SUPREME COURT OF QUEENSLAND

CITATION:	*Knight & Ors v The Queen* [2013] QCA 144
PARTIES:	**MARK DEMPSEY KNIGHT** (first appellant) **WESLEY ROBERT WILLIAMS** (second appellant) **WAYNE THOMAS ROBERTSON** (third appellant) **v** **THE QUEEN** (respondent)
FILE NO/S:	Appeal No 12358 of 2012 SC No 188 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2013
JUDGES:	Muir JA and Boddice and Jackson JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – JURIES – OTHER MATTERS – where the appellants were convicted of murder of another inmate following a retrial – where the appellants' criminal histories were only tendered during the sentencing hearing – where no member of the jury was present in Court during the sentencing hearing – where, 19 days after verdict, a jury member told his hairdresser that the outcome of the trial "wouldn't make a difference as they were already serving life terms or long terms of imprisonment" – where details of the appellants' criminal histories were available online during the course of the trial – where the trial judge repeatedly directed the jury not to make investigations of their own – where the appellants' criminal histories were widely broadcast after sentence – where the primary judge refused the appellants' application to investigate suspected jury bias, fraud or offence pursuant to s 70(7) of the *Jury Act* 1995 (Qld) – whether there are grounds to suspect that the

juror may have been guilty of bias, fraud or offence – whether an investigation of the suspected bias, fraud or offence should be authorised

Jury Act 1995 (Qld), s 69A, s 70(7)

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross & Ors (2012) 87 ALJR 131; [2012] HCA 56, considered
George v Rockett (1990) 170 CLR 104; [1990] HCA 26, considered
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
Hussien v Chong Fook Kam [1970] AC 942; [1969] 3 All ER 1626; [1969] UKPC 26, considered
R v Ferguson; Ex parte Attorney-General (Qld) (2008) 186 A Crim R 483; [2008] QCA 227, cited
R v Glennon (1992) 173 CLR 592; [1992] HCA 16, considered
R v Knight & Ors [2010] QCA 372, related
R v Knight & Ors [2012] QSC 397, related
R v Lacey; ex parte A-G (Qld) (2009) 197 A Crim R 399; [2009] QCA 274, cited
R v Martin & King [1999] QCA 366, considered
R v Sewell [1994] QCA 586, cited
R v VPH, unreported, Court of Criminal Appeal, NSW, CA No 60599 of 1993, 4 March 1994, considered

COUNSEL: G McGuire for the first appellant
P Davis SC, with D Lynch, for the second appellant
J Fraser for the third appellant
D C Boyle for the respondent

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

[1] **MUIR JA**: **Introduction** The appellants appeal against an order of a judge of the trial division of the Supreme Court dismissing an application by the appellants pursuant to s 70(7) of the *Jury Act* 1995 (Qld) (the Act) seeking orders:[1]

> "1. That an investigation of suspected bias or the commission of an offence related to the membership of the jury, or the performance of functions as a member of the jury, that returned verdicts of guilty against the applicants be undertaken; and
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> 2. That the seeking and disclosure of jury information for the purposes of that investigation is permitted."

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1 *R v Knight & Ors* [2012] QSC 397 at [1].

Relevant factual background

[2] After a trial in the Supreme Court in Brisbane, the appellants, all inmates of the Rockhampton Correctional Centre, were convicted, on 2 April 2012, of killing another inmate. The deceased's body was found hanging in a shower cubicle late on the day of the alleged murder. The prosecution alleged that the appellants assaulted and killed the deceased in the shower block.

[3] The prosecution case was circumstantial. No witness claimed to have seen the actual killing. A number of prisoners gave evidence of having seen the appellants assault the deceased in the shower block at lunchtime on the day of the killing. The prison officer in charge of the subject prison block gave evidence that he counted all prisoners alive and well shortly after 5.00 pm.

[4] During the trial, although the prisoner witnesses were asked by the prosecutor why they were in custody in 1999 and most were cross-examined about their criminal records, there was no evidence about the prior criminal record of any appellant or as to why he was in custody.

[5] The appellants were sentenced after the return of the guilty verdicts. On the sentencing hearing, the criminal record of each appellant was tendered. It is common ground that no member of the jury was present in Court during the sentencing hearing.

[6] Knight had a prior conviction for the murder of another prisoner whilst in custody in NSW. Williams had a prior conviction for manslaughter, having killed a person with an iron bar when stealing money from him. He was serving sentences for assaulting other prisoners at the time of the subject offence. Robertson had prior convictions for assault and drug offences.

[7] The appellants had been convicted of murder on an earlier trial in Rockhampton. Those convictions were set aside on appeal.[2] There had been extensive media coverage of the first trial in the local press, including publication of the details of the appellants' respective criminal histories. That publicity included details of Knight's prior offending and disclosed Williams' manslaughter and assault convictions and Robertson's prior conviction for aggravated assault.

[8] Little, if any, reporting of the Brisbane trial occurred prior to the appellants' convictions. On 2 April 2012, an online report on the *Courier Mail* webpage reported that the appellants had been convicted and sentenced to life imprisonment. Reference was made to Knight's prior conviction for murder and Williams' prior conviction for manslaughter. The *Brisbane Times* reported the case on its webpage on 2 April 2012, referring to Knight's prior murder conviction. There were no other reports of the case in the print media in Brisbane. An article in the Rockhampton *Morning Bulletin*, on 3 April 2012, reported the convictions and sentences. It also referred to the appellants' convictions on the first trial.

[9] It was common ground that some details of the appellants' criminal histories were available online during the course of the Brisbane trial. Access could still be had to the reporting of the appellants' criminal histories published in Rockhampton after the first trial. A "Google" search on 21 June 2012, utilising Knight's name, produced the result "28 Nov 2010 … **Mark Dempsey Knight** murdered fellow

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2 *R v Knight & Ors* [2010] QCA 372.

inmates in 1999 and 2000". That entry appeared under the heading "High Profile Convictions « Aussie Criminals and Crooks".

[10] The circumstances which gave rise to the application before the primary judge were as follows. On 21 April 2012, Mr Delibaltas, an officer of Legal Aid Queensland who had been acting for Williams since 2006, was told by his hairdresser, Mr Cosentino, of a conversation he had had with a customer that morning. The content of the conversation with the customer was described by Mr Cosentino, in an affidavit filed in these proceedings, as follows:[3]

> "8. During our conversation, the customer told me that he had not long finished jury service in a Supreme Court trial. The effect of our discussion at this point confirmed that the trial was now over and that the customer was therefore able to talk about it.
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> 9. He told me that the case involved a murder in jail in Rockhampton and involved three men. I believe I told the customer that coincidentally I thought I knew someone who was working on that case. The customer stated something like it wouldn't make any difference as they were already serving life terms or long terms of imprisonment already [*sic*].
>
> 10. The customer also said that the men on trial required two security guards for each of them and that they were rough or tough looking blokes."

[11] The primary judge found it likely that Mr Cosentino's customer was a juror on the Brisbane trial. She noted that there were two correctional officers in Court per defendant which was not unusual.

The primary judge's reasons

[12] The primary judge undertook a thorough review of the evidence and, in particular, media coverage and online materials. Her Honour identified relevant statements and directions by the trial judge as follows:[4]

> "[28] The trial judge's summing up commenced on 22 March 2012, day 35 of the trial. After reminding them in details (sic) of their duty to assess the evidence dispassionately without sympathy or prejudice, the judge said to the jury:
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> > 'Anything that you might have heard or read or seen about this case outside the courtroom you must put totally from your minds. You must not allow yourselves – or you must not concern yourselves with the possible consequences of any verdict or verdicts you, ultimately, return. Whether they be verdicts of guilty or not guilty your role in the trial is over when you come back onto the court and deliver those verdicts.

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3 *R v Knight & Ors* [2012] QSC 397 at [4].

4 *R v Knight & Ors* [2012] QSC 397 at [28]–[29].

> In short, ladies and gentlemen, you must decide this case on the evidence and on the evidence alone. …'

[29] Later in the summing up the judge said about the fact that each of the defendants was a prisoner:

> 'It is self-evident, members of the jury, in this case that the three accused were also inmates of the Rockhampton Correctional Centre at this time, 1999. I tell you as a matter of law that that fact, that is the fact that they were also prisoners at that time, must not be used by you to say that because they may have committed some other offence or offences, therefore must be guilty of the present offence. I am sure again you would understand, ladies and gentlemen, that as a matter of common sense that is so. So, I repeat and I direct you that you must not use the fact that they were in prison at that time to lead to any process of reasoning which may say that because they may have committed other offences, therefore, they are likely to have committed an offence here.'

[30] With regard to the retrial the judge told the jury:

> 'I remind you of something I said earlier in this case. You will be well aware, ladies and gentlemen, that there has been an earlier trial in relation to these charges in the Supreme Court of Rockhampton. You should not speculate about what might have happened at that trial or why there is here a retrial. Trials can be stopped because of an error or because of something quite unforeseen, whatever the reason, it has no continuing relevance. You are to consider the case upon the evidence placed before you in this courtroom.'

[31] Towards the end of the first day of the summing up, immediately before the jury retired for the day, the judge said:

> 'Please remember, ladies and gentlemen, the importance, I've stressed it to you so many times, of [not] discussing this case with anyone or conducting any enquiries or investigations of your own and please be back in time to resume the trial at 10 o'clock on Monday morning.'"

[13] Her Honour noted that the jury retired to consider its verdicts on Tuesday 27 March 2012 and, that after the jury indicated that they were deadlocked on Thursday 29 March 2012, they were given an appropriate direction by the trial judge. Guilty verdicts were returned on Monday 2 April 2012.

[14] The primary judge observed that the appellants had conceded in their submissions "that the trial judge repeatedly directed the jury that they should not make investigations of their own".[5]

[15] After setting out the relevant provisions of the Act and considering the meaning of "grounds to suspect" in s 70(7) of the Act, the primary judge stated that she was not satisfied that there were any grounds to suspect that "a person may have been guilty of bias, fraud or an offence related to the person's membership of the jury or to the performance of functions as a member of the jury".[6] The process of reasoning that led to that conclusion is largely contained in this paragraph of the primary judge's reasons:

> "[44] The problem for the applicants in this case is in the precise factual basis which is said to ground a suspicion that a juror might have been guilty of bias because he had obtained information about the criminal history of the applicants, whether because he searched or because he had been told of material on the internet about the applicants which was not in evidence. There is nothing in what he said to the barber which suggests that he knew before the verdict was reached that the applicants were already serving life terms or long terms of imprisonment. His very words suggest that he took notice of the judge's directions about not discussing the case with anyone else during the trial. The relevant information about the applicants' criminal histories was revealed in the submissions on sentence and by media reports after the verdicts were reached by the jury, all of which were readily accessible to the jurors after verdict. There was no impediment to any juror accessing that information after verdict and it is extremely likely that they would have done so, given the keen interest they would have had in the outcome."

The appellants' argument

[16] The substance of the appellants' argument was as follows. Section 70(7) of the Act permits the Court before which the trial was conducted to authorise an investigation where "there are grounds to suspect that a person may have been guilty of bias, fraud or an offence" relating to a juror's membership of a jury or performance of functions as a juror. A "suspicion" that certain things are true is a lesser level of intellectual conviction than a "belief" in the truth of a state of affairs. "Suspicion" is a "state of conjecture or surmise where proof is lacking".[7] Section 70(7) authorises an investigation to determine whether a "suspicion" is true.

[17] The evidence raised two possibilities: namely, that the information concerning the appellants' prior criminal histories was obtained prior to verdict or after verdict. The primary judge erred in concluding that, since the statements of the juror did not positively suggest that the information was obtained before verdict, there were no grounds to suspect that it was so obtained. Where the evidence did not exclude either possibility, grounds to suspect both existed. The primary judge should have found that the threshold for authorising an investigation had been reached.

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5 *R v Knight & Ors* [2012] QSC 397 at [33].

6 *R v Knight & Ors* [2012] QSC 397 at [45].

7 *Hussien v Chong Fook Kam* [1970] AC 942 at 948; *George v Rockett* (1990) 170 CLR 104 at 115.

[18] The possibility of jurors having considered the criminal records of any of the appellants prior to verdict raised a question of "bias" on the part of a juror or jurors.[8] This is especially so where the juror expressed the view that convicting the appellants "wouldn't make any difference as they were already serving life terms or long terms of imprisonment already (sic)". An investigation is the only means by which the appellants can determine whether the jury's verdicts were tainted.

[19] The low threshold which must be met under s 70(7) is justified because of the secrecy provisions of the Act, the lack of restriction on publication of gravely prejudicial information online and the comparative ease with which anonymous enquiry about a defendant may be made.

[20] The course adopted by the trial judge in *R v Martin & King*,[9] of directing questionnaires to jurors to attempt to resolve the issue of potential bias was not criticised by the Court of Appeal which determined the issue in that case on the basis of the results of that investigation.[10] In *R v Lacey; ex parte A-G (Qld)*,[11] the Court of Appeal considered that an application pursuant to s 70(7) was a method available to the appellant to attempt to establish evidence of juror bias.

Consideration

[21] Section 69A and 70 of the Act relevantly provide:

> "**69A Inquiries by juror about accused prohibited**
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> (1) A person who has been sworn as a juror in a criminal trial must not inquire about the defendant in the trial until the jury of which the person is a member has given its verdict, or the person has been discharged by the judge.
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> Maximum penalty—2 years imprisonment.
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> (2) Subsection (1) does not prevent a juror making an inquiry being made of the court to the extent necessary for the proper performance of a juror's functions.
>
> (3) In this section—
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> ***inquire*** includes—
>
> (a) search an electronic database for information, for example, by using the internet; and
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> (b) cause someone else to inquire.
>
> **70 Confidentiality of jury deliberations**
>
> (2) A person must not publish to the public jury information.
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> Maximum penalty—2 years imprisonment.

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8 *R v Sewell* [1994] QCA 586.
9 [1999] QCA 366.
10 *R v Martin & King* [1999] QCA 366 at [13]–[14].
11 [2009] QCA 274 at [108].

(3) A person must not seek from a member or former member of a jury the disclosure of jury information.

Maximum penalty—2 years imprisonment.

(4) A person who is a member or former member of a jury must not disclose jury information, if the person has reason to believe any of the information is likely to be, or will be, published to the public.

Maximum penalty—2 years imprisonment.

(5) Subsections (2) to (4) are subject to the following subsections.

(6) Information may be sought by, and disclosed to, the court to the extent necessary for the proper performance of the jury's functions.

(7) If there are grounds to suspect that a person may have been guilty of bias, fraud or an offence related to the person's membership of a jury or the performance of functions as a member of a jury, the court before which the trial was conducted may authorise—

(a) an investigation of the suspected bias, fraud, or offence; and

(b) the seeking and disclosure of jury information for the purposes of the investigation.

(8) If a member of the jury suspects another member (the ***suspect***) of bias, fraud or an offence related to the suspect's membership of the jury or the performance of the suspect's functions as a member of the jury, the member may disclose the suspicion and the grounds on which it is held to the Attorney-General or the director of public prosecutions."

[22] It may be inferred that the primary judge took her understanding of the meaning of "grounds to suspect" from the following discussion of the reasons of the Court in *George v Rockett*.[12] Her Honour said:[13]

> "In *George v Rockett* (1990) 170 CLR 104, the High Court considered the meaning of the phrase 'if it appears to a justice … that there are reasonable grounds for suspecting.' This was the state of satisfaction necessary on a pre-condition for the issue of a search warrant under s 679(b) of the Criminal Code. The court referred first to the judgment of the Judicial Committee of the Privy Council in *Hussien v Chong Fook Kam* [1970] AC 942 at 948. In a joint judgment, the court held at 115-116:
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> > 'Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam*, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground

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12 (1990) 170 CLR 104.

13 *R v Knight & Ors* [2012] QSC 397 at [43].

> a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees*, a question was raised as to whether a payee had reasons to suspect that the payer, debtor, "was unable to pay [its] debts as they became due" as that phrase was used in s. 95(4) of the *Bankruptcy Act* 1924 (Cth). Kitto J. said:
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> > "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chamber's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s. (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."""

[23] It was not suggested that the primary judge erred in relying on the above passage. On the contrary, counsel for the appellants cited *George v Rockett* and *Hussien v Chong Fook Kam* in their outline of argument.

[24] It was quite likely, as the primary judge found, that a juror who had sat on a trial, such as the subject trial, would have been interested in accessing post trial electronic media reports in order to ascertain information about the sentences imposed and the sentencing hearing. It is also likely that jurors would have been interested in learning something of the criminal backgrounds of the appellants. No evidence in that regard had been led on trial but the jurors were necessarily aware of the fact that each appellant had committed a criminal offence or criminal offences. The jurors also knew that the Brisbane trial was a retrial. In the course of the trial the trial judge gave extensive directions to the jurors, drawing to their attention the prohibition against inquiring about the appellants.

[25] The appellants contended that the possibilities that the jury found out about the prior convictions before the verdicts, on the one hand, or after the verdicts, on the other, were equally open. That contention cannot be accepted.

[26] There was nothing in the relevant conversation that suggested that the juror's knowledge of the appellants' prior criminal offences was gained before delivery of the jury's verdicts. Nor was there anything in the conversation to suggest that the juror was not alive to, or unmindful of, his obligations as a juror. As the primary judge found, the juror's "very words suggest that he took notice of the judge's directions about not discussing the case with anyone else during the trial".[14]

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14 *R v Knight & Ors* [2012] QSC 397 at [44].

[27] The media coverage of the sentencing of the appellants, coupled with the juror's likely interest in the sentencing and criminal backgrounds of the appellants, arising from his role as a juror, provides a likely explanation for the juror's understanding that the appellants were "already serving life terms or long terms of imprisonment". Another possibility is that the juror remained in contact with other jurors and was told about the earlier sentences by one of them.

[28] Yet another significant reason for concluding that the juror's relevant knowledge was gained post verdict is the "fundamental assumption" that a jury, in a criminal trial, "acted … on the evidence and in accordance with the trial judge's directions".[15] In *R v VPH*,[16] Gleeson CJ stated:

> "The jury will be given appropriate directions to confine their attention to the evidence that is put before them. Our entire system of the administration of criminal justice depends upon the assumption that jurors understand and comply with directions of that character."

[29] In that regard, Mason CJ and Toohey J stated in *R v Glennon*:[17]

> "Likewise, the suggestion that there was a substantial risk that at least one juror would have acquired knowledge, before the verdict was given, of the respondent's prior conviction was again a matter of mere conjecture or speculation. The mere possibility that such knowledge may have been acquired by a juror during the trial is not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice. Something more must be shown. The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. As Toohey J. observed in *Hinch*, in the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them." (citations omitted)

[30] The following observations of this Court in *R v Ferguson; Ex parte Attorney-General (Qld)*,[18] are also relevant:

> "It was also said on behalf of the respondent that jurors might readily inform themselves of the full detail of the publicity adverse to the respondent, including his previous convictions, by accessing such information on the internet, and that this risk to the fairness of the trial could not be obviated by directions by the trial judge. But s 69A of the *Jury Act* makes it an offence for a jury to make such inquiries 'about the defendant in the trial until the jury … has given its verdict,

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15 *Gilbert v The Queen* (2000) 201 CLR 414 at 426.

16 Unreported, Court of Criminal Appeal, NSW, CA No 60599 of 1993, 4 March 1994 at 7.

17 (1992) 173 CLR 592 at 603.

18 (2008) 186 A Crim R 483 at [46].

> or the [juror] has been discharged by the judge.' A court asked to grant a permanent stay of proceedings on indictment should not proceed on the basis of speculation that jurors might, not only disregard their oath to render a verdict based only on the evidence, but also commit an offence in order to do so."

[31] The appellants' argument emphasised the existence of "may" in the introductory words of s 70(7): "If there are grounds to suspect that a person **may** have been guilty of bias, fraud or an offence …". However, subsection (7) is not triggered unless there are "grounds to suspect". Senior counsel for Williams properly accepted that there needed to be a basis for the existence of a relevant suspicion. It was argued also that the failure to require that the "grounds to suspect" must be reasonable indicated that the legislature had deliberately provided a test with a low threshold.

[32] The language of s 70(7) cannot be divorced from its context as French CJ and Hayne J explained in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross & Ors*:[19]

> "The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.
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> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' (emphasis added). And as the plurality went on to say in *Project Blue Sky*:
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> > Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a

[19] (2012) 87 ALJR 131 at 138 [24]–[25].

> way that does not correspond with the literal or grammatical meaning." (citations omitted)

[33] Having regard to the constitutional role of juries of the triers of fact in criminal trials, the respect with which the law has traditionally treated jury verdicts and the ability of juries to reach their verdicts faithfully following the trial judge's directions, it cannot be supposed that s 70(7) contemplated the launching of an investigation without good cause. Nor could the legislature have regarded the authorising of such an investigation as anything other than a serious step. Those circumstances support the construction, which to my mind is borne out by the normal everyday meaning of the words used, that for there to be "grounds to suspect" for the purposes of s 70(7) there needs to be more than the existence of a mere possibility that a juror obtained knowledge of prior convictions before a verdict was returned. Such a possibility may exist in respect of every jury trial in which the accused has prior convictions.

[34] In this case, there is the mere possibility that the juror obtained the relevant knowledge prior to the verdicts. On the other hand, there are cogent reasons for believing that the relevant knowledge was gained after the verdicts. There was no basis for concluding that this possibility amounted to "grounds to suspect" any of the matters referred to in s 70(7).

[35] Had the primary judge concluded that the discretion conferred by s 70(7) had been enlivened, the matters discussed above would have militated against ordering an inquiry.

Conclusion

[36] The appellants failed to demonstrate error on the part of the primary judge and I would order that the appeal be dismissed.

[37] **BODDICE J:** I have read the reasons for judgment of Muir JA. I agree with those reasons and the order that the appeal be dismissed.

[38] **JACKSON J:** I agree with Muir JA's reasons for judgment and that the appeal should be dismissed.