SUPREME COURT OF QUEENSLAND

CITATION:	*R v JX* [2016] QCA 240
PARTIES:	**R** **v** **JX** (appellant)
FILE NO/S:	CA No 229 of 2015 DC No 159 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 18 August 2015
DELIVERED ON:	Orders delivered ex tempore 21 September 2016 Reasons delivered 23 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2016
JUDGES:	Margaret McMurdo P and Morrison JA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 21 September 2016:** **1. The indictment is amended to insert the words "on a date unknown" between "that" and "between".** **2. The appeal against conviction is allowed.** **3. The verdicts of guilty are set aside.** **4. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of two counts of rape of a child – where the complainant maintained her account of the alleged offending and gave a rational explanation for not making a contemporaneous complaint – where the judge directed the jury to carefully scrutinise the appellant's evidence – where the complainant's account was uncontradicted – where the jury were entitled to accept the complainant's account as reliable beyond reasonable doubt CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where a jury note requested "direction" from the judge on "one member of the jury

informing of being raped as a younger woman" – where the judge's initial directions to the jury informed them of the importance of impartiality and all jurors indicated they could be impartial – where the note was consistent with the jury complying with the judge's directions – whether the note created an apprehension or suspicion that the jury was not impartial

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the judge did not give directions to the jury about the note before taking the verdict – where the note indicated uncertainty about the corporate state of mind of the jury – where it was necessary for the judge to remind all jurors of the obligation to be impartial – whether there was a miscarriage of justice

Criminal Code (Qld), s 572(3), s 620

Alameddine v R [2012] NSWCCA 63, cited
Ashley v The Queen [2016] NTCCA 2, cited
R v AP [2003] QCA 445, cited
R v Fahey, Solomon & AD [2002] 1 Qd R 391; [2001] QCA 82, cited
R v Hickey (2002) 137 A Crim R 62; [2002] NSWCCA 474, cited
R v Knight, unreported, New South Wales Court of Criminal Appeal, Hunt, Wood, McInerney JJ, 18 December 1990, cited
R v Lapins [2007] SASC 281, cited
R v McCormack (1996) 85 A Crim R 445, cited
R v Salama [1999] NSWCCA 105, cited
R v TAB [2002] NSWCCA 274, cited
Smith v Western Australia (2014) 250 CLR 473; [2014] HCA 3, cited
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: A W Collins for the appellant
J Phillips for the respondent

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

[1] **MARGARET McMURDO P:** On 18 August 2015, the appellant, an Indigenous man, was charged with two counts of rape in identical terms: "that between the thirtieth day of September 1999 and the twenty-ninth day of September 2003 at [an Indigenous community he] raped [the complainant]". He was convicted of both counts after a two day jury trial. He has appealed against his convictions on three grounds. The first is that the verdicts are unreasonable and cannot be supported by the evidence. The second is that by reason of a note from the jury seeking further directions before the return of the verdicts, a fair minded lay observer might reasonably apprehend that the jury did not bring an impartial and unprejudiced mind

to determining his guilt so that the verdicts should be set aside. The third is that the primary judge erred in law in failing to give the jury the further directions they sought prior to returning their verdict.

[2] Before setting out my reasons for allowing the appeal on the third ground, I will refer to relevant aspects of the trial and to the competing contentions in this appeal.

Relevant aspects of the trial

[3] After the jurors were selected and before the remainder of the jury panel was discharged, the judge told the jury that the appellant was charged with two counts of rape of the complainant, a child at the time. The prosecutor read out the names of the prosecution witnesses. The judge stated:

> "it is essential that every member of the jury be completely impartial between the prosecution and the defence. And sometimes it happens that a member of the jury might know the accused or a connection, a witness or a connection or there might be something about the charge or something completely personal to you which makes you think one of two things: either I can't be impartial, but there's another big test. If somebody on the outside looking in would – and know all the facts – would they think you're impartial, knowing all the facts? So if anyone has a problem, now is the time to put up your hand and I can deal with it. Anyone have a problem with proceeding? No. Good."

[4] The trial judge then discharged the remainder of the jury panel. In her opening remarks the judge reminded the jury that they must determine the case solely on the evidence produced in the courtroom,[1] adding:

> "if anyone brings into the jury room information which does not come from this trial and in the evidence, you should tell me. You have taken an oath or affirmation to decide the case on the evidence and only on the evidence.[2]
>
> ...
>
> You should keep an open mind as the case progresses. Criminal trials are dynamic in nature. They are organic. If there was no change in the evidence effected by cross-examination, we wouldn't bother with it, so keep an open mind.[3]
>
> ...
>
> If you experience a problem related to the trial in any way, whether it's management way or in relation to evidence, I'll help you as much as I can. Just, if you're here, just – you can put up your hand, if you're in the jury room, it's easier if you write a note, and then I can discuss it with counsel and decide how to deal with it."[4]

[5] The complainant, who was 19 at trial, gave the following evidence.

---

1 T1-3, l 30 – l 31, AB 23.
2 T1-4, l 33 – l 36, AB 24.
3 T1-5, l 17 – l 20, AB 25.
4 T1-5, l 29 – l 33, AB 25.

[6] The complainant's living arrangements at the relevant time were complicated. The appellant sometimes lived with her mother, her and her siblings in an Indigenous community. The appellant and her mother separated before she started grade one. When she thought she was in grades one, two and three during 2001 to 2003, she lived with her Aunty J until the complainant moved with her mother to Townsville in 2004. When living with her Aunty J, she sometimes visited the appellant in two different houses, one of which was the home of the appellant's sister. The appellant left the community in 2003.

[7] When she was in grade one or two, she thought, the appellant rode her and her sister on his bicycle to his sister's home. She and her sister had a shower. A floor to ceiling brick wall separated the shower from the bathroom bench. He came into the shower and told her to hop out. He put her on top of the bathroom bench. Initially, she was facing towards him. He then turned her around, putting her belly against the bench. He washed his hands with soap, rubbed soap on his penis and put it in her anus. She felt like screaming but she could not. Her anus was hurting. He took his penis out, put it back in, and took it out two or three times, she thought, hurting her (count 1).[5] He turned her around and put his penis in her vagina. This stung and hurt her. She could not say anything; it was like she could not talk (count 2). She could not see her sister during counts 1 and 2. He pulled her off the bench. She went back into the shower with her sister and then he jumped in. He told them both to jump out of the shower. She and her sister got dressed. She could not remember what happened after that.[6] She thought she could not walk properly. Everyone thought she had fallen off the bike or something. Her anus was "all sore." This was the only time the appellant sexually abused her.[7]

[8] She did not tell anyone about this until 2012 when she wrote an essay. She did not name herself in the essay but her English teacher knew she was writing about herself and referred her to the school counsellor. She told the counsellor what had happened. She also told her best friend at the time, DR. She did not tell anybody earlier because she was ashamed and did not want anyone to know.[8] She told DR that she was seeing the counsellor because something happened to her when she was small. DR asked her what happened. She told DR that she was raped but did not go into more detail. She was crying when she spoke to DR and the counsellor.[9]

[9] In cross-examination she maintained that the appellant put his penis into her anus and her vagina. She agreed that, although she thought the offending happened when she was in grade one, it could have happened in grades two or three.[10] She agreed that, to the best of her recollection, whilst the appellant was sexually abusing her, her sister was still in the shower. She could not remember how long the offending took but it was very quick.[11] She had a good relationship with her Aunty J who was like a mother to her but she did not tell her about the appellant's conduct.[12] Nor did she tell her mother about it; she was not really close to her mother. The essay she wrote in grade 12 was fictional, with fictional characters. While she was reading the essay to her teacher, she began to cry. Her teacher questioned her and sent her to a counsellor. Although DR was her best friend, she told her about these things only after she spoke to the counsellor.

---

5 T1-14 – T1-15, AB 31 – 32.
6 T1-15, AB 32.
7 T1-25, AB 42.
8 T1-16, AB 33.
9 T1-17, AB 34.
10 T1-19, AB 36.
11 T1-20, AB 37.
12 T1-21, AB 38.

[10] The complainant's mother gave evidence that after she separated from the appellant, the complainant and her sister would visit him at his sister's house twice a week.[13] The mother and her children left the Indigenous community for Townsville in 2004. She thought the complainant was in grade one in 2001.[14]

[11] The counsellor gave evidence that in June 2012 the complainant, who was quite nervous and upset, told her that when she was a child she was raped by her step-father.[15]

[12] DR gave evidence that the complainant was her cousin and best friend and the appellant was DR's uncle. In 2012 the complainant told her at school that the appellant had raped her.[16] The complainant was sad and did not want to talk after that.[17]

[13] The complainant's Aunty J gave evidence that she looked after the complainant and two of her siblings from July 1999 until about 2004.[18] Sometimes the children would stay with their mother. Aunty J never saw the appellant collect the children from her house.[19]

[14] The appellant, who did not give or call evidence, made the following admissions which were accepted by the prosecution. He had no further contact with the complainant in the Indigenous community from and after 29 September 2003.[20] The complainant's sister was interviewed by police on 25 January 2013 and did not recall witnessing the appellant sexually abuse the complainant.[21] The complainant was interviewed by police on 24 January 2013 and again on 31 August 2013.[22]

[15] During the prosecution case, the jury sent a note to the judge asking for a copy of the complainant's essay and her police statement. The judge told them that the essay was not available and it was not possible to view police statements. Her Honour reminded them:

> "that the evidence is what the witness says in the witness box, not what they said to the police. Sometimes it happens that there's cross-examination and they'll say – the barrister will say, "You said this here, but this is what you said in the police statement. You know, they're not the same, are they?" That sort of thing. And that way you sometimes – you get to hear what's in the police statement. But, generally speaking, what was said to the police is not evidence; it's what is said here."[23]

[16] During the judge's final directions to the jury, the judge reminded them that they must determine the facts of the case based on the evidence before them in the courtroom.[24] They must reach their verdict on the evidence from the witnesses in the witness box, and the admissions.[25] The judge explained that her directions and the barristers' addresses were not evidence. Her Honour emphasised that, before convicting the appellant,

---

13 T1-29, AB 46.
14 T1-30, AB 47.
15 T1-36, AB 53.
16 T1-39, AB 56.
17 T1-40, AB 57.
18 T2-6 – T2-7, AB 65 – 66.
19 T2-9, AB 68.
20 T2-13, AB 72.
21 T2-14, AB 73.
22 T2-15, AB 74.
23 T2 – 5, l 28 – l 34, AB 64.
24 AB 79, l 24 – l 25.
25 AB 80, l 12 – l 14.

they must accept the complainant's evidence as truthful and reliable beyond reasonable doubt; the complainant's credibility was at the heart of the case. The defence case, the judge explained, was that these things did not happen. The judge set out the disadvantage to the appellant of the long delay in the complainant reporting the case and warned the jury that it was dangerous to convict on the complainant's evidence alone unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, they were satisfied beyond reasonable doubt of its truth and accuracy. The judge summarised the defence case: the complainant's recollection was not reliable; it could have been honest but mistaken; she made no complaint for years; the span of dates over which the offences were charged was so wide that it was impossible after all this time for the appellant to say what he was doing on some unspecified day; and the jury would have a reasonable doubt and would find him not guilty.

[17] The jury retired to consider their verdict at 12.29 pm on the second day of the trial. The judge stated that she would not take a verdict between 1.00 pm and 2.00 pm. The court reconvened at 2.20 pm when the bailiff informed the judge the jury had a verdict. The judge stated that at about 2.00 pm she had received the following note from the jury: "Could we please have direction on one member of the jury informing of being raped as a younger woman." The judge said that, after receiving the note, she arranged for counsel to come to her chambers where she told them that she would reconvene the court with the whole jury and remind them of the need for both impartiality and apparent impartiality, and to decide the case on the evidence. Her Honour stated that she was about to return to court to do this when the bailiff informed her that the jury had a verdict. The jury then returned to the courtroom and delivered their verdict of guilty on both counts at 2.21 pm.[26] Neither counsel submitted that the judge should give the foreshadowed redirection before the taking of the verdict.

The contentions in this appeal

[18] The appellant points out that, although no objection was taken to the form of the indictment, each charge alleges that the offence occurred between 30 September 1999 and 29 September 2003. As a result, he contends that each charge is defective because each pleads a continuing offence. He points out that formal particulars were not provided but concedes that the particulars are obvious as, on the prosecution case, the two incidents happened on the same day, at the same place, and in a single course of conduct on an unknown date between the dates charged in the indictment.

[19] As to the first ground of appeal, the appellant emphasises that the complainant's evidence was unsupported by independent evidence. There were limited opportunities for the offending to have occurred. The complainant's sister, who the complainant says was present in the bathroom at the time of the offences, was unable to support the complainant's evidence. No evidence was led of the details of the complainant's essay or of the nature of her counselling. The appellant also emphasises the very significant delay between the alleged offence and the complaint to others.

[20] As to the second ground of appeal, the appellant contends that the appropriate test to be applied is that identified by Mason CJ and McHugh J in *Webb v The Queen*[27]: "whether the incident is such that, notwithstanding the proposed or actual warning of the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury has not

---

26 Verdict 2, AB 92.

27 (1994) 181 CLR 41, 53.

discharged or will not discharge its task impartially." This test, the appellant submits, was recently applied by the High Court in *Smith v Western Australia*.[28] French CJ, Crennan, Kiefel, Gageler and Keane JJ, in discussing *Weiss v The Queen*,[29] noted that in some cases it may be proper to allow the appeal and order a new trial where there had been a "serious breach of the presuppositions of the trial".[30] The appellant also refers to *Ashley v The Queen*[31] but contends that, unlike *Webb*, *Smith* and *Ashley*, the present case depended entirely on the complainant's credit about which there were concerning aspects. In the present case a juror raised with the jury during their deliberations that she had been raped as a young woman; this gives rise to a reasonable apprehension or suspicion that she said this in the context of discussing the complainant's credit. As a result, the appellant contends, there is a reasonable apprehension that a juror or the jury has not discharged its task impartially in returning a verdict of guilty.

[21] As to the third ground of appeal, the appellant contends that *R v TAB*,[32] *R v Knight*,[33] *R v McCormack*,[34] *R v Salama*,[35] *R v Hickey*[36] and *R v Lapins*[37] support his submission that, where the jury has asked the judge for a direction on a matter of law, that direction should be given before a verdict is taken. The appellant contends the jury's question to the judge concerned a matter of law. There was no significant delay between when the judge received the question and when the jury indicated they had reached a verdict. The judge stated prior to taking the verdict that she was about to give the jury apposite directions. The judge had instructed the jury to tell her if anybody brought information into the jury room which did not come from the evidence at trial. In all these circumstances, the appellant contends, the judge's failure to direct the jury as to the irrelevance of the female juror's experience as a young woman rape victim has given rise to a miscarriage of justice.

[22] In essence, the respondent submits that none of these contentions are made out in the circumstances here and the appeal should be dismissed. I will deal more fully with the respondent's contentions in discussing each ground of appeal in turn.

Conclusion

[23] The respondent rightly concedes that the counts were defective in that they charged the rapes as continuing offences and applies to amend the indictment to insert the words "on a date unknown" between "that" and "between" in each count.[38] The appellant does not contend it is inappropriate to allow amendment, even at this late stage. That concession too, is rightly made. The power under s 572(3) *Criminal Code* 1899 (Qld) to amend an indictment where no injustice will be done includes amending an indictment after verdict at appellate level: see *R v Fahey & Ors*[39] and *R v AP*.[40] I would grant the respondent's application to amend the indictment by inserting the words, "on a date unknown" between "that" and "between" in each count.

---

28 (2014) 250 CLR 473.
29 (2005) 224 CLR 300.
30 (2014) 250 CLR 473, 485 – 486 [53] citing *Weiss v The Queen* (2005) 224 CLR 300, 317-318 [43] – [46].
31 [2016] NTCCA 2.
32 [2002] NSWCCA 274.
33 Unreported, New South Wales Court of Criminal Appeal, Hunt, Wood, McInerney JJ, 18 December 1990.
34 (1996) 85 A Crim R 445, [70].
35 [1999] NSWCCA 105.
36 [2002] NSWCCA 474.
37 [2007] SASC 281, [35].
38 See [1] of these reasons.
39 [2002] 1 Qd R 391.
40 [2003] QCA 445, [18].

[24] As to the first ground of appeal, the respondent's case was not without its difficulties. These have been highlighted by the appellant, as they were by his counsel at trial. The complainant, however, maintained throughout a thorough cross-examination that the appellant committed the alleged offences. There were opportunities, albeit limited, for him to have committed them in the manner she described. The judge correctly directed the jury to scrutinise her evidence with great care because of the delay and to only convict if satisfied of its truth and accuracy. The complainant gave a rational explanation as to why she did not make a contemporaneous complaint: she was ashamed and did not want anyone to know. Her sister was two years younger than her and would have been but three or four years old at the time of the alleged offences so that this was one explanation for not remembering the incident. In any case, the complainant's description of the bathroom made it plausible that the offending could have occurred out of her sister's line of vision and, with the shower running, also out of her hearing. After all, the complainant's evidence was not that she yelled out for help or screamed out loudly in pain. The fact that her sister could give no evidence to support the complainant's evidence did not require the jury to reject it. The details surrounding the complainant's essay which led to her complaint and her subsequent counselling could have been, but were not, explored by the defence at trial. This gap in the prosecution case is no reason to reject the complainant's evidence. The complainant's evidence was uncontradicted.

[25] After reviewing the whole of the evidence, I am satisfied it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of both offences. The first ground of appeal is not made out.

[26] As to the second ground of appeal, the fact that the jury informed the judge shortly before they returned their verdicts that one juror was "raped as a younger woman" does not necessarily mean that this juror was partial, or that she infected other jurors and the verdict. The judge's initial directions to which I have referred[41] made clear to the jury their obligations as to impartiality and all jurors indicated their ability to be impartial. The fact that a juror has been a victim of a crime, perhaps a crime of the type charged against the accused person, does not automatically mean the juror cannot decide the case impartially in accordance with their solemn oath or affirmation. The concept of a jury trial by 12 peers makes it likely that sometimes one or more jurors will themselves have been victims of crime, even of the type charged against the accused person. This does not preclude the juror or jurors from being empanelled if they consider they can act impartially and there is no reason to objectively consider that their empanelment would undermine confidence in the criminal justice system. Significantly, the note did not state that the juror concerned was acting partially or seeking to improperly influence other jurors. As the respondent contends, the note was consistent with the jury conscientiously following the judge's initial directions: to inform the court if any information that was not in evidence was brought into the jury room. Had the jury been given careful directions as to the note, in light of the judge's initial, clear directions about the need for juror impartiality, the fair-minded and informed member of the public referred to in *Webb*[42] would not have had a reasonable apprehension or suspicion that the juror to whom the note referred did not discharge her duty impartially, or had improperly infected either the deliberations of other jurors, or the verdict. The second ground of appeal is not made out.

---

41 See [3] and [4] of these reasons.

42 Set out in [19] of these reasons.

[27] The third ground of appeal is, however, problematic for the respondent. The jury retired to consider its verdict at 12.29 pm on the second day of the trial and returned with their guilty verdict at 2.21 pm that day, less than two hours later (including the lunch break). The prosecution case was by no means strong and turned entirely on the reliability of the complainant's unsupported account of events when she was five or six years old, 13 or 14 years earlier. As the judge explained to the jury, each juror was required to carefully assess the complainant's evidence to determine whether it could be accepted as reliable beyond reasonable doubt. At about 2.00 pm the judge received the jury note.[43] It is not apparent from the transcript why the judge arranged for counsel to come to her chambers to discuss the note. The preferable course would have been to reconvene in open court so that everything said about this matter could be accurately recorded in the transcript. I note, however, that it is not suggested anything turns on this in the present case. Her Honour later made clear in court that she had told counsel in chambers that she would reconvene and remind the jury of the need to be, and be seen to be, impartial, and that they must decide the case on the evidence. The judge was about to give the jury those entirely appropriate directions concerning a matter of law when the bailiff informed her that the jury had a verdict. The judge did not then delay taking the verdicts until she gave those directions and allowed the jury time to consider them. Neither counsel objected to the course adopted by the judge, but it was not a course supported by a body of high legal authority.

[28] In *TAB*, the New South Wales Court of Criminal Appeal in 2002 considered whether a verdict can be taken before a jury request for direction has been given. Levine J (Mason P and Sully J agreeing) referred to *Knight* and *McCormack* which established that the practice in New South Wales was that, ordinarily, the trial judge should ensure that no further directions are to be sought or given before the jury retires to consider their verdict.[44] (I observe that this practice is not commonly followed in Queensland where the jury routinely retire to consider their verdict before the judge asks counsel if they have applications for redirection; after determining those applications and if redirections are necessary, the judge then invites the jury to return to the courtroom and gives any redirections the judge considers apposite). Levine J then referred to *Salama*[45] where an appeal against conviction was allowed because the verdict was taken before the jury had been directed as to questions they had asked of the judge before verdict.[46] His Honour relevantly concluded:

> "… (b) in circumstances where the jury asks a question that indicates that further directions as to law are required and which indicates some uncertainty in the corporate state of mind of that tribunal, the trial judge should ensure that no verdict is taken before that question is answered;
>
> (c) where the jury, as in this case, merely asks to be reminded of evidence…the verdict of the jury given in the absence of that reminder should be respected.
>
> [73] As the authorities indicate, each case will depend on its own circumstances".[47]

---

43 Set out in [17] of these reasons.
44 *R v TAB* [2002] NSWCCA 274, [70].
45 [1999] NSWCCA 105.
46 *R v TAB* [2002] NSWCCA 274, [71].
47 Above, [72] and [73].

[29] Later that year the New South Wales Court of Criminal Appeal applied *TAB* in *R v Hickey*.[48] The jury's question to the judge about joint criminal enterprise remained unanswered when they returned their guilty verdict in Hickey's trial. James J (Spigelman CJ and Sully J agreeing) allowed the appeal as this amounted to a miscarriage of justice. James J noted, however, that, although a question asked by the jury should be answered by the trial judge before taking any verdict, it did not necessarily follow that every verdict taken while a jury question remains unanswered involved a miscarriage of justice.[49]

[30] The South Australian Court of Criminal Appeal referred to *Hickey* with approval in *Lapins*. In that case, the jury requested a copy of the judge's summing up. His Honour advised them that this was not the practice, declined their request, but explained that if they wished to have a part of the summing up read to them, they should put their request in writing and he would do his best to assist. The jury did not respond to the judge's invitation and several hours passed before their guilty verdict. Gray J (Duggan J agreeing) considered that, as there was no response from the jury, there was no evidence of any unanswered or unresolved issue with respect to the jury so that there was no irregularity in the verdicts and dismissed the appeal must be dismissed.[50] Vanstone J (Duggan J also agreeing) also dismissed the appeal, observing that it was not a case where the jury was denied assistance; the jury decided not to pursue the enquiry so that there was no outstanding request at the time the verdicts were delivered.[51]

[31] The New South Wales Court of Criminal Appeal has most recently considered this issue in *Alameddine v R*[52] where the jury, after retiring to consider their verdict, sent the judge a note asking about the weight they could give to joint criminal enterprise in relation to specified DNA evidence. His Honour asked the jury to clarify the information they required and to try and redraft their question. The jury did not redraft their question but about an hour later indicated they had finished deliberating and could not reach a unanimous verdict. The judge gave them directions consistent with *Black v The Queen*[53] and told them they could deliver a majority verdict of 11 jurors. They returned soon after with majority verdicts of guilty, the judge not having answered their enquiry. In allowing the appeal, Grove AJ (McClellan CJ at CL and Johnson J agreeing) affirmed the principle that a verdict should not be taken until a request for direction has been fulfilled, adding:

> "Where a question manifests confusion, it is important that this be removed and the jury be directed along the correct path. Even if, absent direction, a jury has resolved an issue to their own satisfaction, it has been held erroneous to omit so to do: *R v Salama* [1999] NSWCCA 105.
>
> It is perhaps understandable how the obtaining of the requested redraft of the question was overlooked, given the focus of the series of communications from the jury concerning its inability to agree but the omission amounted to error. Even where the directions in the initial charge are adequate, it has been held that they no longer remain so in the light of the existence of an unanswered question: *R v Hickey* (2002) 137 A Crim R 62."[54]

---

48 [2002] NSWCCA 474.
49 Above, [46] and [47].
50 Above, [2], [35] – [38].
51 Above, [2] and [61].
52 [2012] NSWCCA 63.
53 (1993) 179 CLR 44.
54 [2012] NSWCCA 63, [45] and [46].

[32] The respondent contends that, although the jury asked for "direction" in the note to the judge, in context it was not a request for help which needed to be answered before verdict; the jury would not understand the legal connotation of the word "direction." It was, the respondent submits, their way of informing the judge, in case this was important, that information was in the jury room which had not come from the trial; as the jury did not refer to this issue again before verdict, it cannot have concerned them. The respondent emphasises the observations in *Hickey* that not every case where a jury question is unanswered before verdict will result in a successful appeal and each case must be considered on its own facts. In this case, the respondent contends, in light of the judge's earlier full and careful directions as to impartiality there was no reason to think the jury had not followed those directions in returning their guilty verdicts.

[33] This Court should follow the line of authority accepted at appellate level in New South Wales and South Australia that, as a general rule, a trial judge should not take a verdict until any requests from the jury for direction have been answered as fully as possible. That approach accords with the common sense notion that the trial judge must properly direct the jury and that their verdict should not be taken whilst their concerns may remain unanswered, particularly as to matters of law, about which they rely entirely on the judge for direction. It is also consistent with s 620 *Criminal Code* 1899 (Qld) which states that "it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make"[55] and that "[a]fter the court has instructed the jury they are to consider their verdict."[56] The respondent does not contend otherwise. As *Hickey* identifies, that does not mean, where a guilty verdict is taken before a jury question has been answered, it will inevitably be set aside on appeal. The question for the appellate court is whether it would be a miscarriage of justice to allow the guilty verdict to stand in the particular circumstances of that case.

[34] I cannot accept the respondent's contention that the jury note in this case was simply to inform the judge and did not require a response before verdict. It was a clear and courteous request for judicial direction following one jury member telling the others that she was raped as a younger woman. It raised the possibility that this juror may be using her past experience to improperly emotionally influence other jurors about the critical question in the trial: the reliability of the complainant. The note was effectively a question about the applicable law. It raised the possibility of some uncertainty in the corporate state of mind of the jury. For that reason, as the trial judge correctly apprehended, despite the initial judicial directions as to impartiality, it was necessary to remind all jurors of their obligation to be impartial, to decide this case on the evidence and to enquire if each juror could do so. A further general enquiry as to whether the jury or any juror had any concerns or questions would also have been prudent. It is true, as the respondent contends, that the trial was short and the jury had been earlier instructed as to the need for impartiality. But the resolution of the complainant's reliability was by no means a straightforward issue for the jury. It required the careful assessment of her evidence to determine whether it could be accepted as reliable beyond reasonable doubt in light of the delay, her youth and the judge's firm warning. The jury did not have the benefit of the directions foreshadowed by her Honour before returning their guilty verdicts. This amounted to an error of law. Despite the jury's difficult task in this case, they deliberated for

---

55 *Criminal Code* s 620(1).

56 Above, s 620(2).

but a short time before verdict, particularly taking into account the lunch break. In the absence of the direction the trial judge foreshadowed, it may be that the verdict was tainted by the emotions of the juror referred to in the note. There is a real possibility that there has been a miscarriage of justice. The appeal must be allowed and a retrial ordered to ensure justice is seen to be done in this case and to maintain confidence in the criminal justice system.

[35] I observe that there is no reason to abandon the usual, time-efficient Queensland practice of allowing the jury to commence deliberating whilst the judge determines applications for redirections. It is not inconsistent with s 620,[57] provided judges endeavour to give all required directions and redirections, and answer all jury questions, before taking a verdict.

Orders:

1. The indictment is amended to insert the words "on a date unknown" between "that" and "between".
2. The appeal against conviction is allowed.
3. The verdicts of guilty are set aside.
4. A retrial is ordered.

[36] **MORRISON JA:** I have had the considerable advantage of reading the draft reasons prepared by the President. Subject to what follows I agree with her Honour's conclusions, and the orders she proposes.

[37] The transcript reveals the question asked by the jury, and how it was dealt with:[58]

> "BAILIFF: The jury have reached a verdict, your Honour.
>
> HER HONOUR: Yes. I'll get them in a moment. I'll just put on record what happened, what – our discussions.
>
> MR LYNHAM: Yes.
>
> HER HONOUR: So we had – received a note from the jury at about 2 o'clock. The note says:
>
> > *Could we please have direction on one member of the jury informing of being raped as a younger woman.*
>
> I then asked counsel to come in and I told them that what I'd decided to do was address the whole jury and remind them of the question of impartiality, apparent impartiality and deciding on the evidence. We were just about to come back in and – to do that and the bailiff informed us that we have a verdict. Mark the note B and put it on the file, and bring the jury in."

[38] The jury had retired at 12.29 pm. The note was received at about 2 pm, and Court resumed at 2.20 pm, by which time the jury had decided upon the verdicts. The jury were then brought in and the verdicts taken, without more being said by either the learned trial judge or counsel on either side.

---

57 Relevantly set out in [33] of these reasons.

58 AB 92 lines 4-21.

[39] For the reasons given by the President in paragraph [26] above, I agree that the note does not lead to the conclusion that the juror concerned was acting partially or seeking to improperly influence other jurors. I also agree that the note shows that the jury were diligently observing the directions they had been given, to inform if any information that was not evidence was brought into the jury room.

[40] In my view, when the content of the note is considered in light of the offences they were considering, any fair-minded and informed member of the public would not have a reasonable apprehension or suspicion that the juror concerned could not discharge her obligations impartially. Nor would that be thought of the jury as a whole.

[41] The offences were of child rape, the complainant being aged between five and eight years at the time. The note reveals that the juror said she had been raped "as a younger woman". That does not suggest she had been raped as a child, let alone one as young as the complainant or in any circumstances that might come close to those under consideration in the trial. In fact the note does not necessarily suggest that she had been raped when she was under the age of consent.

[42] The note did not state or imply that the juror concerned was acting partially or seeking to improperly influence other jurors. I would conclude that the note simply informs the trial judge that a juror has said something and seeks to know if there is an issue for the jury that arises from that fact. However there are two matters, to which I shall refer in more detail in due course, which affect the outcome.

[43] The two matters are: first, the use of the word "direction" in the note; and secondly, the fact that the learned trial judge considered it necessary or advisable to respond to it by reminding the jury of "the question of impartiality, apparent impartiality and deciding on the evidence".

[44] In *R v TAB*[59] the facts were more complicated than in the present case. The jury asked for the transcript of where the offence had occurred. The trial judge asked them whether they needed the evidence in chief, or the cross-examination as well. The jury said they wanted both. About 40 minutes later the jury let it be known they had reached a verdict. It was not known whether they had received the transcripts they asked for.

[45] Levine J[60] referred to *R v Salama*,[61] which itself had circumstances described in *TAB* as "peculiar".[62]

[46] The jury in *Salama* asked "The charge on the indictment states 'Did fire a firearm with disregard for safety of Alice Salama. Does this include accidentally?'" Then, while that question was being debated between the trial judge and counsel, the jury sent a second note: "Your Honour, we have reached a verdict. Please disregard the question previously sent in." The trial judge decided to take the verdict over the objection of counsel, who asked that the question be answered first.

[47] Having received the verdicts the trial judge then said that "before accep(ting) this verdict from you I should deal with the questions which you have put to me…". The questions were then read, answered, and the verdicts taken a second time.

---

59 [2002] NSWCCA 274.
60 With whom Mason P and Sully J concurred.
61 [1999] NSWCCA 105.
62 *TAB* at [71].

[48] The decision of Kirby J in *Salama* was that the notes revealed confusion on the part of some members of the jury. After referring to the insight that might be provided by "external indicators of compromise" and "external indicators of confusion", his Honour said:[63]

> "[71] The first note, on its face, betrayed confusion. The confusion went to the heart of the charge. Notwithstanding the jury's apparent resolution of the issue to their own satisfaction, it was important that the question be answered. It was also important that they should then deliberate further in the light of that answer. Once the verdict was delivered, the opportunity to answer the question, and instruct the jury, was lost. After verdict, the obligation was to immediately discharge the jury...It was not open to the judge to interrogate the jury as to the grounds for its decision...
>
> [72] Although what occurred was irregular, it is apparent that an issue arose in his Honour's mind as to whether the jury had understood the directions which had been given. Hence, the directions were given for a second time. Failure to answer the question before the verdict was, in my view, an error justifying a new trial."

[49] Levine J identified two factual features of *Salama*: the jury had said there was no need to answer the question, and the question itself was a request for further direction. Levine J continued:[64]

> "[72] In these cases it can be seen that within the framework of the matter of principle referred to by Mahoney P in McCormack: (a) a jury should not formally be asked to retire to consider its verdict until all applications for further directions have been dealt with conclusively; (b) in circumstances where the jury asks a question that indicates that further directions as to law are required and which indicates some uncertainty in the corporate state of mind of that tribunal, the trial judge should ensure that no verdict is taken before that question is answered; (c) where the jury, as in this case, merely asks to be reminded of evidence (and assuming that the reminder was not in practical terms given to it) the verdict of the jury given in the absence of that reminder should be respected.
>
> [73] As the authorities indicate, each case will depend on its own circumstances."

[50] Ultimately Levine J held that there had been no irregularity amounting to a miscarriage of justice.[65]

[51] As is evident from the passages above, both *TAB* and *Salama* were cases where the jury's note revealed "some uncertainty in the corporate state of mind of that tribunal" or confusion.

---

63 *Salama* at [71]-[72].
64 *TAB* at [72]-[73].
65 *TAB* at [74].

[52] *R v Hickey*[66] had an even more complicated set of facts. The jury were to consider offences involving a joint criminal enterprise. They asked this question:[67]

> "Can we have a copy of the judge's directions given on Thursday 16 March 2000.
>
> If the facts presented do not support the proposed scenario but we find that the facts support a variation of the scenario is there any point of law preventing a conviction, if the end result of both scenarios is the same?"

[53] The trial judge was concerned that the questions be dealt with in the presence of the accused, even though he was legally represented. Because the accused had absented himself from the trial at that point there was a delay in answering the jury question. The judge proposed, and counsel agreed, that the jury should clarify each of the questions asked. The jury were brought in and as to the first question they were asked to "retire to the jury room and just focus on what in particular you want to be redirected about, what area or areas that you particularly want me to direct you again on".

[54] As to the second question, the judge asked the jury to clarify the question, because she was not entirely sure what the jury were seeking clarification on. The jury then returned to the jury room.

[55] The jury sent a third question: "Can the judge please explain joint criminal enterprise?" In the absence of the jury, and still in the absence of the accused, the judge proposed redirection on that issue, with which there was no disagreement from the lawyers for the parties.[68] By then, the accused still being absent, the judge had the jury informed that court would resume the following day. Then the jury sent another note: "Three of the jurors do not want to come back tomorrow", and shortly after that yet another note: "After further discussion we have now reached a verdict".[69] The verdicts were taken.

[56] James J[70] observed that the question should have been answered before the verdict was taken. He went on:[71]

> "[48] However, in the present case I consider that the combination of events relied on by counsel for the appellant, that is, the delay in answering the questions, the failure to answer the question asked by way of clarification of the earlier questions and the return of a verdict only minutes after members of the jury had been asked to state in writing why they did not want to come back the following day and resume their deliberations then, produces the consequence that the verdicts of guilty involve a miscarriage of justice.
>
> [49] The question asked by the jury asked the trial judge to explain joint criminal enterprise, that is, to explain to the jury principles of law. The question had been asked, because the jury had been asked by the trial judge to clarify two earlier questions, one of

---

66 [2002] NSWCCA 474.
67 *Hickey* at [22].
68 *Hickey* at [28].
69 *Hickey* at [34]-[35].
70 With whom Spigelman CJ and Sully J concurred.
71 Hickey at [48]-[51].

> which had asked for a copy of directions the judge had given in her summing up and the other of which would suggest that the jury had doubts about the view of the facts advanced by the Crown.
>
> [50] It would appear from the latter of the two earlier questions asked by the jury that the jury thought it was reasonably possible that the appellant, even if he was one of the three men, had not been one of the two men who had entered the newsagency but had been the driver. …
>
> [51] It would seem to me there is a real possibility that the jury thought it was reasonably possible that the appellant had been the driver. In those circumstances, it seems to me that the directions given by the trial judge about joint criminal enterprise on charges of robbery whilst armed with a dangerous weapon, even if initially sufficient, should have been expanded in any answer given by the trial judge to the question asked by the jury requiring that joint criminal enterprise be explained. In any event, what her Honour said in her summing up about the criminal liability of the driver should not have been expressed as being "an example"."

[57] In my view, it is evident from those passages that apart from the delay and the speed with which the jury reached a verdict after being told they had to come back the next day,[72] the main factor in the conclusion reached was the confusion on the part of the jury, evident from the note. James J put it as "the failure to answer the question asked by way of clarification of the earlier questions", which went to what was joint criminal enterprise.

[58] *R v Lapins*[73] involved a jury requesting a "transcript of the judge's directions to the jury". The judge informed them that it was not the practice to give a transcript but they were asked to retire again and frame the specific directions they would like re-read. Nothing more was heard from the jury and they returned a verdict without more being done.

[59] The court[74] held that there was no breach of the general principle[75] that questions from the jury should be dealt with before any verdict is taken. Gray J said:[76]

> "[37] The jury did not respond to the Judge's invitation. Several hours passed before their verdict. It is unclear as to what particular concerns led the jury initially to request a copy of the summing up. However, it is clear that the Judge expressly invited the jury to formulate any request they had in writing and that he would then do his best to assist. The jury did not do so.
>
> [38] It has not been established that there was any unanswered or unresolved issue with respect to which the jury wished to have assistance. I would refuse this application."

---

72 Which clearly indicated the possibility of a compromise verdict to avoid coming back the next day.
73 [2007] SASC 281.
74 Duggan, Gray and Vanstone JJ. On this issue Duggan J concurred with Gray and Vanstone JJ.
75 Drawn from *Hickey* and *TAB*.
76 *Lapins* at [37]-[38].

[60] Essentially the same reasoning was reached by Vanstone J:[77]

> "[61] …The interaction between judge and jury indicates that the request they made – that a transcript of the summing up be provided – was not one which the judge considered the practice of the court permitted fulfilling. Having advised the jury that that was the position, the judge indicated that he would receive any specific request for assistance. None was forthcoming. This is not a case where the jury was denied assistance. Apparently the jury decided not to pursue the enquiry. Therefore there was no outstanding request at the time when the jury's verdicts were delivered."

[61] *Lapins* is a case where the Court found that the jury note or question did not necessarily bespeak confusion or uncertainty in the corporate state of mind. Rather, the simple request was not pursued by the jury.

[62] *R v Alameddine*[78] was another case involving questions of joint criminal enterprise. The central issue was identity. The jury sent a note indicating that they were having difficulty in reaching a unanimous agreement. A Black direction was given. A second note was sent, in much the same terms as the first. After that a third note was sent asking: "How much weight can be given in reference to joint criminal enterprise in regard to using the DNA evidence from the interior door handle of the car to implicate the accused for robbery?"[79]

[63] The jury were asked to redraft the question to clarify what it was they were seeking. They did not do that but told the judge they "had finished deliberating", which meant, it was revealed, that they could not reach a unanimous verdict. A majority verdict was permitted and given. Ultimately no answer was given to the third question.

[64] Grove AJ held that there was a miscarriage:

> "[45] There is ample authority that a verdict should not be taken until a request for direction has been fulfilled: *R v McCormack* (1986) 85 A Crim R 445. Where a question manifests confusion, it is important that this be removed and the jury be directed along the correct path. Even if, absent direction, a jury has resolved an issue to their own satisfaction, it has been held erroneous to omit so to do: *R v Salama* [1999] NSWCCA 105.
>
> [46] It is perhaps understandable how the obtaining of the requested redraft of the question was overlooked, given the focus of the series of communications from the jury concerning its inability to agree but the omission amounted to error. Even where the directions in the initial charge are adequate, it has been held that they no longer remain so in the light of the existence of an unanswered question: *R v Hickey* (2002) 137 A Crim R 62."

[65] Once again the question of confusion was a determining factor. The references to *Hickey* and *Salama* have to be understood in light of the analysis above.

[66] In my view, the authorities referred to above establish that unanswered jury questions can cause a miscarriage when they evidence confusion or uncertainty in the corporate

---

77 *Lapins* at [61].

78 [2012] NSWCCA 63.

79 *Alameddine* at [36], per Grove AJ, with whom McLellan CJ at CL and Johnson J concurred.

mind of the jury. Where they do not signify that, the case for establishing a miscarriage of justice becomes harder.

[67] The note here did not evidence confusion or uncertainty. It did not, as in *Salama*, show confusion that went to the heart of the charge. It did not as in *Hickey* and *Alameddine*, go to a question of law at the heart of understanding the offences. The note fitted more in the category dealt with in *TAB* and *Lapins*, where the jury resolved the issue to its own satisfaction.

[68] The two matters referred to earlier are: first, the use of the word "direction" in the note; and secondly, the fact that the learned trial judge considered it necessary or advisable to respond to it.

[69] In my view, the fact that a jury uses the word "direction" in a question asked of a trial judge, should normally connote that the question is a formal request on a matter of importance to the jury. However, it does not necessarily bespeak confusion or corporate uncertainty. Each case depends on its own facts. Here the jury had been told that the trial judge would give them "directions … on law"[80] and that if they needed assistance to ask for it: "If you need anything, evidence read, if you need further direction on the law, just tell me".[81] When the jury asked so soon afterwards for a "direction", it must be taken to mean it was seen by the jury as a matter of law.

[70] However, the issue of law did not go to the charges themselves. It was as to the position of the jury, given that a juror had made the disclosure. That puts it into a different category, in my view, to the situations in *Hickey*, *Salama* and *Alameddine*.

[71] That being said, the learned trial judge considered it necessary or advisable to respond to it by way of further directions, and announced that decision to counsel for both sides. That gave weight to the question, and, no doubt, the anticipation that the further directions would be given before any verdict. That is a factual twist which is not apparent in any of the authorities referred to. It is the factor that warrants the orders proposed by the President.

[72] I agree with the orders proposed.

[73] **NORTH J:** I have read the reasons for judgment of the President. I agree with the orders proposed for the reasons given by her Honour.

---

80 AB 79.
81 AB 89.