SUPREME COURT OF QUEENSLAND

CITATION:	*R v Knight & ors* [2012] QSC 397
PARTIES:	**MARK DEMPSEY KNIGHT, WESLEY ROBERT WILLIAMS and WAYNE THOMAS ROBERTSON** (applicants) **v** **THE QUEEN** (respondent)
FILE NO:	Indictment no 188 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 December 2012
DELIVERED AT:	Brisbane
HEARING DATES:	28 September and 19 November 2012
JUDGE:	Atkinson J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JURIES – where applicants convicted of murder on retrial – where retrial removed to Brisbane due to publicity – where 19 days after verdict person believed to be a juror on the retrial stated to his barber that outcome of trial 'wouldn't make any difference as they were already serving life terms or long terms of imprisonment' – where trial judge repeatedly instructed jury not to seek or consider information other than the evidence – where previous convictions of applicants widely broadcast after sentence on retrial – whether any grounds to suspect that juror may have been guilty of bias, fraud or an offence – whether investigation of any suspected bias, fraud or offence should be authorised *Jury Act* 1995 (Qld), ss 68, 69A, 70(7) *Black v The Queen* (1993) 179 CLR 44, cited *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, cited *Patel v The Queen* [2012] HCA 29, distinguished *R v Cant* [2002] NTCCA 8, distinguished *R v Ferguson; ex parte A-G (Qld)* [2008] QCA 227,

distinguished
R v Folbigg [2007] NSWCCA 371, distinguished
R v Gallagher (1987) 29 A Crim R 33, cited
R v Glennon (1992) 173 CLR 592, considered
R v K [2003] NSWCCA 406, distinguished
R v Knight (No 1) [2009] QSC 448, related
R v Knight (No 2) [2009] QSC 449, related
R v Knight (No 3) [2009] QSC 450, related
R v Lacey; *ex-parte Attorney-General (Qld)* [2009] QCA 274, cited
R v Long; ex parte A-G (Qld) [2003] QCA 77, distinguished
R v Minarowska and Koziol (1995) 83 A Crim R 78, cited
R v Mirza [2004] 2 WLR 201, cited
R v Munday (1984) 14 A Crim R 456, cited
R v Pan [2001] 2 SCR 344, cited
R v Patel [2012] QSC, unreported, 27 November 2012, considered
R v Rinaldi and Kessy (1993) 30 NSWLR 605, cited
R v Skaf and Skaf [2004] NSWCCA 37, distinguished
R v Thompson [2011] 2 All ER 83, cited
R v Vaitos (1981) 4 A Crim R 238, cited
Sorby v The Commonwealth (1983) 152 CLR 281, cited
Vaise v Deloval (1785) TR 11; 99 ER 944, cited

COUNSEL: P J Davis SC with D R Lynch for the applicants
D C Boyle for the respondent

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

[1] On 2 April 2012 at the end of a trial which had commenced on 1 February 2012, the applicants, Mark Dempsey Knight, Wesley Robert Williams and Wayne Thomas Robertson, were each convicted in the Supreme Court in Brisbane of the offence of murder of Robert James Buckley. The applicants have appealed their conviction to the Court of Appeal. During the pendency of that appeal they have brought an application in the trial division of this court pursuant to s 70(7) of the *Jury Act* 1995 (Qld). The application sought the following orders:

> "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
> 2. That the seeking and disclosure of jury information for the purposes of that investigation is permitted."[1]

[2] Section 70(7) of the *Jury Act* provides:

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1 The orders sought were refined during the course of the proceeding.

> "(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."

[3] The applicants submitted that there were grounds to suspect that a juror or jurors may have been guilty of bias or an offence because a juror, by searching the internet, found out about the applicants' criminal convictions prior to verdict. The respondent submitted that the evidence was not sufficient to provide grounds for such a suspicion.

The conversation

[4] The factual basis for this application is found in an affidavit from Giuseppe Anthony Cosentino. Mr Cosentino is a barber who works part time at a hairdressing establishment in Wynnum. He recalled an occasion when he had a conversation with a male customer at about 11.00am on Saturday 21 April 2012. Mr Cosentino gave a physical description of the customer. Mr Cosentino could not remember the exact words said but was able to recount the general effect of their conversation. The relevant paragraphs of Mr Consentino's affidavit provide as follows:

> "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*].
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> 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."

A different version of the conversation, quoted in the applicants' submissions, is not supported by any admissible evidence so I have not taken it into account.

[5] As it happened, Mr Consentino was also the barber for Peter Delibaltas, the solicitor who acted for one of the accused in a murder trial where there were three accused involving a murder in a jail in Rockhampton. Mr Consentino saw Mr Delibaltas later that day when he was, by chance, due to provide hair cuts to Mr Delibaltas and his two sons. He told Mr Delibaltas of the conversation that he had had with the customer who said that he had been a juror.

[6] It does appear likely from Mr Consentino's account of the conversation that his customer was a juror on the trial of Mark Knight, Wesley Williams and Wayne Robertson which commenced on 1 February 2012 and concluded with their conviction for murder on 2 April 2012, some 19 days before the conversation. There were two correctional officers in court per defendant. This is not unusual and is the standard arrangement for defendants who, whilst they are on trial, are in the custody of the court.[2]

[7] The applicants were convicted on a retrial of the murder of Robert James Buckley who was found dead in a shower cubicle in the old Rockhampton prison on 16 June 1999. The applicants had each been convicted of murder in the Supreme Court in Rockhampton in 2009. The convictions were quashed by the Court of Appeal and a new trial ordered on 23 December 2010. The retrial was held in Brisbane as a result of an order made on 4 March 2011 removing the trial to Brisbane. The basis of the application for removing the trial from Rockhampton was the extensive publicity given to the case in the media in Rockhampton including publication of the respective criminal histories of the applicants after they were convicted.

The media coverage and online materials

[8] In support of the application for removal, a search of media coverage of the trial of the applicants was conducted between 28 January and 18 February 2011. There were 40 relevant press clippings and 47 relevant broadcast transcripts and summaries of coverage. Those clippings and transcripts are exhibited to an affidavit by a paralegal in the employ of Legal Aid Queensland which was affirmed on 18 February 2011. The utility of the material referred to in that affidavit is limited by the fact that the search of the media materials was conducted about a year before the retrial in the Supreme Court in Brisbane started and because it was a search of "Media Monitors", a private media monitoring service, not of what was publicly available on the world wide web.

[9] The attached newspaper clippings and online articles were from the Rockhampton *Morning Bulletin* commencing on 12 June 2009. They covered the evidence given at the trial. On 29 July 2009, the Rockhampton *Morning Bulletin* reported that the three applicants had been convicted of murder and that the judge sentencing them to life imprisonment had "revealed extremely violent criminal histories including for murder, manslaughter and assault". It was reported that it was revealed when the three were sentenced that "Knight was already serving 22 and a half years in prison for another jailhouse murder". An excerpt from the Rockhampton *Morning Bulletin* from 1 August 2009 referred to the difficulty that the police inspector who was responsible for the investigation had faced "due to the large number of witnesses - about 200 - and also because the crime was committed by serving prisoners who were already doing time for violent crimes"; another excerpt says that Knight was "found guilty of murdering another inmate in Bathurst jail in 2000 and spent the next six years appealing the process before being transferred interstate"; another excerpt described in more detail the circumstances of Knight's first murder conviction. On the same date in another article the Rockhampton *Morning Bulletin* revealed that Williams was involved in a gang attack on another inmate in 2003 and that when he was 27 he was convicted of unlawfully killing a person and sentenced to eight years imprisonment. It revealed he had other convictions for assault. An

[2] See, for example, the affidavits of Amy Stannard sworn 12 and 13 September 2012.

article on Robertson revealed that he had a conviction for an aggravated assault of a female when he was 17 years old.

[10] On 23 December 2010 AAP reported that the applicants had been granted a retrial. It made no reference to their criminal history. It was also reported the following day in a similar way in the Rockhampton *Morning Bulletin*.

[11] The affidavit also exhibits various reports from the Australian Broadcasting Corporation (ABC) news of the trial in Rockhampton. A report on the ABC on 29 July 2009 of their conviction said that they were given a mandatory life sentence, but Knight "was ordered to serve a minimum of 20 years because he had a conviction of murdering another prisoner at the Bathurst jail in New South Wales in 2000". The successful appeals were reported by the ABC. It appears that, of all the radio reports of the matter, only on the ABC radio news in Rockhampton at 5.30pm on 29 July 2009 referred to Knight's sentence of a minimum of 20 years because he had a previous murder conviction in New South Wales in 2000.

[12] Mr Delibaltas swore that during the trial in the Supreme Court in Brisbane, which was a retrial, the trial judge repeatedly directed the jury that they should not speak to anyone about the case apart from other jurors and that they should not undertake any investigations themselves. Mr Delibaltas has also given evidence that during the progress of the trial in Brisbane, he took notice of whether there was any press reporting of the case because that had caused, he said, various problems during the trial that took place in Rockhampton. He said that to his knowledge there was little, if any, reporting of the case during the retrial in the print media or on television.

[13] This distinguishes it from many cases in Queensland which have received extensive pre-trial publicity and intensive publicity during the trial.[3]

[14] Mr Delibaltas has also sworn that none of the jury members was present in the courtroom during the sentencing process. During the sentencing proceedings, the prosecution tendered into evidence the respective criminal histories of the applicants. That material had not been before the jury, who had not been told why the applicants were in custody in 1999 or what their prior criminal convictions were. After the trial concluded, a report of the verdicts and sentences was published on the *Courier Mail* website. That report, which was publicly available from 2 April 2012, after the conviction of the applicants, quite properly referred to the criminal histories of the applicants which were before the court on the sentencing hearing. The opening paragraph of the report reads:

> "TWO convicted killers and a fellow prisoner have been jailed for life for the murder of a fellow central Queensland inmate almost 12 years ago."

[15] After referring briefly to the case alleged against the applicants the report continued:

> "Prosecutor Danny Boyle said both Knight and Williams had previous convictions for murder or manslaughter.

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[3] See for example *R v Ferguson; ex parte A-G (Qld)* [2008] QCA 227; *R v Long; ex parte A-G (Qld)* [2003] QCA 77; *Patel v The Queen* [2012] HCA 29.

> He said Knight was convicted for the brutal murder of an inmate with a knife while in company.
>
> The court was told Williams had been convicted of the manslaughter of man who [*sic*] he hit over the head with a steel pole and then stole $80.00.
>
> Mr Boyle said Williams attacked the man in November 1987, but that the victim did not die until five months later.
>
> He said Robertson also had criminal convictions in Queensland and NSW, but the details of the offences were not read into the record."

[16] After referring to the fact that the judge imposed life imprisonment, which was reported to be the only sentence available under Queensland law, the report continued:

> "He further ordered now convicted double murderer Knight serve at least 20-years in custody before being eligible for parole."

[17] Mr Delibaltas performed an internet search regarding the applicants on 21 and 22 June 2012. If the dates which the Google search shows as the date of the entry are correct, then on 26 November 2010, the website aussiecriminals.com.au revealed that Knight murdered fellow inmates in 1999 and 2000. An entry made on 12 June 2004 shows Mark Dempsey Knight being convicted in the New South Wales Supreme Court of murdering Craig Brookes Dally in March 2000. A search of Wesley Robert Williams' name shows a report of sentencing after the trial in Brisbane on 2 April 2012 on the *Brisbane Times* website. That report, which was published after their conviction on the retrial, shows that the judge on sentencing in Brisbane "ordered Knight who had a prior murder conviction spend at least 20 years behind bars before being eligible for parole". A Google search of Wayne Thomas Robertson did not show any additional adverse material.

[18] Mr Delibaltas exhibited various articles referred to on inmate.com.au on 6 May 2012 with regard to Mark Dempsey Knight's conviction for murder on 21 June 2004. Mr Delibaltas also swears that he performed a search of the Supreme Court of Queensland library internet site for judgments on 22 June 2012, searching the judgments database under the name "Mark Knight". That search revealed a number of irrelevant items but also revealed three pre-trial rulings by Justice McMeekin in May, June and July 2009. This does not necessarily mean that those judgments were available on the Supreme Court of Queensland Library website at the time of the trial in Brisbane. There is a standing instruction to the judge's associate found in the Associates' Manual to organise the removal of any such judgments from the website until the verdict is reached.

[19] An affidavit from Amy Stannard from the Office of the Director of Public Prosecutions deposes to the information she received from Gavin Dunn about the publication of pre-trial rulings and the Court of Appeal judgment in this matter. Mr Dunn is the officer of the Supreme Court of Queensland Library responsible for both uploading and removing judgments from the Supreme Court of Queensland

Library website. The pre-trial rulings by McMeekin J[4] were not uploaded onto the Supreme Court Library website until 1 May 2012, almost a month after the retrial concluded. This explains why they were found by Mr Delabaltas when he conducted a search on 22 June 2012. The Court of Appeal decision, *R v Knight & Ors* [2012] QCA 372 was removed from the website on 27 January 2012 at the request of the trial judge's associate prior to the commencement of the retrial. It was removed from the AustLII website on 30 January 2012. None of these judgments was searchable online during the retrial.

[20] In addition to the affidavit of Mr Delibaltas is an affidavit by Nadia Bromley, a lawyer from Legal Aid Queensland, who acted for Wayne Thomas Robertson. She said that:

> "As media reports about the case had created various problems during the last trial, at or around the time of the commencement of the trial in Brisbane in early 2012, I conducted an internet search using the Google search tool to see whether there were any articles available. I used a search term similar to 'Knight, Williams, Robertson, murder'."

[21] She said she did not record the results of the search but recalls that there were numerous search results. She recalls reading the list of search results and recalls clicking on one of them which brought up an article about the original sentencing proceedings after the trial in Rockhampton. She says:

> "I recall that the article mentioned the criminal histories of the applicants in some detail."

[22] On the applicants' material this appears to be the only reliable evidence that there was material which **could** have been found by a web search by persons empanelled on the jury at the time of the trial in Brisbane which would have revealed the criminal histories of the applicants as mentioned in Ms Bromley's affidavit.

[23] I have been assisted by searches conducted by officers of the Director of Public Prosecutions. Mr Boyle from that office annexed to his submissions a schedule of media articles that were available at the time of the 2012 retrial and which refer to the criminal history of at least one of the applicants. Six such articles were found. The first was published in 2004 and referred to Knight's previous conviction for murder. There were four items from 2009 after the applicants' conviction in the Supreme Court in Rockhampton: two in the Rockhampton *Morning Bulletin* online archive from 29 July and 30 July 2009 referred to Knight's previous conviction for murder and made a general statement and Williams' and Robertson's violent criminal histories; one article from the *Fraser Coast Chronicle* on 5 October 2009 referred to Knight's already serving a 22 year sentence, although it did not specify for what offence; and there was a record of an ABC news story from 29 July 2009 which referred to Knight's previous conviction for murder. On 26 November 2010 a non-news media website referred to Knight having been convicted of the murder of a prisoner which occurred subsequent to the murder of Buckley. There were no

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[4] *R v Knight (No 1)* [2009] QSC 448; *R v Knight (No 2)* [2009] QSC 449; and *R v Knight (No 3)* [2009] QSC 450.

media reports available online at the commencement of the retrial in Brisbane that had been published in 2011 or 2012.

[24] Charles Kooij, a senior media officer with the Department of Justice and Attorney-General, conducted a search of media coverage of the retrial occurring between 2 and 21 April 2012, i.e., from the date of sentencing until the conversation with Mr Consentino. He found a radio news item which was broadcast at 6.00pm on 2 April 2012 and syndicated across radio stations 4BC (Brisbane), 1071 AM (Kingaroy), 4BH (Brisbane), 4CRB FM (Gold Coast) and two other regional stations. It reported that the applicants had each received life sentences after successfully appealing their earlier convictions. A report in the Rockhampton *Morning Bulletin* on 3 April 2012 specifically reported that Knight had a prior murder conviction. Mr Kooij also found the *Courier Mail* article and the *Brisbane Times* article on 2 April 2012 earlier referred to. The *Brisbane Times* article referred to Knight's prior murder conviction and the *Courier Mail* article referred to the details of Knight's prior murder conviction, Williams' prior manslaughter conviction and to Robertson's criminal convictions in Queensland and New South Wales.

[25] This provides further support for the proposition that material was available online at the start of the retrial which could, if searched, have alerted a juror to the applicants' previous convictions. However, it also shows that in the reports of the sentencing of the applicants after the retrial, their convictions were referred to in open court and reported after the trial. Notwithstanding the jurors' not having been present in court for the sentencing it is almost beyond belief that at least one, if not all, of them would not have read the reports of the sentencing in the *Courier Mail* and/or the *Brisbane Times* and/or heard the report on the radio and therefore formed the view expressed by the juror to Mr Consentino that "they were already serving life terms or long terms of imprisonment". There is nothing in what the juror said to suggest that he found this out before the end of the trial.

[26] This case can be distinguished for that reason from cases such as:

(a) *R v K* [2003] NSWCCA 406, where immediately after a verdict of guilty of murder, the jurors and defence counsel went to a nearby hotel where a juror revealed to counsel that a number of jurors had acquired knowledge consequent upon internet searches about the history of the matter, though to varying degrees, including that the appellant, who was on trial for the murder of his first wife, had previously been tried, but acquitted, for the murder of his second wife. In such a case, with regard to the information gathered about the accusation of murdering his second wife, it would have been appropriate for counsel to refer the "forelady", who expressed such concerns, to the sheriff;

(b) *R v Cant* [2002] NTCCA 8, where a juror reported to the judge in a note that a juror had told other members of the jury that the accused was facing charges other than those before the court;

(c) *R v Skaf and Skaf* [2004] NSWCCA 37, where two jurors attended the park where crime was alleged to have been committed on their own at night to test the lighting. That information came to light well after the trial concluded when a juror had a conversation with a solicitor who gained the impression that the juror had taken into account information obtained when he "went to the park" which was not evidence in the trial; or

(d) *R v Folbigg* [2007] NSWCCA 371 where a juror told a law student who was known to the juror and who was undertaking practical legal training during

> the trial, that "during trial one of the jurors had researched [the defendant's] history etc on the internet."[5]

All of these are examples of complaints of juror misconduct **during** the trial before verdict which it was appropriate for the sheriff to investigate further, notwithstanding the usual restraint exercised in ordering an investigation of juror conduct.[6]

The retrial

[27] The judge in his opening remarks to the jury was detailed and explicit in his direction to the jury to decide the case only on the evidence, not to allow any external influence play any part in their decision making, not to discuss the case with anyone else, orally or by electronic means, and not to conduct any investigations of their own. He instructed the jury as follows:

> "You will recall a short while ago, ladies and gentlemen, that you took an oath or an affirmation that you would decide the case according to the evidence. That is an important obligation and it has some important consequences. One is that you should pay careful heed to all of the evidence that's presented in this courtroom. Discuss the case amongst yourselves as much as you like as the trial progresses but it is important that you do not discuss it with anyone else, and that includes discussion by electronic means as well as oral means. The reason for this is that you are the people who are to determine the outcome of this trial and you do so solely on the evidence that is presented in this courtroom. Don't take the risk of any external influence or contamination on your minds. Don't speak to anyone who is not a member of this jury about this case. If someone should come up to you and try to talk to you about the case then you should end that conversation. And if that occurs, if they persist, you report it back to the Bailiff here and it will be dealt with. It will be brought to my attention. Similarly, if outside this courtroom you inadvertently overhear something about this trial, don't discuss it with your fellow jurors; tell the Bailiff and it will be brought to my attention.
>
> Do not attempt in any way to conduct own [*sic*] investigations into the conduct or to make any inquiries about the matter or about the defendants yourself. You would understand, I am sure, ladies and gentlemen, that it is inherently unjust - it would be inherently unjust for a juror to act upon information which is not in evidence and information which neither the prosecution nor the defence knew you

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5 [2007] NSWCCA 371 at [5]. The dangers of relying on material found on the internet are graphically demonstrated by the reporting of this very application. It was reported in the *Sunshine Coast Daily* on 30 September 2012 that :
"Brisbane Supreme Court heard a Friday how a juror had commented to a **bailiff** that the men were serving life sentences or long-term jail terms anyway to the jury's verdicts made no difference." (emphasis added)
The report was factually inaccurate. The comment, not in those terms, was made to a barber not a bailiff. That factual difference is important. The only time a juror is likely to say something to a bailiff is at the court at the time of trial or verdict. The comment to the barber was made some 19 days after the trial.

6 See *R v Lacey*; *ex-parte Attorney-General (Qld)* [2009] QCA 274 at [109].

> were acting on or had any knowledge of. They don't have the opportunity to test the accuracy of that information, which may be completely false, or whether it has any application to a particular person. Information in the public arena is not always accurate. It might refer to someone else, for example, with a similar name. And as I have said, the prosecution and the defence will not have had the opportunity to test the material as they do with evidence presented in this courtroom.
>
> There have been many instances or instances, at least, where a jury has made private investigations and mistrials, unfortunately, have resulted and new trials ordered or there have been successful appeals on occasions, and that simply illustrates the unfairness. So private inquiries can lead to inaccuracies, ladies and gentlemen, and it is imperative that you decide this case solely on the evidence that you hear in this courtroom and on nothing else, not anything that you see or hear or read outside this Court."

[28] The trial judge's summing up commenced on 22 March 2012, day 35 of the trial. After reminding them in details of their duty to assess the evidence dispassionately without sympathy or prejudice, the judge said to the jury:

> "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.
>
> 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 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."

[32] The summing up took place over three days, Thursday 22, Monday 26 and part of Tuesday 27 March 2012. The jury retired to consider its verdicts on 27 March. The jury did not reach its decision quickly. After the jury indicated they were deadlocked on Thursday 29 March, the trial judge gave them a *Black*[7] direction. The jury returned verdicts of guilty of murder against each of the applicants on Monday 2 April 2012. This course of events does not suggest that the jury failed to give their decision due consideration.

[33] The applicants conceded in their submissions that the trial judge repeatedly directed the jury that they should not make investigations of their own, although he did not specifically refer to investigating the applicants' criminal records or why the applicants were in prison in 1999. No such direction was requested by the defence and there are obvious forensic reasons why the defence did not ask the judge to draw specific attention to this matter.

[34] As the High Court held in *R v Glennon*[8] the court should not readily underrate the integrity of the system of trial by jury or the effect on the jury of the instructions given by the trial judge. The law proceeds on the footing that the jury will act in conformity with the instructions given to them by the trial judge. Brennan J observed, at 614, that the law must, of necessity, place much reliance on the integrity and sense of duty of jurors. The experience of the courts is that that reliance is not misplaced.[9]

[35] Douglas J recently observed, in sentiments with which I concur:

> "The courts do not lightly assume that jurors will not obey their oaths and determine a case otherwise than according to the evidence."[10]

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7 *Black v The Queen* (1993) 179 CLR 44 at 51-52.

8 (1992) 173 CLR 592 at 603.

9 *R v Vaitos* (1981) 4 A Crim R 238; *R v Gallagher* (1987) 29 A Crim R 33 at 41; *R v Munday* (1984) 14 A Crim R 456 at 457-458; *R v K* [2003] NSWCCA 406 at [60]; *Gilbert v The Queen* (2000) 201 CLR 414 at 425. This is supported by empirical research: see *"A Review of Jury Directions"* Queensland Law Reform Commission Report No 66 Chapter 5.

10 *R v Patel* [2012] QSC, unreported, 27 November 2012, at [28].

The *Jury Act*

[36] Section 70 is found in Part 8 of the *Jury Act* which deals with various miscellaneous matters involving juries and includes a number of offence provisions. It is an offence, for example, to impersonate a juror or member of the jury panel (s 66); to falsify a jury list or interfere with the proper formation of a jury (s 67); or to terminate or prejudice the employment of anyone because of their absence from employment because of jury service (s 69).

[37] Of more relevance to this application is the context provided by sections 68, 69A and 70 of the *Jury Act*.

[38] Section 68 gives the power to the sheriff or the sheriff's delegate to ask questions of a person (s 68(1)) or require a person to produce documents to find out whether the person is qualified for jury service (s 68(4)). Such questions must be answered truthfully (s 68(3)). It is an offence to fail to answer a question (s 68(2)) or produce a document (s 68(5)) without reasonable excuse. The *Criminal Law (Rehabilitation of Offenders) Act* 1986 does not apply to disclosure of information in response to such a question (s 68(6)). The maximum penalty for an offence under s 68 is 20 penalty units or four months imprisonment.

[39] Section 69A was introduced into the *Jury Act* by s 54 of the *Criminal Law Amendment Act* 2002 (Qld), which came into effect on 19 July 2002. It made it a criminal offence for a juror to make inquiries about the defendant. The section is in the following terms:

> "**69A Inquiries by juror about accused prohibited**
>
> (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.
> Maximum penalty—2 years imprisonment.
>
> (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—
> ***inquire*** includes—
> (a) search an electronic database for information, for example, by using the internet; and
> (b) cause someone else to inquire."

[40] Section 70, which immediately follows s 69A, protects the confidentiality of jury deliberations subject to certain exceptions including the exception found in subsection 70(7). The relevant part of s 70 is set out below:

> "**70 Confidentiality of jury deliberations**
>
> (2) A person must not publish to the public jury information.
> Maximum penalty—2 years imprisonment.

(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.

(9) On application by the Attorney-General, the Supreme Court may authorise—
- (a) the conduct of research projects involving the questioning of members or former members of juries; and
- (b) the publication of the results of the research.

(10) The Supreme Court may give an authorisation under subsection (9) on conditions the court considers appropriate.

(11) Information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding may be disclosed—
- (a) in the course of the proceeding—by any person with the court's permission or with lawful excuse; or
- (b) after the proceeding has ended—by the juror or someone else with the juror's consent.

…

(17) In this section—

…

jury information means—

(a) information about statements made, opinions expressed, arguments advanced, or votes cast, in the course of a jury's deliberations; or

(b) information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding."

[41] Section 70(7) of the *Jury Act* is an exception to the general exclusionary rule which provides that evidence of jury deliberations is inadmissible.[11] On the other hand there has never been a general exclusion of evidence of matters extrinsic to jury deliberations based on jury misconduct or the consideration of material not admitted into evidence.[12]

[42] Section 70(7) requires there to be "grounds to suspect that a person may have been" guilty of bias, fraud or an offence. The offence may be related in the person's membership of a jury or to the performance of functions as a member of a jury. In those circumstances the courts may authorise an investigation of the suspected bias, fraud or offence and the seeking and disclosure of jury information for the purposes of the investigation.

[43] 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:

> "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 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:
>
> > '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

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11 *Vaise v Deloval* (1785) TR 11; 99 ER 944; *R v Rinaldi and Kessy* (1993) 30 NSWLR 605; *R v Mirza* [2004] 2 WLR 201; *R v Pan* [2001] 2 SCR 344.

12 *R v Minarowska and Koziol* (1995) 83 A Crim R 78 at 85; *R v Thompson* [2011] 2 All ER 83 at 85-86 per Lord Judge CJ.

> 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 this debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.'"

[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.

[45] I am not satisfied in those circumstances that there are 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. I would therefore refuse the application to authorise an investigation.

The privilege against self-incrimination

[46] For the benefit of future applications of this type it may be useful to mention a matter which arose on the hearing of this application. Any questionnaire sent by the sheriff to jurors which asks them questions about the commission of an offence may elicit information about the commission of an offence by that or another juror. The applicants originally sought an order that the sheriff should direct a questionnaire to each member of the jury asking questions which were apt to discover whether or not any juror, including the one asked, had committed an offence including an offence against s 69A of the *Jury Act*. The applicants maintained the primary submission that it was not necessary in such a situation for the sheriff to inform jurors that not only were they under no obligation to answer any question he put to them, specifically they were under no obligation to answer, if the answer might tend to incriminate them.

[47] The privilege against self-incrimination "in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them."[13]

[48] The privilege protects a person not only from incriminating himself or herself, except by exercise of a free choice to do so, but also from making a disclosure

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13 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 508 per Mason CJ and Toohey J.

which may lead to incrimination or to the discovery of real evidence of an incriminating character.[14]

[49] An ordinary member of the community who had served on a jury would, unless clearly informed to the contrary, be likely to assume that he or she was obliged to answer a questionnaire sent by the sheriff of the Supreme Court of Queensland. That outcome is even more likely when the juror had, in fact, been obliged to answer questions put by the sheriff as to their qualification for jury service under s 68 of the *Jury Act*. It could also be assumed that a juror would be unlikely to know, unless informed of it by the sheriff or a legal adviser, about the privilege against self-incrimination or that s 69A made inquiries by a juror about a defendant prior to verdict a criminal offence. Any questionnaire delivered to jurors by the sheriff authorised by the court under s 70(7) should clearly inform a juror of his or her rights.

Conclusion

[50] In this case, I was not satisfied that the test required in s 70(7) of the *Jury Act* was made out. Had I been so satisfied it would have been necessary for a carefully worded written questionnaire to be sent to jurors by the sheriff which clearly informed them that they did not have to answer any of the questions asked; and, if applicable, that in particular the juror did not have to answer any question that might tend to incriminate that juror. The report prepared by the sheriff on receipt of the answers to the questionnaire should not refer to any individual in such a way that the juror can be identified unless warranted by the circumstances of the case.

[51] The application is dismissed.

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[14] *Sorby v The Commonwealth* (1983) 152 CLR 281 at 310.