SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gately* [2010] QCA 166
PARTIES:	**R** **v** **GATELY, Darren James** (appellant)
FILE NO/S:	CA No 4 of 2010 SC No 612 of 2009 SC No 621 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	2 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2010
JUDGES:	Holmes and Muir JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – PARTIALITY – where appellant convicted of murdering his father – where, at the commencement of the trial and after receiving the general direction to deal with the matter dispassionately, juror communicated a concern to the trial judge – where juror's grand-daughter had been killed by her boyfriend in the course of a domestic relationship – where juror had not had contact with her grand-daughter for some time – where primary case and her grand-daughter's case dissimilar – whether a fair-minded and informed person might apprehend or suspect that bias existed – whether trial judge misapplied the *Webb* test – whether conclusion that test not met reasonably open to the trial judge CRIMINAL LAW – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – APPLICATION OF PROVISO TO PARTICULAR CASES – where juror communicated a concern to the trial judge – where trial judge adjourned the court to meet with the juror in his chambers to

ascertain the substance of the concern – where defence counsel had acceded to that procedure – where the procedure caused a momentary breach of s 617 of the *Criminal Code* 1899 (Qld) which mandates that "the trial must take place in the presence of the accused" – whether this breach amounts to such a serious departure from the essential requirements of the law that it goes to the "root of the proceedings" – whether a breach of s 617 precludes the application of the proviso

Criminal Code 1899 (Qld), s 590AB, s 617, s 688E

AK v Western Australia (2008) 232 CLR 438; [2008] HCA 8, considered
Evans v The Queen (2007) 235 CLR 521; [2007] HCA 59, cited
Gazepis v Police (1997) 70 SASR 121; [1997] SASC 6813, considered
R v Bryer (1994) 75 A Crim R 456, cited
R v Bujora [2001] QCA 310, considered
R v Collie (2005) 91 SASR 339; [2005] SASC 148, considered
R v Cornwell [2009] QCA 294, cited
R v DAJ [2005] QCA 40, considered
R v East (2008) 190 A Crim R 225; [2008] QCA 144, considered
R v HAU [2009] QCA 165, considered
R v K; ex parte A-G(Qld) (2002) 132 A Crim R 108, [2002] QCA 260, considered
R v TQ (2007) 173 A Crim R 385; [2007] QCA 255, considered
Rabey v The Queen [1980] WAR 84, considered
Thomas v The Queen (No 2) [1960] WAR 129, considered
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, applied

COUNSEL: R East for the appellant
M Cowen for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant was convicted after a trial of the murder of his father. The substance of the Crown case was helpfully and succinctly set out in the submissions of the appellant's counsel:

> "The appellant and his sister claimed that their father had sexually abused them when they were children. Inflamed by alcohol and his sister's drunken but doubtful revelations, the appellant armed himself

> with a knife. Bent on revenge he began a search for his father. During that search he made statements such as 'I'm going to kill him'. It was alleged that after finding his father he stabbed him, cut his throat and beat him to death. When approached by police shortly after it was said that he stated, 'I've murdered him. He's dead. He's dead. He's a dirty paedophile. He deserves to die.'"

Counsel for the appellant conceded that it was a strong case. The conviction was challenged on grounds concerning communications between the trial judge and a juror which resulted in the judge's decision not to discharge the juror.

The communication with the juror and the decision not to discharge her

[2] The circumstances were that after the jury was sworn in, but before the Crown opened its case, the juror communicated a concern to the trial judge through a note written either by herself or by the bailiff. His Honour read it out to counsel in the absence of the jury; it was in these terms:

> "One of the jurors – number 26 – juror number 6, her daughter was recently murdered. The trial is to start in Brisbane next year. She has said she doesn't think that it would be a problem in terms of her serving as a jury in – a juror in this trial."

[3] The learned judge asked counsel for their submissions. Defence counsel objected to the juror's continuing on the jury. Some discussion about the test laid down in *Webb v The Queen*[1] ensued. Defence counsel submitted that, given the juror's close personal connection to a trial to be conducted in the following year involving her daughter's murder, there was a reasonable apprehension of bias on her part, because of her prospective emotional response to a trial involving an accused alleged to have murdered his father. The learned judge pointed out that it was not known what the relationship between the juror and her daughter was. He went on to say that he would adjourn and speak to the juror in his chambers to see if he could elicit more detail. Defence counsel acceded to that course.

[4] When court resumed, the learned judge put the following details before the court:

> "Well I spoke to the juror concerned. It is in fact a grand-daughter not a – a daughter. And the trial is likely to proceed early in the new year. She was a little unsure. It – the events happened on – I think in the Warwick area so it's probably likely to proceed in Toowoomba. She won't be involve[d] in the trial and – as a witness or anything like that. She hadn't seen the girl for a couple of years since she had left home. And her boyfriend is charged with bashing – with causing her death by bashing her. So she – and she tells me that she thought she should raise the matter but didn't think it would affect the way in which she approached the matter here as a juror."

[5] Defence counsel said that he could not advance his argument any further, but he maintained his submission that the juror's deliberations might be affected by those circumstances. The learned judge ruled against him in the following terms:

> "Well I suppose all – well life's experiences might have some impact upon the way each juror approaches the matter. The – the – one of

---

1 (1994) 181 CLR 41.

> the jurors has informed the Court that she is the grandmother of a – a young woman who was killed and whose boyfriend is charged with her [murder]. She had not seen the grand-daughter for a couple of years or so since she had left home. The juror concerned has informed me in a discussion in my Chambers that she does not consider that these matters would affect her impartiality or her capacity to act as a juror in accordance with her oath.
>
> The test to be applied is that laid down by the High Court in Webb and the Queen … namely whether the facts that I have outlined give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror concerned has – would not discharge her oath impartially. I'm not persuaded that this test has been met. In fact put in the positive I – I think there is reason to positively conclude that she would discharge her task impartially. In these circumstances I decline to discharge the juror concerned."

[6] The grounds of appeal against conviction were that the learned trial judge erred in refusing to discharge the juror, resulting in a miscarriage of justice, and that the private communication between the juror and the trial judge after the juror had been sworn amounted to a fundamental irregularity giving rise to a miscarriage of justice.

Should the juror have been discharged?

[7] The relevant test as set out in *Webb* is "whether a fair-minded and informed person might apprehend or suspect that bias existed". The trial judge's opinions and findings are, however, not irrelevant:

> "The fair-minded and informed observer would place great weight on the judge's view of the facts. Indeed, in many cases a fair-minded observer would be bound to evaluate the incident in terms of the judge's findings." [2]

[8] The appellant submitted that the fact that the juror herself had raised a concern at a stage after the jury had been informed of the need for impartiality could itself give rise to a reasonable apprehension of partiality. Both the killing of the juror's grand-daughter and the appellant's trial raised questions of a murder in a familial context, in each case involving a brutal bashing. A fair-minded person might apprehend that such a case would arouse strong emotions in the juror, and perhaps antagonism towards the accused, while her fellow jurors might be overly sensitive to her feelings in their reasoning about the case. The case itself was one in which photographs of the deceased were described as "pretty grisly", of a kind likely to excite revulsion.

[9] The learned judge, it was suggested, had erroneously considered the matter by reference to the juror's own assessment of her capacity to act impartially: that was evidenced by his statement that he thought there was "reason to positively conclude that she would discharge her task impartially". Unlike what was done in *Webb*,[3] no specific direction was addressed to the juror cautioning her to consider the case dispassionately and objectively. In the present case, the trial had not advanced very

---

2 At 52.

3 At 56.

far. To discharge the juror would not have created any real inconvenience; and the charge, of course, was the most serious in the criminal calendar.

[10] I do not think there is any warrant for supposing that the learned judge misapplied the *Webb* test. His Honour referred to the relevant fact that the juror was not in close contact with the grand-daughter who was killed, and took into account, as was rational, the juror's own belief that she could act as an impartial juror. Having identified those features, he applied the *Webb* test and expressed himself unpersuaded that it had been met. His subsequent expression of some confidence that the juror would discharge her task impartially may well have reflected his view of the juror's conscientiousness in coming forward; but it does not mean that he misapplied the test. The appellant has not identified any error of principle on his Honour's part.

[11] Nor has it been demonstrated that the view the learned judge took was not open. As his Honour pointed out, the juror had not, for some time, been in contact with her grand-daughter. Apart from the fact that there were two violent deaths involved, the cases were not otherwise similar: the present case involved a son killing his father in revenge, whereas that involving the juror's grand-daughter seems to have been a killing in the course of a domestic relationship. The seriousness of the charge and the relative lack of difficulty which would result from discharging the juror were not considerations which could affect the fundamental question of whether the juror could proceed impartially. The fact that the juror was not given a specific direction was not directly relevant to the appeal ground but, in any case, the general directions to the jury to deal with the matter dispassionately were entirely adequate.

[12] The judge's decision in such a case is,

> "… a discretionary judgment in the sense that it involves a value judgment. Where no error of principle is involved, an appellate court is naturally slow to substitute its opinion for the trial judge's opinion."[4]

Here, no error of principle has been established; and the learned judge's conclusion as to the juror's impartiality was reasonably open to him. This ground of appeal must fail.

Whether the communication between the judge and juror gave rise to a miscarriage of justice

[13] The procedure adopted here was unusual. The more normal course where a juror wishes to raise a concern of the kind involved here is for the juror to approach the bench and speak to the judge, usually in a way which is not audible to the parties. The appellant's counsel pointed out that such a course enabled matters to be dealt with without embarrassment to the juror concerned, while enabling the parties to assess the juror's demeanour and gain some impression, at least, of the extent of the communication. In the present case, however, the procedure had been conducted in the trial judge's chambers. There was a risk other members of the jury might have thought that the need for a private discussion arose from some concern about the accused.

---

[4] At 53-54.

[14] It was contended that the requirement of s 617(1) of the *Criminal Code* 1899 (Qld), that the accused be present for his trial, was so fundamental that its breach had produced a mistrial, requiring the setting aside of a conviction and verdict. Section 617 is in the following terms:

> "**617 Presence of accused**
>
> (1) Subject to this section the trial must take place in the presence of the accused person.
>
> (2) If an accused person so conducts himself or herself as to render the continuance of the proceedings in the person's presence impracticable, the court may order the person to be removed and may direct the trial to proceed in the person's absence.
>
> (3) Where 2 or more accused persons are charged in the 1 indictment, if it is made to appear to the court that any of them is unable to be present by reason of the person's illness or infirmity, the court may permit the person to be absent during the whole or any part of the trial if it is satisfied—
>
> (a) that the interests of the accused person will not be prejudiced by the trial proceeding in the person's absence; and
>
> (b) that the interests of justice require that the trial should proceed in the person's absence.
>
> (4) The court may in any case permit a person charged with a misdemeanour to be absent during the whole or any part of the trial on such conditions as it thinks fit.
>
> (5) If an accused person absents himself or herself during the trial without leave, the court may direct a warrant to be issued to arrest the person and bring the person before the court forthwith."

[15] Counsel for the respondent did not dispute that what had occurred was a contravention of s 617. His argument was that the irregularity was minor and had not produced any miscarriage of justice. At the worst, the case was one for the application of the proviso to s 668E.

[16] That leads to a consideration of whether this was an error so fundamental as to be beyond the application of the proviso, notwithstanding that there is no reason to question the correctness of the jury's verdict. In *Wilde v The Queen*[5] Brennan, Dawson and Toohey JJ said this of the proviso's applicability:

> "The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso … .
>
> There is no rigid formula to determine what constitutes such a radical or fundamental error. It may go either to the form of the trial or the

---

5 (1988) 164 CLR 365 at 373.

> manner in which it was conducted. There are those cases which identify irregularities which are sufficient to vitiate a trial and afford a basis for a writ of venire de novo. They are concerned more with the form of the trial but even in that area they provide no real touchstone for determining when an irregularity is so serious as to cause a mistrial … But the wording of the proviso is quite general and it is clear that it may be applied notwithstanding a misdirection concerning the law or the wrongful admission of evidence. In the end no mechanical approach can be adopted and each case must be determined upon its own circumstances." (citations omitted.)

Gummow and Hayne JJ observed in *Evans v The Queen*[6] that the High Court had not

> "… authoritatively decided what kind of departures from essential requirements may be said to go to 'the root of the proceedings'."

[17] In *Weiss v The Queen*[7] the question was couched in these terms,

> "… whether some errors or miscarriages of justice occurring in the course of a criminal trial may amount to such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso."

The question here is whether the conduct of the trial (albeit briefly), in the appellant's absence was per se such a "fundamental error" or "serious breach of the presuppositions of the trial" as to exclude the proviso's application, or whether the proportions of the irregularity and the circumstances in which it occurred may be properly considered in arriving at a view of its significance.

[18] In South Australia, where there is no statutory equivalent of s 617, the exclusion of a defendant from his trial has not been held necessarily to constitute a fatal irregularity; rather, assessment has been undertaken of the infringement of the accused's right to be present and its effect on the fairness of the trial. In *Gazepis v Police*,[8] Doyle CJ, delivering the leading judgment, expressed some concerns about the potential for erosion of the accused's right to be present at a trial if the effect on the case's outcome were used as the criterion for determining whether the trial had been vitiated. On the other hand, he had sympathy for the view that not every infringement of the right should be regarded as vitiating the trial. In the case before him, a magistrate had asked the defendant to leave the court while he rebuked his counsel for interjecting. It was, the Court held, a clear irregularity; but its effect on the defendant's ability to exercise his rights was sufficiently minor to enable a conclusion that the fairness of the trial was not affected.

[19] In *R v Collie*,[9] Duggan J, with whose reasons Doyle CJ and Vanstone J agreed on this point, said that the question whether a breach of the general rule that an accused person must be present for his trial automatically vitiated the trial was linked with a consideration of whether the proviso could be applied. There was authority for the

---

6 (2007) 235 CLR 521 at 533.
7 (2005) 224 CLR 300 at 317.
8 (1997) 70 SASR 121.
9 (2005) 91 SASR 339.

proposition that the degree of irregularity was a relevant circumstance to be taken into account. In that case, the exclusion of the appellant while his co-accused's application for separate trials was heard resulted in a ruling which was, in fact, in his favour. The court concluded that no substantial miscarriage of justice had resulted.

[20] Counsel for the respondent here relied on *Thomas v The Queen (No. 2),*[10] a decision of the Court of Criminal Appeal of Western Australia. That case concerned s 635 of the Western Australian Criminal Code which, like s 617, provided:

> "The trial must take place in the presence of the accused person ..."

The accused claimed that he had been absent from the dock when a redirection was given to the jury. The Court found as a fact that he had been present in the court for the redirection, but went on to say that even if it had concluded differently, it would not have upheld the appeal. It rejected the argument that a failure to comply strictly with the requirements of s 635 rendered the whole trial a nullity. There were common law authorities to the effect that not every irregularity of the kind would justify the quashing of a conviction; the question was whether the departure from proper procedure was one which went "to the root of the case".[11]

[21] After referring to s 689(1) of the *Criminal Code* 1913 (WA) (the equivalent of s 688E of the *Criminal Code* (Qld)) as to the grounds on which an appeal could be allowed, the Court in *Thomas* continued:

> "It may well be that any breach of a mandatory provision of the Code, such as s. 635, should properly be regarded as a miscarriage of justice in the sense necessary to open the way to an appeal under s. 689(1). But we are not prepared to hold that every such breach, that is to say any absence of an accused person, by whatever mischance it may have occurred, for however short a time, and at whatever stage of the trial, must inevitably result in his subsequent conviction being quashed. In our view, the proper approach is to examine the circumstances of his absence and consider what then occurred and whether by any possibility his defence could have thereby been prejudiced or his chances of conviction increased. If neither of these could have followed then his appeal should not be allowed. This really amounts to an application of the proviso to s. 689(1) and to holding that no substantial miscarriage of justice has actually occurred."[12]

The appellant's claimed absence could not have prejudiced his defence or affected the trial's result; accordingly, had the Court found the facts in his favour, it said, it would still have refused to quash his conviction.

[22] Observations in *Rabey v The Queen*,[13] another case from Western Australia, also suggest that the seriousness of the breach of the requirement may be relevant to its effect. In that case, the jury had sent the trial judge a note inquiring about some evidence, to which he responded with a handwritten answer quoting from the transcript of the evidence. Burt CJ held on another ground that the appeal should be

---

10 [1960] WAR 129.
11 At 136.
12 At 136.
13 [1980] WAR 84.

allowed, but observed that the communication had offended against two rules: the first (given statutory effect in s 635 of the *Criminal Code* (WA)), that a person charged with a criminal offence had a right to be present and to hear all that the trial judge had to say to the jury in directing them, and the second, that a court exercising criminal jurisdiction must sit in public. In considering the application of the proviso, whether such an irregularity had an effect on the verdict might not be decisive; the more significant question was whether there was "a serious departure from essential requirements of the law".[14] Lavan SPJ and Wickham J agreed with what Burt CJ had said about the proviso, but found it unnecessary to consider any miscarriage of justice entailed in the procedure adopted, because the note given to the jury was incomplete and misleading, that fact of itself producing a miscarriage of justice.

[23] A consideration of the approach taken in Queensland can begin with *R v Bujora*,[15] a case in which the appellant had been permitted to absent himself from his trial to seek medical attention while his counsel (who had no objection to that course of action) continued to cross-examine witnesses about generally uncontroversial matters. The Court observed that nothing suggested that a fair trial was put at risk through that irregularity and dismissed the appeal. It should be noted, however, that the appellant in that case was unrepresented and did not draw the Court's attention to any relevant authority.

[24] In *R v K; ex parte A-G (Qld)*[16] (which counsel for the respondent sought to distinguish as involving a much more significant irregularity), the jury, while deliberating, made an inquiry about the law through the medium of the bailiff. The trial judge conveyed his direction on the point, again through the bailiff, who entered the jury room and recited the judge's response to the jury. That was, this Court held, a contravention of s 617. McPherson JA said this:

> "Quite apart from the confusion that may have been engendered in transmitting the communication between judge and jury concerning their verdicts, the principles laid down in s 617 and s 620 of the Code are so fundamental as to produce a mistrial and to require that the conviction and verdicts in this case be set aside. It is a defect that cannot be cured by the acquiescence of counsel or by the application on appeal of the proviso to s 668E of the Code."

(Section 620 of the *Criminal Code* imposes a duty on the trial judge to instruct the jury as to the law applicable to the case.)

[25] Mackenzie J agreed that the appeal should be allowed, but not on the basis identified by McPherson JA. He regarded the redirection, which was on the need for unanimity, as related to so fundamental an issue that the procedure the learned trial judge adopted to inform the jury about it caused the trial to miscarry. Neither s 54 of the *Jury Act* 1995 (Qld), nor its predecessor, s 621 of the *Criminal Code*, which concerned the bailiff's powers to communicate with the jury, permitted such a procedure. The third judge in *R v K*, Atkinson J, agreed with the reasons of both McPherson JA and Mackenzie J.

[26] In *R v DAJ*,[17] the appellant succeeded on an appeal against conviction because prejudicial evidence had been introduced into the trial through unfair cross-

---

14 At 88.
15 [2001] QCA 310.
16 [2002] QCA 260.
17 [2005] QCA 40.

examination of him. The court did not accept that the appellant had made out another aspect of his complaint of prejudice, which concerned the jury's having seen him struggle with a police officer taking him into custody. There was, however, a consequence of that event which also constituted a ground of appeal. The day after the contretemps, because of the appellant's unsatisfactory behaviour of the preceding day, the trial judge ordered that he be held in the cells while he addressed the jury about the need to consider whether they could proceed impartially. The consequence was that the trial was conducted in the appellant's absence for five minutes. As McMurdo P observed, the case did not fall within the exceptions set out in s 617(2). She concluded:

> "The unlawful exclusion of the appellant from the court room strikes at his constitutional democratic right to be present at his trial on these serious offences of a sexual nature. This error of law was so fundamental to the criminal trial process that it invalidated the whole trial and in itself requires that the appeal be allowed, the convictions set aside and a retrial ordered."[18]

Jerrard JA, on the other hand, regarded the learned judge's actions as a proper maintenance of control of the proceedings and the courtroom[19]. Mackenzie J, noting that the circumstances in which proceedings could be conducted in an accused's absence were very limited, preferred to leave the question for future decision.[20]

[27] In *R v TQ*,[21] the jury was permitted to replay video recordings of a child complainant's police interview and her cross-examination in the courtroom in the bailiff's presence, but in the absence of the trial judge, counsel and the accused. Counsel had intimated they did not wish to remain while the tapes were played and it was, apparently, considered unnecessary that the appellant be present. The result, this Court concluded, was that part of the trial had taken place in the absence of the appellant. Jerrard JA observed that it was very unlikely that there had been any miscarriage of justice resulting from the breach of s 617(1), but it was nonetheless a "breach of a fundamental requirement for the process of conducting a criminal trial".[22] He referred to the remarks of McPherson JA in *R v K* and of the President and Mackenzie J in *R v DAJ,* concluding that the appellant had strong grounds to have the conviction set aside on the ground of the contravention of s 617(1). As it happened, other necessary directions had not been given, requiring the setting aside of the conviction in any event. Williams JA agreed with the reasons of Jerrard JA. Mullins J expressed the view that the breaches of s 617 and 620 of the *Criminal Code* in *R v K* were far worse than the breach of s 617 in the appeal before her. Consequently she would have considered the application of the proviso, but for the other identified errors.

[28] In *R v East*,[23] the unrepresented appellant had been removed from the courtroom for disruptive behaviour. In his absence, the Crown called three witnesses. The trial judge refused the appellant's application to have them recalled for cross-examination. Keane JA, with whom the other members of the court agreed,

---

18 At [6].
19 At [44].
20 At [51-52].
21 [2007] QCA 255.
22 At [35].
23 [2008] QCA 144.

considered that an error. He referred to s 616 of the *Criminal Code* (which entitles an accused to make his defence and have witnesses examined and cross-examined) and s 617(1) as recognising fundamental procedural entitlements of the accused "to participate in his or her trial and to confront his or her accusers".[24] Section 617(2) permitted that entitlement to be qualified where the accused's conduct would frustrate the processes of justice, but any permitted qualification was confined to what was necessary to preserve the trial process. The denial of the accused's entitlement to address the case against him was "inconsistent with an essential aspect of the criminal trial"[25] and went beyond what was necessary.

[29] That led to a consideration of whether the proviso could be applied. Keane JA referred to what was said in *Wilde v The Queen* as to errors so fundamental that they produced a miscarriage of justice by their very nature, excluding the application of the proviso, regardless of the strength of the case. He observed that the right of an accused to be present at his trial and to cross-examine was a fundamental assumption on which the due administration of criminal justice depended. Referring to *R v K* and *R v TQ,* Keane JA said that the denial of such a right was a defect of a kind which in those cases the court had regarded as beyond the reach of the proviso. Of s 616 and s 617, he said:

> "These provisions state, in mandatory terms, essential requirements of due process in relation to the trial of a criminal charge. These requirements are subject, of course, to statutory exceptions, such as that contained in s 617(2), but such exceptions must be applied so as to detract from the statutory requirements of due process no more than is necessary in order to preserve the efficacy and integrity of the trial process."

The denial of the right to cross-examine and the disadvantage caused to the appellant by his lack of representation in circumstances which, had he been granted an adjournment he had sought, he could probably have succeeded in securing legal representation, had resulted in a trial not conducted according to law. Although the case was strong, the proviso could not be applied.

[30] Some assistance can also be obtained from the approach taken in cases concerning breaches of the obligation which s 590AB of the *Criminal Code* imposes on the prosecution to provide disclosure. In *R v HAU*,[26] Keane JA, delivering the leading judgment, described the prosecution's obligations under s 590AB as of "fundamental importance to a fair trial of a charge on indictment".[27] He referred to *R v Bryer*[28] for the proposition that non-compliance with the disclosure obligations were such a serious breach of the fundamental requirements of the trial as to deny the application of the proviso, at least where the non-disclosure "might well have influenced the result of the trial". The loss of the opportunity to cross-examine the complainant caused by the Crown's breach of its obligations was not illusory, and went to the root of the fairness of the trial, so that there was no room for the application of the proviso. That approach of assessing whether the breach might have made a difference to the verdict, with an affirmative answer precluding the application of the proviso, was applied in *R v Cornwell*.[29]

---

24 At [76].
25 At [77].
26 [2009] QCA 165.
27 At [36].
28 (1994) 75 A Crim R 456 at 478.
29 [2009] QCA 294.

[31] The right of the accused to be present at his trial is fundamental, whether or not it is statutorily prescribed, but it is of some significance that that the legislature in Queensland has seen fit to give it legislative force. However, there is reason to think that the statutory character of the right may not, of itself, necessitate a conclusion that any breach of it will fall outside the application of the proviso. Two decisions of the High Court concerning provisions in New South Wales and Western Australia, requiring a judge trying criminal proceedings without a jury to give reasons in a particular form,[30] offer some support for that view. In *Fleming v The Queen*,[31] the trial judge had failed to include in his judgment reference to a necessary warning. The High Court observed:

> "There may be cases where the failure to satisfy the requirements of s 33 involves errors that are so trivial that the Court of Criminal Appeal may conclude that there has been a trial according to law, notwithstanding that failure."[32]

In that case, however, the subject matter of the warning was so important that the miscarriage of justice was substantial and the proviso could not be applied.

[32] In *AK v Western Australia*,[33] the breach was of the statutory duty to give reasons. Gummow and Hayne JJ identified two crucial features of the failure: it was a statutory requirement that there be reasons for decision meeting certain criteria; and the failure related to the central issue that was tried. That amounted to a substantial miscarriage of justice, precluding the application of the proviso. Heydon J, reaching a similar view, referred to the importance of the requirement in the circumstances of the case and the extent of its breach in concluding that the proviso should not be applied. The error was, in the words used in *Wilde v The Queen*,

> "a sufficiently 'serious breach of the presuppositions of the trial' to go to 'the root of the proceedings'."[34]

[33] Having undertaken this review of the cases, my conclusion is that it is not every departure from the requirement that the accused be present, however minor, that amounts to fundamental error of the kind identified in *Wilde.* I do not think McPherson J in *R v K* , in speaking of the fundamental principles in ss 617 and 620, was saying that every breach of those sections must produce a mistrial, but rather that the breaches in that case had. Notwithstanding dicta in some of the other cases which might suggest a more stringent view, the weight of authority suggests that it is proper to have regard to the extent of the breach and its implications for the fairness of the trial in order to consider, in accordance with *Wilde*, whether what happened was "such a departure from the essential requirements of the law that it goes to the root of the proceedings".

[34] The irregularity in the present case was minor in its proportions. The substance of what was discussed between the judge and juror was immediately communicated to counsel, who had acceded to the procedure. Although it was suggested that the procedure adopted might have influenced other members of the jury to think that it

---

30 Section 120(2) *Criminal Procedure Act* 2004 (WA) and s 33, subsequently renumbered as s 133(3) *Criminal Procedure Act* 1986 (NSW).

31 (1998) 197 CLR 250.

32 At 265.

33 (2008) 232 CLR 438.

34 At 482.

was attributable to some concern about the accused, that seems improbable; and certainly the juror herself, if asked about it by the other members of the jury, could have disabused them of any such notion. It is fanciful to suppose that it caused any disadvantage to the accused.

[35] There was not such a departure in this case from the essential requirements of the law as to deprive the appellant of a fair trial. The irregularity was not one so serious or fundamental as to preclude the application of the proviso. I would conclude that no substantial miscarriage of justice actually occurred, and on that basis would dismiss the appeal.

[36] **MUIR JA:** I agree that the appeal should be dismissed for the reasons given by Holmes JA.

[37] **McMEEKIN J:** This appeal against conviction should be dismissed for the reasons given by Holmes JA.