 The Act, s 19; *Juries Act* 1967 (Vic), s 14(2); *Juries Act* 1927 (SA), s 6; *Jury Act* 1995 (Qld), s 33; *Juries Act* 1957 (WA), s 18(1); *Jury Act* 1899 (Tas), s 39; *Juries Act* (NT), s 6; *Juries Act* 1967 (ACT), s 7(1).

52 (1993) 177 CLR 541.

53 With whom Spigelman CJ and Ireland J agreed. See *R v Mei Qin Wu,* unreported, Court of Criminal Appeal (NSW), 6 October 1998.

54 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 2.

55 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 5.

Abadee J referred to the earlier decision of the Court of Criminal Appeal in *R v Brownlee*[56] in which Grove J had traced the history of jury trial with assistance from the Hamlyn Lectures of Sir Patrick Devlin[57]. He rejected the appellant's submission that the trial judge had acted prematurely on the basis of the suggested illness of the juror when he had "at best … vague information concerning her prognosis and … enquiries were in train to determine the likelihood of the juror's return to the trial"[58]. He dismissed the argument that the words "incapable of continuing" in s 22 of the Act meant, in the case of illness, incapable of continuing to act as a juror for the rest of the trial[59]. He then turned to the reference to the "magic" in the number twelve. He pointed out that that word had been used in *Brownlee*, attributed to Lord Somers in a pamphlet in 1682 cited by Evatt J in a paper for the 1936 Australian Legal Convention. Lord Somers, after recounting several times in which, in history, the number twelve had assumed significance, concluded that so it was in England in the case of petty jurors in criminal cases. A "round dozen" had been fixed to which "some magic was at one time ascribed to the number alone"[60].

49 Abadee J distinguished cases in Canada which had emphasised the seriousness of depriving an accused of the right to be tried by a jury of twelve[61] and cases in the United States of America in which deprivation of rights under the Sixth Amendment to the Constitution of that country have been argued[62]. He concluded[63]:

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56 (1997) 41 NSWLR 139.

57 Devlin, *Trial by Jury*, Hamlyn Lectures, 1966.

58 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 9.

59 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 9.

60 Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* Supp 49 at 53.

61 *Basarabas v The Queen* (1982) 2 CCC (3d) 257; *R v Sophonow (No 2)* (1986) 25 CCC (3d) 415.

62 Such cases include *United States v Peters* 617 F 2d 503 (1980) (a case where a juror attended ten minutes late on the third day of a trial but was discharged after five minutes); cf *United States v Shelton* 669 F 2d 446 (1982) and *Williams v Florida* 399 US 78 (1970). The United States cases must be read in the context of statutory provisions providing for replacement of discharged jurors by alternates. There is no such provision under the Act.

63 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 15.

> "All that said, the accused should not be lightly deprived, in my view, of his right to be tried by a jury of twelve persons. The discharge of a juror deprives the accused of the voice of one juror in the consideration of the verdict."[64]

50 In this way Abadee J reached the critical point in his reasons. He drew a distinction between discharge "on the ground of illness where the juror is unable to attend and the situation of discharge where, for example, there is an incident at the trial which may raise an issue of partiality [of] the juror"[65]. Without indicating precisely what this difference was, Abadee J came to his result. This was that the "matter ultimately turns on the question of the exercise of discretion"[66]. By reference to traditional authorities[67], Abadee J concluded:

> "There is nothing to suggest that there was in the instant case a capricious exercise of the discretion in discharging the single juror. In my view, considerable weight should be given to the views of the trial judge on the question of whether or not a juror should be discharged. He is the judge on the spot. He is the person who is in the best position to assess how the trial is progressing and whether there have been any delays and what may be the consequences of further delay and the like … The discharge was upon a specific basis, in this case illness … In my opinion it was a matter for his Honour to consider the adequacy of the information without considering whether it needed further augmentation … [He] was not required to wait longer and see how events further transpired or evolved. This was a trial that had already lost some days of hearing time which itself caused inconvenience to the other jurors and disruption to their lives."[68]

51 It was this conclusion, that the judge's discretion had not miscarried, which resulted in the order of the Court of Criminal Appeal dismissing the appellant's appeal.

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64 Referring to *R v Goodson* [1975] 1 WLR 549 at 552; [1975] 1 All ER 760 at 762.

65 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 16 with reference to *Webb v The Queen* (1994) 181 CLR 41 at 52.

66 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 17.

67 *House v The King* (1936) 55 CLR 499 at 504-505; *Pambula v Herriman* (1988) 14 NSWLR 387 at 400-401.

68 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 17-18.

The issues

52 As I approach this appeal, it presents three issues.

1. Did the trial judge have the power or discretion in the circumstances to discharge the juror?

2. If so, did the judge exercise that power or discretion and, if he did, did such exercise miscarry in the circumstances?

3. If it did miscarry, did the resulting error occasion no substantial miscarriage of justice? Was it such that, although the point raised by the appeal might be decided in favour of the appellant, the appeal should be dismissed by the application of the proviso[69]?

53 In this Court it is common ground (or at least not contested), that the juror in question was ill[70]; that the judge was entitled to make enquiries about the juror's reported illness[71]; that the judge had the power or discretion to discharge a juror[72]; and that it is legally requisite that an accused person's trial upon criminal offences, where a jury has been empanelled, should commence before a jury of twelve and ordinarily desirable that it conclude before a jury of that number[73].

The judge's power of discharge

54 It seems to have been assumed, both in the reasoning of the Court of Criminal Appeal and in the initial submissions before this Court, that Flannery DCJ had a *discretion*, conferred by law, to discharge an individual juror. Therefore, argument was approached by reference to the well known authorities which control, and limit, appellate intervention in challenges to discretionary decisions made by judges[74]. It is true that judicial reasoning exists which, in analogous circumstances, describes the function of the judge in determining whether or not

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69 *Criminal Appeal Act* 1912 (NSW), s 6 proviso.

70 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 3.

71 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 5-6.

72 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 5.

73 *R v Mei Qin Wu* unreported, Court of Criminal Appeal (NSW), 6 October 1998 at 11.

74 *House v The King* (1936) 55 CLR 499 at 504-505; cf *Norbis v Norbis* (1986) 161 CLR 513 at 540 considered in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1373.

to discharge an individual juror as "discretionary"[75]. It is also true that in some Australian jurisdictions, by reason of the express replacement of the common law power by a statutory provision the power now conferred may properly be described as discretionary[76]. However, it is important to notice that, so far as the Act is concerned, there is no purported conferral of power on a judge to discharge an individual juror. That power is simply assumed[77]. Instead, what s 22 does "is to set out what the consequences of discharging a juror shall be"[78].

55 Those consequences can only be understood against the background of the common law already described. What s 22 does is to provide for the circumstances in which, contrary to the common law, the judge might continue with the trial before the remainder of the jury after the particular juror is discharged. That section is addressed to delineating those circumstances in which the residue of the jury, initially put in charge of the accused, are to be "considered as remaining for all the purposes of that trial … properly constituted".

56 Relevantly to the present proceedings, there are three requirements for the application of s 22 of the Act. They arise from a study of the terms of the section:

(a) That a member of the jury has died or is discharged by the court;

(b) That in the case of criminal proceedings the number of the jury's members is not reduced (relevantly) below 10; and

(c) That the court so orders.

57 There is no difficulty with requirement (b) because, with the discharge of the absent juror, the jury in the appellant's trial remained at 11 throughout and were thus never reduced below 10. The difficulties arise from the suggested failure to observe the precondition to the exercise of the power stated in requirement (a) and to observe the procedure required for its effective exercise stated in requirement (c).

58 So far as requirement (a) is concerned, this was not a case of a juror dying. Accordingly, discharge was contemplated "whether as being through illness incapable of continuing to act or for any other reason". As it happened, the ground invoked before Flannery DCJ at this trial was the suggested illness of the absent juror. It was not one of the multitude of other reasons that have been cited from

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75 See eg *R v Hambery* [1977] QB 924 at 929.

76 See eg *Criminal Code* (WA), s 646 ["or may, if it thinks fit … discharge the juror"].

77 On this point see *R v Hambery* [1977] QB 924 at 927.

78 *R v Hambery* [1977] QB 924 at 927.

time to time to justify discharge of a particular juror - such as where a juror left the jury room during deliberations to speak to outsiders on the telephone[79], wished to go on holidays during a trial which had overrun[80], or disclosed familiarity with witnesses called at the trial[81] and so forth. If there was an "other reason" which seemed to have played a part in the trial judge's decision it was the delay that had already occurred by reason of his own earlier absence for illness and, by inference, the inconvenience which still further delay would occasion to the remaining jurors if there were an interruption whilst the duration of the illness of the missing juror was explored.

59 It is necessary to return to an analysis of the events described in the transcript. With respect, Abadee J's statement that a juror was "discharged due to illness" is one of conclusion. It does not appear clearly expressed in the trial judge's reasons. Flannery DCJ began with an immediate indication of an inclination to discharge the missing juror simply because of her absence and its reported reason. And at a time when it appears from the transcript that enquiries by the Sheriff's Office were not completed as to how long the absent juror was likely to be away by reason of her reported illness, he reached his decision to discharge her.

60 As an exercise of the power contemplated by s 22 of the Act, the foregoing is plainly defective. Whilst it is certainly proper to consider the possibility of discharging a juror in the context of the stage reached in the particular trial (and whilst it is also proper to consider in this regard the convenience of the remaining jurors[82]), it would not be a proper exercise of the power for which s 22 provides to discharge an individual juror "through illness" without at least some assurance that such a step was warranted on that ground. So much flows from the terms of s 19 of the Act, read against the background of the common law which I have sketched.

61 It may be possible to infer from the transcript (although unrecorded) that, between the judge's announcement of his proposal to discharge the juror and his doing so in the presence of the jury soon afterwards, he had received a message from the Sheriff's Office that the Sheriff did not have that juror's home telephone number and had exhausted his means of checking further on her availability. I agree with Abadee J that the adjectival clause "incapable of continuing to act" does

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79 *R v Goodson* [1975] 1 WLR 549; [1975] 1 All ER 760.

80 *R v Hambery* [1977] QB 924.

81 *Derbas* (1993) 66 A Crim R 327 at 331.

82 *R v Hambery* [1977] QB 924 at 930. It would also be relevant, for example, to consider the public and private costs incurred or thrown away by the discharge of the jury and the obligation to recommence the trial; cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 168; *Gallagher* (1987) 29 A Crim R 33 at 37-39.

not mean incapable for the estimated duration of the trial. Because of the ultimate want of contest of the juror's illness, it is inappropriate to say more about this. But the words in the Act must be given some meaning beyond "incapable" simply because a juror is absent. In the case of discharge through illness, those words suggest that it is not every illness that will warrant discharge. So much is understandable when the terms and history of the provision are considered. In short, in order to attract the quality of "proper constitution" to the remaining jurors as the "jury", it is necessary where the ground propounded for discharge of a juror is illness, that the judge should be satisfied that such illness exists and is one rendering the juror "incapable of continuing to act", at least for more than a short amount of time. Thus, a mere failure of a juror to attend for jury service will not clothe a reported illness with the requisite seriousness to warrant automatic discharge of that juror. There may be no illness at all. People do make false claims of illness to avoid uncongenial circumstances far less important and stressful than jury duty. With respect to the trial judge, having proceeded on the ground of the juror's illness, it was necessary for him to be satisfied by at least some material, that the illness was of the requisite kind and likely duration. In fairness to his Honour, he appears to have had no assistance from counsel by reference on this point to s 22 of the Act, or indeed at all.

62 There is another difficulty with the passage of transcript which occurs in the presence of the jury and which therefore alone represents the record of the formal discharge of the juror. The passage proceeds on an apparent assumption that the juror has already been discharged. But that could not lawfully have been done in the absence of the jury. Accordingly, it is necessary to infer from the words "[w]e can carry on with eleven" a judicial decision and order to discharge the juror in question. Whilst I am prepared to imply into the words used such an order, the passage is certainly elliptical. What is undoubtedly missing is an order, as s 22 contemplates, that the residual jurors should be considered as remaining "for all the purposes of that trial … properly constituted".

The need for an order as to remaining jurors

63 Neither at trial, nor in the Court of Criminal Appeal, did the appellant, by her counsel, object to the failure of the trial judge to make an order in terms of the closing words of s 22 of the Act. Yet it is clear that only "if the court … so orders" will the remaining jurors be entitled to continue as the jury properly constituted for the trial of the accused. This is a condition of the exercise of the power to continue which the Act permitted but which the common law resolutely denied. When reference was made to practice, this Court was informed by counsel for both sides, that after a juror is discharged, the practice in New South Wales does not involve the making of an express order in the terms of s 22, directed to the status of the remaining jurors as "the jury". That statement is confirmed by what happened at this trial.

64 Counsel for the appellant sought leave to amend the appellant's grounds of appeal to complain about the lack of a specific order of the kind that s 22 appears to contemplate. He also sought special leave upon that ground. By majority, these applications were refused. Although I fully understand the reasons which lay behind the refusal, I would have granted leave to amend and special leave to argue the point.

65 I would have done so because it is plain that, from first to last, the appellant's contentions are of a technical kind. In criminal trials which have resulted in convictions such objections are by no means unusual and are sometimes successful[83]. This reflects the very high commitment of our legal system to observance of the law as a precondition to criminal conviction and punishment. In saying this I have not overlooked the need to respect the position of the trial judge; to allow for infelicity of judicial expression made on the run; to accept the desirability of a high measure of finality in the trial process; and to recognise the public and private costs that are incurred when appeals are taken and still more when they result in new trial orders[84]. Different principles apply in civil cases. In criminal proceedings, vigilance against legal error remains the rule.

66 Objection to the discharge of the juror was duly noted at the trial. What then followed was primarily the responsibility of the trial judge. The value of this case, if it has any, concerns the approach proper to the decisions to be made in applications under Pt 4 of the Act in criminal trials in New South Wales. As the appeal was before this Court on other grounds, I would have permitted all of the technical objections to be disposed of. This was especially justified because, in my view, the order required by s 22 is not legally redundant or surplusage. It addresses the judge's attention to an important question which has to be decided. This is not, as such, whether the individual juror should be discharged. It is assumed that this has been done. Rather, it is what then follows. Is it (as at common law) that the entire jury must likewise be discharged? Or is it that the remaining jurors will be taken as properly constituting the jury for the trial? Involved in that decision are considerations quite separate from a decision to discharge an individual juror. For example, a different decision on such a question might be made at a very early stage of a long trial from that which would be appropriate at a late stage. A different decision might be made where, having regard to the circumstances of the discharge, an apprehension could arise that the entire jury could have been contaminated or their verdict cast into doubt by the

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83 A recent example is *Byrnes v The Queen* (1999) 164 ALR 520 at 542-543.

84 *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372-1374.

events occasioning the discharge[85]. A different decision might follow from an earlier discharge of other jurors and the complexity or fine balance of the evidence.

67 This Court having refused special leave to amend the grounds of appeal, I must approach the issues within the confines of the matters originally argued. However, it is to be hoped that in future, where the question of discharge of a juror in a criminal trial arises, closer attention will be paid than is suggested by the reported practice in New South Wales to the terms of the statutory provision governing not only the discharge of a juror (if any) but the consequence of such discharge. There are two stages of judicial decision-making contemplated by s 22 of the Act. Each stage presents its own considerations for determination. The two should not be conflated.

The exercise of the power miscarried

68 Upon the assumption that the trial judge had the power in the circumstances to discharge the absent juror on the ground nominated, namely "that she is sick and it could be tomorrow or the next day", it is next necessary to consider whether such exercise of the power miscarried because it was made otherwise than in accordance with law. Because, in my view, it is inappropriate to test what the judge was called upon to do under s 22 of the Act by reference only to the principles governing discretionary decisions, the Court of Criminal Appeal erred in approaching the question on that basis. Because both parties argued the case on the same footing and because some judicial reasoning (frequently in a different statutory context) is so expressed[86], the error is understandable enough. But it casts into doubt the legal analysis of the Court of Criminal Appeal and thus its order.

69 The proper approach in this case was to ask whether the judge, as the donee under s 22 of a statutory power, afforded to him upon certain conditions (one of which was the lawful discharge of a member of the jury as provided) erred in the exercise of the power because a condition to its exercise was not fulfilled. Upon this analysis, the case did not fall to be considered, as such, by reference to the rules governing the appellate review of a discretionary decision exercised at trial. Although there is an obvious overlap with the considerations which are relevant to each of these questions, more help is (as it seems to me) to be derived from cases (many in the field of administrative law), which explain how the donees of

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85 cf *R v Goodson* [1975] 1 WLR 549; [1975] 1 All ER 760; *Derbas* (1993) 66 A Crim R 327.

86 eg *United States v Fajardo* 787 F 2d 1523 (1986); *Basarabas v The Queen* (1982) 2 CCC (3d) 257 at 265; *R v Wellman* (1996) 108 CCC (3d) 372 at 373.

statutory power subject to conditions are to act in the lawful exercise of such powers[87].

70 Greater latitude will be accorded to the exercise of powers granted to judicial officers than those afforded to administrators[88]. But both are obliged, when exercising powers conferred on them by Parliament to do so only in the fulfilment of Parliament's purposes. Both must avoid considerations irrelevant to the power in arriving at the decision[89]. This requires ascertainment of, and adherence to, the power conferred by the legislature. When such power is invoked, it is ultimately for the courts to discern what restraints the legislation, expressly or by implication, places upon the considerations to which the decision-maker may have regard[90]. Obviously, the broader the language in which the power is conferred, the less scope will there be, and willingness, for an appellate court to find that the exercise of the power has miscarried. Particularly is this so in the case of powers vested in judicial officers.

71 This analysis requires that the purposes of the legislature be ascertained[91]. A donee of statutory power may not act so as to frustrate the policy and objects of the statute by which the power is conferred[92]. The failure of a decision-maker to give full reasons for the exercise of power will not exclude scrutiny of such exercise or of such reasons. In the case of an administrator, the court may imply

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87 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42 where Mason J pointed to the guidance which could be found in the close analogy between judicial review of administrative action and appellate review of judicial discretions; cf Fridman "An Analysis of the Proper Purpose Rule" (1998) 10 *Bond Law Review* 164 at 172-174.

88 *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 543*; Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 659 per Dixon CJ.

89 *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 12 per Stephen J.

90 *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 12; cf *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 187.

91 cf *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1053 per Lord Pearce.

92 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030 per Lord Reid.

from silence that there was no good reason[93]. A heavier obligation falls upon judicial officers to give adequate reasons for their decisions so that, where appropriate, those reasons may be submitted to appellate consideration[94]. In the case of interlocutory decisions extended reasons are not required[95]. But where it is suggested that the power in question has been exercised by reference to irrelevant or extraneous considerations, or without reference to those which are relevant, an appellate court may conclude that the challenged decision has miscarried. There will have been no lawful exercise of the power.

72 In approaching these questions appellate courts, as much as courts exercising judicial review, are obliged to remind themselves that their role is not, as such, to consider how they would have exercised the power had it, by law, belonged to them[96]. A conclusion that a power has not been exercised according to law may more readily be reached where it is unclear that the relevant preconditions to the exercise of the power have been taken into account[97] or where the decision-maker has misstated a relevant consideration[98] and the result is a decision which adversely affects a party's interests or exposes that party to a new hazard or new jeopardy[99].

73 When the power conferred by s 22 of the Act is considered in these terms, the ultimate disposal by the Court of Criminal Appeal of the appellant's appeal to it by reference to the rules governing appellate review of discretionary decisions is revealed, with respect to the judges constituting that Court, as inadequate and

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93 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1053 per Lord Pearce.

94 *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388 applied in *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666 per Gibbs CJ.

95 *Housing Commission of NSW v Tatmar Pastoral Co* [1983] 3 NSWLR 378 at 386; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 269. Contrast O'Loghlen, "Whether courts must give reasons for decision", (1999) 73 *Australian Law Journal* 630.

96 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230-231; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42 per Mason J.

97 cf *Sadler v Sheffield Corporation* [1924] 1 Ch 483.

98 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322.

99 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45 per Mason J.

inappropriate. On this ground alone (unless the order would be sustained by other reasoning) the appeal must succeed.

74 When the correct principles are applied, the analysis supports the appellant's complaint. Her case is not governed by a constitutional rule, in the sense of one established by s 80 of the Australian Constitution[100]. Nevertheless, at common law the jury has often been described as the "constitutional tribunal" for the determination of facts where the law provides for jury trial[101]. The approach of the trial judge in this case, and the very hasty way in which his decision was made, over objection, to deprive the appellant of her right to the verdict of a jury of twelve[102], represented in my view a miscarriage of the power. This was so because an irrelevant consideration was taken into account, and a relevant consideration ignored. The irrelevant consideration was the trial judge's repeated statement that there was "no magic in the number twelve". As I have shown, there may not be "magic", as such. But the number is supported by the plain terms of s 19 of the Act and by long legal history. Moreover, every juror presents a forensic advantage to an accused person. At least in New South Wales, the accused has only to persuade one juror to that person's side to defeat the prosecution. In the case of a female accused, the loss, as here, of a female juror (depending on the composition of the jury) could in some cases be specially relevant. Whilst it was not inappropriate for the trial judge to remember, as a matter of context, the time lost during his own absence through illness as well as the convenience of the jury and public interest in avoiding the loss of their efforts, such considerations could not obliterate the appellant's prima facie entitlement to remain in the charge of the jury selected and sworn. And to have that jury's verdict.

75 The entire proceeding described in the transcript was concluded in little more than 10 minutes. The impression is inescapable that the consideration which weighed most heavily with the judge was the earlier loss of two days. The consideration of the appellant's rights, asserted and re-asserted through her counsel, was consigned to much lower significance, if any significance at all was attached to it. No reference was made to her right. No reference was addressed to the care which should inform the exercise by a court of its power to deprive her of the voice even of a single juror in the jury room in the consideration of the

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100 *Cheatle v The Queen* (1993) 177 CLR 541; cf *R v Brownlee* (1997) 41 NSWLR 139 at 142-143.

101 *Hocking v Bell* (1945) 71 CLR 430 at 440 per Latham CJ citing *Mechanical and General Inventions Co v Austin* [1935] AC 346 at 373 per Lord Wright.

102 *Morin v The Queen* (1890) 18 SCR 407 at 415; *Newell v The King* (1936) 55 CLR 707 at 712 per Latham CJ.

verdict[103]. There is no mention of the requirement to approach the question of discharge giving weight to the primary rule established by s 19 of the Act. Nor is there a reference to the conventional criterion of necessity expressed in terms of a "high degree of need"[104]. Instead, the judge, doubtless under pressure and not greatly assisted, appears to have approached the power reposed in him upon an assumption that he had an uncontrolled power or discretion the exercise of which was not inhibited by the ordinary requirement that the jury in this criminal trial should consist of twelve persons.

76 Accordingly, both in the considerations which informed the exercise of the power and in the procedures which were adopted as well, in my view, as in the lack of attention to the making of an order under s 22, the decisions of Flannery DCJ miscarried. On the meagre materials provided, the judge was not initially empowered to discharge the absent juror. Even if he was, the decision to do so constituted an exercise of his power by reference to irrelevant considerations and a failure to exercise it by reference to those considerations which governed the decision. The precondition for the order under s 22 of the Act, to continue with the residue of the jury as the jury for the trial (assuming an order for that purpose to have been made *sub silentio*) was therefore not satisfied. The purported conduct of the trial thereafter by a jury constituted by eleven jurors, was not lawful.

No issue as to the proviso arises

77 In light of its conclusion, it was unnecessary for the Court of Criminal Appeal to consider whether relief should be given to the appellant for the objection which she raised, taking into account the substantial merits of her defence to the counts on the indictment upon which she was found guilty. In this Court, the written submissions for the prosecution contained an extended passage which submitted that, as no actual miscarriage of justice had been demonstrated, relief should be denied. Eventually, this argument did not appear to be pressed.

78 The argument cannot succeed in the light of the holding of this Court in *Maher v The Queen*[105]. In that case, by reference to the history of jury trials and the way in which an accused person is put in the charge of those constituting the jury, the Court rejected arguments that an irregularity which amounted to a failure to comply with the provisions governing the composition and procedures of the

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103 *R v Goodson* [1975] 1 WLR 549 at 552; [1975] 1 All ER 760 at 762; *Basarabas v The Queen* (1982) 2 CCC (3d) 257 at 265.

104 *R v Richardson* [1979] 1 WLR 1316 at 1318; [1979] 3 All ER 247 at 249 citing Archbold, *Criminal Pleading, Evidence & Practice in Criminal Cases*, 40th ed (1979) at §437.

105 (1987) 163 CLR 221.

jury could be overridden because there was no substantial miscarriage of justice in an otherwise strong Crown case. So far as a trial which has commenced is concerned, upon which the jurors have sworn or affirmed to enquire whether the accused be guilty or not guilty, the requirement of the law governing the constitution of the jury must be strictly followed until the jurors give their verdict and disperse again to the community. In *Maher* this Court explained[106]:

> "The provisions of the *Jury Act* and of the Code which govern the constitution and authority of the jury as the tribunal of fact in a criminal trial are mandatory, for the entitlement to trial by jury … is trial by a jury constituted in accordance with the *Jury Act* and authorized by law to try the issues raised by the plea of not guilty. A failure to comply with those provisions may render a trial a nullity, at least in the sense that the conviction produced cannot withstand an appeal: see *Crane v Public Prosecutor*[107]. In any event it involves such a miscarriage of justice as to require the conviction to be set aside. Thus, in *Reg v Smith*,[108] a trial was regarded as a nullity because a challenge for cause had been wrongly determined by the judge and not by the jurors. The converse situation arose in *Reg v Hall*[109] where the trial judge directed jurymen to try a challenge for cause when the relevant statute required the judge to try any challenge. The conviction was set aside. A similar view was taken in *Reg v Short*[110]. There a juryman was taken ill and the remaining jurymen were discharged but did not leave the jury-box. Another juryman was called and sworn but the other eleven jurymen were not resworn. Judgment against the prisoner was reversed for error on the record. Again, in *R v Dempster*,[111] when it appeared that one of the jurors while duly empanelled and chosen had not been sworn, the court directed the record to be amended by expunging all entries subsequent to the plea of not guilty."

79 As the Court held in *Maher*, so here. The verdicts, reached by residual jurors after a purported discharge of one member of the sworn jury miscarried, are not

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106 (1987) 163 CLR 221 at 233-234; cf *Katsuno v The Queen* [1999] HCA 50 at [126-137]. Exceptions may arise where the irregularity complained of was truly *de minimis* and not prejudicial to the defendant; cf *R v Alexander* [1974] 1 WLR 422; [1974] 1 All ER 539.

107 [1921] 2 AC 299.

108 [1954] QWN 49.

109 [1971] VR 293.

110 (1898) 19 LR (NSW) 385.

111 [1924] SASR 299.

the verdicts of the jury sworn to try the issues joined between the Crown and the appellant. The conviction founded on those verdicts cannot stand. It cannot be saved by the suggestion that there is no substantive miscarriage. As the decisions cited in *Maher*, and many other decisions, show, our law attaches high importance to the proper composition of the jury not only at the start but throughout a trial. It does so especially in criminal trials where the consequences can be so serious for the liberty, reputation and pocket of the accused and for society.

80 To a superficial reader of this opinion, unaware of the centuries of history and the constitutional and legal principles which inform it, this outcome may seem unmerited. But the ultimate importance of this case lies in an insistence that a power conferred by Parliament must be exercised by the donee of the power (perhaps especially if he or she is a judicial officer), by reference only to relevant, and not irrelevant, considerations. The discharge of one member from a jury having the accused person in their charge, and the action of proceeding thereafter with a jury of reduced numbers, can only be permitted where the law clearly authorises that course. The procedures provided by law must then be followed. The considerations relevant to a lawful decision – and no others – must be taken into account.

81 There was then, "magic" in the relevant sense, in a jury comprised of twelve persons. This was not because of the significance of twelve in many other contexts as the appellant's counsel suggested[112]. Nor was it relevant that the common law first hit upon twelve as an "historical accident"[113] which scholars severally contend may be traced to Roman, Saxon, Frankish or Norman origins.[114] Twelve it has long been by the common law. And twelve it now ordinarily is by the Act and by its equivalents in every Australian jurisdiction. The Act established that number as the norm. It strictly controlled derogations. It was because long history and the common law reaffirmed that approach as relevant to a judicial decision to discharge a juror. And it was because the discharge in question involved forensic disadvantages to the accused in the charge of the jury, which the accused was entitled to have properly taken into account by the judge called upon to exercise the power of discharge. The consideration ought not to have been given the short shrift that it received.

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112 As to the astonishing significance of twelve in history relied on, see Ifrah, *The Universal History of Numbers from Pre-History to the Invention of the Computer* (1998) at 92; Gullberg, *Mathematics - From the Birth of Numbers* (1998); Funk, *Word Origins and Their Romantic Stories* (1978).

113 *Williams v Florida* 399 US 78 at 102 (1970).

114 *Kingswell v The Queen* (1985) 159 CLR 264 at 299 per Deane J.

82 With every respect to those of a different view, it is not sufficient in these circumstances for courts to answer those who invoke the protection of the law with general statements. To say to them that the decision they challenge was "discretionary". That the exercise of the power was not "capricious". That the primary judge was "on the spot". That it would have been "better" if different procedures had been followed, and so on. Even where a judge's decision is discretionary, or the exercise of a judge's power involves matters of evaluation akin to discretion[115], such decisions are not put beyond legal scrutiny by reference to established rules. Restraint in appellate interference is certainly called for; but not appellate abdication. Reference to defects without relief is cold comfort for those deprived of legal entitlements who have duly recorded their objections and pressed them upon judicial decision makers. It is no solace to them to say that it would have been better if the judge's decision had not been made so hastily. That it would have been better if the judge had enjoyed more information before ordering the discharge of a juror. That it would have been better if the judge had turned his attention to the second decision contemplated by the Act. There is nothing that teaches the lessons of the law so well as an affirmative judicial order upholding an argument that has been made good by reference to established legal principles[116]. Of course, there is then a cost and inconvenience. But that is the price of the rule of law. It is a comparatively small price. It is one which we should be willing to exact in the unsatisfactory circumstances of this case.

Orders

83 The appeal should be allowed. The order of the Court of Criminal Appeal of New South Wales should be set aside. In place of that order, it should be ordered that the appeal to that Court be allowed. The conviction of the appellant should be quashed. A new trial should be had upon counts 1 and 2 of the indictment upon which the appellant was originally tried.

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115 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 75-76 per Gaudron J; *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 373 per Deane J.

116 cf *Katsuno v The Queen* [1999] HCA 50 at [130].

84 CALLINAN J. This is an appeal against the conviction of the appellant for the following offences:

> "1. On 7 June 1995 at Marrickville and elsewhere in the State of New South Wales, did detain Liang Yong Zhou with intent to hold Liang Yong Zhou for the advantage of Mei Qin Wu.
>
> 2. On 7 June 1995 at Redfern in the State of New South Wales, did attempt to administer a destructive thing, namely diamorphine, to Liang Yong Zhou with intent to murder the said Liang Yong Zhou."

85 On 16 March 1998 a trial on four counts against the appellant commenced before a judge of the District Court of New South Wales, his Honour Judge Flannery QC and a jury. The appellant pleaded not guilty to all of the counts against her.

86 Ten days into the trial, on 1 April, the trial judge was informed that one of the jurors had taken ill. His Honour intimated his intention to discharge the juror and invited submissions from the parties. The following exchange then took place in the absence of the jury:

> "HIS HONOUR: This case has had unfortunate external problems. My two days off for medical reasons, it is just taking too long. We would be unlucky. This case, even at the worst case scenario, not hearing time but actual date, we should finish the case, at the worst, early May. We would be a bit unlucky to lose three. In determining these applications to discharge a juror, I have a pretty broad brush, have I not? The message I had from the Sheriff's Officer was that she is not well today, she might not be well tomorrow. What do you say Mr Crown?
>
> CROWN PROSECUTOR: I concur with your Honour's thoughts. The most expedient method is simply to have her discharged.
>
> COUNSEL: Your Honour, I would object to that course. I do note your Honour's concerns. You seem to have a perception that the trial still might be going in May, that is not my view. I would imagine some time by about the middle of this month the trial should be about complete.
>
> HIS HONOUR: I am a bit pessimistic. Your approach, I think if I understand you correctly, is to the chain of possession, is that the sort of thing you are running?
>
> COUNSEL: As a result of what has occurred.
>
> HIS HONOUR: How many extra witnesses might that lead to?

CROWN PROSECUTOR: Six your Honour. They are only shortish witnesses.

HIS HONOUR: Short in chief.

COUNSEL: My friend says they are short in chief. I would expect that if they adhere to what I expect they are going to say, they took it somewhere, they conducted a test, they replaced it. There is not too much there I could do. I would ask your Honour, instead of discharging the person at this stage, perhaps until we find out a little more. If she is going to be off three, four days, well then yes.

HIS HONOUR: What is the magic in twelve anyhow?

COUNSEL: That is the amount which is prescribed. My concern is that one is not sure how things are going with the trial. As the trial is going on this juror, for example, might be strongly inclined to my view of things.

HIS HONOUR: Do you know which one it is Michael?

SHERIFF'S OFFICER: No sir, no. It is a female. I think it is the young girl. Her boyfriend rang in sir.

HIS HONOUR: The young girl who normally sits fourth from here.

COUNSEL: My respectful suggestion would be that we adjourn then until the position with her becomes clear. If as a result of the phone call that we expect this afternoon, if as a result of that phone call it is clear that this particular juror is going to be away for two days or something, then I would concur. My respectful submission is that we do not have her removed as it were now.

HIS HONOUR: Somebody is ringing her home. The only number that the Sheriff's Department has is the work number.

Mr Glennon, you will be protected elsewhere if it comes to that. Although it would be a difficult one I imagine. I propose to discharge the juror …"

87 The trial judge then discharged the juror and in the presence of the jury said this:

"Your colleague … is not well. Ladies and gentlemen, there is no magic in the number twelve. We can carry on with eleven. We are sorry to lose her, but it is my decision. I have the power to discharge in these circumstances. The Sheriff's Office have not got her home number. The message we got

earlier from her friend is that she is sick and it could be tomorrow or the next day. I think time is running on, so we will carry on with eleven."

88 The trial continued with eleven jurors and on 29 April the appellant was found guilty on counts 1 and 2 which I have earlier set out.

89 An appeal to the Court of Appeal was unanimously dismissed (Spigelman CJ, Abadee and Ireland JJ). Abadee J (with whom the other members of the Court agreed) concluded that an accused should not be lightly deprived of his or her right to be tried by a jury of twelve persons. His Honour regarded the matter here however as one of the exercise of a discretion. There was, his Honour thought, nothing to suggest any capriciousness in its exercise by the trial judge in discharging the juror. The bases upon which the decision was made, illness and the prospect of the juror's unavailability for the next day or two were, Abadee J thought, reasonable bases for the discretionary decision that his Honour made.

The appeal to this Court

90 The appellant's case before this Court is that it is a fundamental right of an accused to be tried by a jury of twelve persons and that any reduction in that number may only be made strictly in accordance with any statutory power to do so, and in the proper exercise of a judicial discretion.

91 It is uncontroversial that a continuing jury of twelve is much to be preferred. The *Jury Act* 1977 (NSW) ("the Act") provides that a jury is to consist of twelve persons (s 19). Section 22, which is the section which permits the relaxation of the requirement for twelve jurors in the course of proceedings is in this form:

> "Where in the course of any trial or coronial inquest any member of the jury dies or is discharged by the court or coroner whether as being through illness incapable of continuing to act or for any other reason, the jury shall be considered as remaining for all the purposes of that trial or inquest properly constituted if:
>
> (a) in the case of criminal proceedings, the number of its members:
>
> (i) is not reduced below 10,
>
> (ii) is reduced below 10 but approval in writing is given to the reduced number of jurors by or on behalf of both the person prosecuting for the Crown and the accused or each of the accused, or
>
> (iii) is reduced below 10 but not below 8 and the trial has been in progress for at least 2 months,

…

and if the court or the coroner, as the case may be, so orders."

92 The appellant's primary submission was that s 19 of the Act raised a statutory presumption of the critical importance of a jury of twelve persons and that more powerful reasons than those given by Flannery DCJ to justify the reduction in the number were required. Section 19 provides as follows:

> "The jury in any criminal proceedings in the Supreme Court or the District Court is to consist of 12 persons returned and selected in accordance with this Act."

93 The appellant contends, in effect, that there is a particular significance (independent of any statutory requirement for it) in the constitution of a jury by twelve persons. Much of the history of the constitution of juries was recently surveyed by Grove J in *R v Brownlee*[117].

94 The starting point is widely, but not universally, regarded as being the reforms of Henry II, just 100 years after the Norman invasion of England. A new procedure was then instituted for bringing accused persons to trial. Twelve knights, (or failing them, twelve good and lawful men) were to be summoned and sworn to present for trial those persons who had been guilty of felony.

95 But, as Windeyer[118] points out, this was not strictly the origin of *trial* by jury. It was associated with the "ordeal", consisting as it did of the subjection of the alleged felon to one of the four methods of trial then prevailing in England, of fire, hot water, cold water and the morsel (which would stick in the accused's throat if he or she were guilty). The ordeal was abolished in 1215. Before 1215, an accused might be tried by a jury but could not be compelled so to submit. An election could be made for trial by ordeal. Because the jury consisted of twelve jurymen drawn from the county in which the case arose and who had pre-existing knowledge of the case, there were cases in which an accused might well have thought himself or herself to have a better chance of exoneration as a result of the ordeal. The jury verdict was thought at first to be a substitution of the voice of the country for God's voice, which spoke through and by the outcome of the ordeal.

96 The appellant here collected a range of interesting historical, superstitious, commercial and religious usages of the number twelve: for example, the Twelve Tables, the celebrated body of Roman Law; the twelve apostles; a year of twelve months, and the unit of twelve as the basis of the Imperial system of

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117 (1997) 41 NSWLR 139.

118 *Lectures on Legal History* (1938) at 59-61.

measurement and currency. The reason for a jury of twelve, according to Sir Patrick Devlin[119], was that it was sufficient to create a formidable body of opinion in favour of the side that won, and Forsyth's *History of Trial by Jury* explains the importance of a unanimous verdict of twelve jury members[120]. As interesting as these historical allusions may be, they have nothing to say about the construction and application of the Act.

97 In *Brownlee*, Grove J concluded that there was no historical or legal warrant for concluding that in trial by jury there inheres a concept that it must consist of an immutable number of twelve persons. Section 22 of the Act gives statutory effect to that view in appropriate circumstances.

98 The appellant accepts, as she must, that s 22 did confer a discretion upon the trial judge to discharge a juror. She urges however that the discretion miscarried for these reasons.

99 It is submitted that the trial judge should not have been influenced by the fact that he had had "two days off for medical reasons". The second is that his Honour discharged the juror without making a more energetic and thorough attempt to discover the nature of the juror's illness and the length of time for which she might be absent and because no adjournment was had to enable further enquiries to be made. There was, therefore, the appellant submits, only the vaguest of information concerning the juror's prognosis and probable absence.

100 I would accept that a trial judge's absence for two days for medical reasons might not of itself be a sufficient reason for the discharge of a juror in ordinary circumstances. But in the whole of the context of the case, the time that it had so far taken, the expense incurred, its likely further duration and the further loss that the absent juror's absence might entail, I cannot regard his Honour's unavailability for medical reasons for two days as an entirely irrelevant matter.

101 No doubt it would have been better if more details of the juror's indisposition had, if they could have been, ascertained. So too the case would have been clearer had it been possible to form a definite view of the likely duration of the juror's absence. However the discretion conferred by the section is a wide one. In *United States v Fajardo*, Kravitch J said[121]:

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119 *Trial by Jury* (1956).

120 (1852) at 196ff.

121 787 F 2d 1523 at 1526 (1986). See also *United States v Peters* 617 F 2d 503 (1980); *United States v Shelton* 669 F 2d 446 (1982); *Basarabas v The Queen* (1982) 2 CCC (3d) 257.

> "… the decision to excuse a disruptive juror is reviewed only for abuse of discretion because the degree of disruption is gauged better by first-hand impressions rather than the review of a cold record."

102 An examination of the exchanges between the trial judge and counsel at the trial shows that the trial judge was giving effect, and not improperly so, to first hand impressions, of matters which were of relevance. In short the appellant has not established that the trial judge's discretion miscarried.

103 I need only make this further observation. It is appropriate that a trial judge, confronted with a situation in which he or she has to make a decision about a reduction in the number of jurors not do so hastily, without as full an inquiry as is practicable and reasonable, and without making explicit orders as s 22 requires, as to the reduction in number and the continuation of the trial with the reduced number. Adherence to such a procedure (which the Act demands) has the effect not only of ensuring an unambiguous record of what has taken place but also of focussing the trial judge's attention upon the necessity to weigh up whether a juror's or jurors' absence should require the trial to be aborted or whether it should continue with the reduced number. Here I take what Flannery DCJ said and ruled to involve at least implicitly consideration of, and orders covering these matters. This was not therefore a case of the kind considered in *Maher v The Queen*[122] where what occurred was directly relevant to and affected the constitution and the authority of the jury trying the case contrary to the statutory provisions governing these matters.

104 I would dismiss the appeal.

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122 (1987) 163 CLR 221.