SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2014] QCA 277
PARTIES:	**R** **v** **SMITH, Leslie Glyn** (appellant)
FILE NOS:	CA No 45 of 2014 DC No 182 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	7 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2014
JUDGES:	Holmes JA and Philippides and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY PROCEEDINGS – DELAY – where the appellant was convicted by a jury of rape – where the appellant sought a permanent stay of the indictment on the ground of unfairness – where the delay was approximately 25 years – where the appellant contended that the delay had caused him "insurmountable difficulties" in testing the complainant's evidence – whether the judge erred in refusing to grant a permanent stay CRIMINAL LAW – EVIDENCE – MISCELLANEOUS MATTERS – EVIDENCE OF SEXUAL EXPERIENCE, REPUTATION OR MORALITY – where the appellant was convicted by a jury of rape – where the appellant admitted the act of sexual intercourse, leaving only consent in issue – where the complainant gave evidence that the age disparity between her and the appellant was one of several reasons why she would not have consented to sex with him – where the trial judge refused to grant the appellant's counsel leave under s 4 of the *Criminal Law (Sexual Offences) Act* 1978 to cross-examine the complainant to establish that she had previously had sex with an older man – whether the evidence was of substantial relevance to the fact in issue – whether the trial judge erred in refusing to grant leave

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of rape – where the appellant admitted the act of sexual intercourse, leaving only consent in issue – where the appellant contended that the complainant's testimony was so unreliable and marred by discrepancies between her account and the testimony of the other witnesses that the jury could not have been satisfied of the appellant's guilt beyond reasonable doubt – whether on the whole of the evidence it was open to the jury to be satisfied to the required degree of the appellant's guilt – whether the verdict was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF TRIAL JUDGE – OTHER CASES – where the appellant was convicted by a jury of rape – where the trial judge permitted the jury to have the exhibit which was the appellant's interview with police during their deliberations – where the trial judge gave the appropriate direction to the jury against giving disproportionate weight to the evidence – whether the trial judge erred in the exercise of discretion

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF TRIAL JUDGE – CONTROL OF PROCEEDINGS – DISCHARGE OF JURY – where the appellant was convicted by a jury of rape – where the trial judge received a note from the jury during their deliberations which revealed the jury's voting intentions – where the trial judge determined that the prescribed period for a majority verdict under s 59A(2) of the *Jury Act* 1995 (Qld) had elapsed – where the trial judge asked the jury to reach a majority verdict – where the appellant contended that the trial judge ought to have disclosed the voting information to the appellant's counsel before exercising the discretion to ask the jury to reach a majority verdict – where the appellant submitted also that the judge should have discharged the jury – whether the appellant was denied procedural fairness due to the trial judge's non-disclosure of the jury's voting numbers

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4
Evidence Act 1977 (Qld), s 99
Juries Act 2000 (Vic), s 46
Jury Act 1995 (Qld), s 59A(2), s 60(1), s 70

Chidiac v The Queen (1991) 171 CLR 432; [1991] HCA 4, cited
HM v R (2013) 231 A Crim R 349; [2013] VSCA 100, considered
LLW v R (2012) 35 VR 372; [2012] VSCA 54, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, followed
Marshall v Director General, Department of Transport (2001) 205 CLR 603; [2001] HCA 37, considered

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, followed
MJR v R (2011) 33 VR 306; [2011] VSCA 374, considered
Nguyen v R [2013] VSCA 65, considered
R v Black, Watts and Black (2007) 15 VR 551; [2007] VSCA 61, applied
R v Ferguson; ex-parte A-G (Qld) (2008) 186 A Crim R 483; [2008] QCA 227, followed
R v H [1999] 2 Qd R 283; [1998] QCA 348, cited
R v Kashani-Malaki [2010] QCA 222, applied
R v Millar (No 2) (2013) 227 A Crim R 556; [2013] QCA 29, considered
R v NZ (2005) 63 NSWLR 628; [2005] NSWCCA 278, cited
R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, cited
R v Yuill (1994) 34 NSWLR 179; (1994) 77 A Crim R 314, applied
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2008) 233 CLR 259; [2008] HCA 5, followed

COUNSEL: A Boe with B Dighton for the appellant
B Campbell for the respondent

SOLICITORS: Biggs Fitzgerald Pike for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA**: The appellant was convicted by a jury of rape. There was no dispute that he had had sexual intercourse with the complainant; the issue was whether that intercourse was by consent. The jury was also directed on the excuse of mistake of fact (in respect of consent) under s 24 of the *Criminal Code* 1899.

The grounds of appeal

[2] The appellant appealed his conviction on the broad ground that it was "unsafe and unsatisfactory". He also alleged error in the refusal of a judge on a pre-trial application to order a permanent stay of the indictment on the basis of alleged unfairness occasioned by delay in the prosecution. The remaining grounds of appeal concerned claimed errors by the trial judge in refusing to give leave for cross-examination of the complainant in respect of earlier sexual experience; permitting a DVD recording of the appellant's interview with police to be made available to the jury for viewing during its deliberations; and, after his Honour had received a note which revealed the jury's voting intentions, failing to discharge the jury, determining that the prescribed period for a majority verdict had elapsed and asking the jury to reach a majority verdict.

The complainant's account

[3] The complainant, Ms B, gave evidence that at the end of 1988, when she was fifteen, she worked over the school holidays in the kitchen of the Townsville casino's restaurant. While she was working there, she became the girlfriend of one of the waiters, a young man named Smit. The appellant was also employed in the kitchen as a steward and occasionally she had to work with him. Ms B said that he

sometimes made sexually suggestive remarks to her, but she made it clear that she had no interest in him. In February 1989, after Ms B had returned to school, the appellant telephoned her and asked her to come to dinner with him; she declined.

[4] Ms B and Mr Smit were part of a group of friends which included a school friend of hers, Ms Faulks; Ms Faulks' boyfriend, Mr Petrie; and Mr Smit's older sister and her boyfriend, Marcus, who shared an apartment with the appellant. Other than Ms B and Ms Faulks, all of those individuals were employed at the casino. In mid-April 1989, the group planned to meet at the apartment which Marcus and the appellant shared, with the intention of going out together. Ms B went there with Ms Faulks and Mr Petrie; the arrangement was that Mr Smit would join them there when he had finished his shift at work. Marcus left to meet Mr Smit's sister in the city centre; Ms B was under the impression that the appellant had gone with him. Ms Faulks and Mr Petrie also left on a detour back to the latter's unit before the planned meeting in town.

[5] After all of the others had departed, however, Ms B realised that the appellant was still in the apartment. He was drinking rum and appeared intoxicated and agitated. He made statements to the effect that it was clear Ms B wanted to have sex with him and had arranged matters so that she would be alone with him. Ms B maintained that she wanted nothing of the sort; she was Mr Smit's girlfriend and he would soon be there. The appellant responded by saying that if Mr Smit did not arrive by a specified time, it would show that Ms B did indeed want to have sex with him. These exchanges continued over some period of time, during which Ms B made three separate telephone calls to Mr Smit to urge him to come and get her. In the first two calls Mr Smit said that he was delayed; in the third he said that he was unable to come at all.

[6] At the time he had designated, the appellant pointed out that Mr Smit had not arrived, and announced his intention of having sex with Ms B. Ms B ran past him to the front door of the unit, made her way to the road outside, and ran across it and towards the city centre. After she had run for a few minutes, she heard the sound of a motorcycle and hid between parked cars, lying on the ground. The motorcycle pulled up. The rider was the appellant, who said that he now understood that Ms B was not interested in him; that she should get on the motorbike and he would take her back to the unit and call a taxi for her so that she could go and join Mr Smit at the casino. After some repetition of those statements, Ms B accepted that he had changed his position and did return to the apartment with him.

[7] When they arrived at the unit, the appellant brought Ms B a glass of water and telephoned for a taxi for her. He then told her that the taxi would be about twenty minutes, which was sufficient time for him to have sex with her. He took her by the wrist and pulled her to his bedroom. She tried to twist her arm out of his grip and make herself a dead weight, finally hooking her legs around the bedroom doorway in an unsuccessful attempt to prevent him from dragging her inside. At one stage during that process, he pulled her upright by her hair. Once inside the bedroom, the appellant pushed Ms B so that she fell on her back on the bed, with her knees over the end of the bed. She tried to kick him with her right leg, but he held it at right angles to her body with one hand, with the other hand undoing her trousers. He pulled the boot, stocking, trouser leg and underwear off her left leg and, restraining her right leg with his hand over her thigh, proceeded to rape her.

[8] After the rape, the appellant left the room. Ms B dressed herself and took the cab which he had called to Mr Petrie's flat. She found its door open and could hear Mr Petrie and Ms Faulks speaking in a room inside. She waited in the living room for half an hour until they emerged. She told them nothing of the rape at that point. The following day, Ms B saw that there were traces of semen on her upper thighs and underpants. Over the next few days she observed that the area around her vagina was bruised and swollen. About a month after the incident, the appellant telephoned her and asked her whether she wanted her stocking back.

[9] Although she did not tell anyone of the rape immediately after its occurrence, Ms B said that she did so subsequently. About a week later, at school, she told Ms Faulks that the appellant had raped her that night, but Ms Faulks appeared not to take her account seriously. A month or so later, she told Mr Smit that she had been raped by the appellant, but again did not feel that he believed her. Subsequently, having heard rumours that the appellant was boasting of having had consensual sex with her, she raised the matter with Mr Smit once more and said that the appellant had raped her. He responded by saying that he did not believe that the two had had sex. In 1990, Ms B told a male friend that she had been raped by another worker from the casino. She first made a complaint to police about the incident in 2007, in South Australia, where she then lived.

[10] In cross-examination, inconsistencies between earlier statements (in her police statement, the committal proceedings and a prior aborted trial) and her current evidence were put to Ms B. It was suggested to her that at no stage had she directly rebuked the appellant when he made suggestive comments to her while she was working at the casino; she said she disagreed with that proposition. It was then put to her that at the earlier trial she had agreed that she had not directly rebuked the appellant. In response, Ms B said that she accepted that her answers were contradictory, but went on to explain that on the earlier occasion she had been terrified and affected by having taken a number of Valium tablets. Questioned about her relationship with Ms Faulks, Ms B refused to agree with the proposition that they had no falling out. She accepted, however, that at the previous trial she had agreed when it was put that she "certainly didn't have any falling out with [Ms Faulks]".

[11] As to the incident when she ran from the unit and hid from the appellant, it was put to Ms B, and she conceded, that in her statement to police she had said that she was crouched down behind the cars rather than lying on the ground. Although her current evidence was that the road was well lit, she accepted that on a previous occasion she had said that the street lighting was "fairly poor"; and although she had now testified that while the appellant was talking to her he remained on his motorbike, at the previous trial her recollection was that the appellant had got off the motorbike and approached her.

[12] In her police statement, Ms B had said that she encountered the appellant again at the casino when she returned to work there at the end of 1989, and she had given evidence to that effect at the earlier trial. In her statement, she had explained that she had avoided the appellant, who also seemed to be avoiding her; he no longer pestered and harassed her. Group certificates indicated, however, that the appellant was, in fact, working in south-east Queensland at the relevant time. Ms B now conceded that she was not sure that he was there at that time, attributing any confusion in her memory to the effects of post-traumatic stress disorder.

[13] Ms B was asked a number of questions about the background to her complaint. She agreed that in 2005 she approached a victims of crime organisation in South Australia in relation to another incident, with a view to obtaining counselling and therapy. She made contact with a South Australian police inspector in relation to her complaint of rape in November 2007. Ms B was asked whether, when she first approached the police officer, she was aware of an entitlement for victims of crime to receive compensation. She answered "I can't say I do clearly remember that". She accepted she knew of the scheme but said she was not sure exactly when she became aware of it. It was put to her that at the earlier trial, when she was asked about when she became aware of the availability of compensation, she had answered, "possibly 2007 in South Australia" and in response to a further question about whether that was before she made her complaint to the police, she had answered in the affirmative. In the current trial, she said she could not recall the question and answer, although she did not dispute them.

[14] When she made her complaint, Ms B agreed, she had been undertaking therapy with counsellors and psychologists over some 20 years for problems including her poor relationships with her parents. She accepted a number of suggestions put to her about her personal concerns and the therapy she had received. She had had a number of difficulties in her personal relationships and had experienced dissociative episodes, which included something she described as "split awareness when happened [sic] out of the body". She had suffered nightmares about being raped. She expressed a need for "validation" of her experiences, in the form of acknowledgement of them by others, and had described feeling "validated" when the appellant was charged. Between 1995 and 2007, Ms B agreed, she had on various occasions undertaken a particular therapy called "neuro-linguistic programming", which entailed "accessing subconscious beliefs that are causing conscious trauma". A particular therapist had used with her a system of making suggestions to which she would physically respond through touch and movement. Ms B denied that her encounter with the appellant was the subject of any of the therapy.

The evidence of other witnesses in the Crown case

[15] Other members of the group which had been friendly with Ms B in 1989 gave evidence. Mr Smit, who had been her boyfriend at that time, said that he recalled the appellant frequently asking him questions about Ms B and at one stage expressing interest in having sex with her. He recalled the night on which there was a plan that the friends would meet at the appellant's unit. He received a number of calls from Ms B that night. In the first conversation, at about 7.30 pm, she said that Ms Faulks and Mr Petrie were at the unit with her; they would have dinner and he could meet her in the city later.

[16] At about 10.30 pm, Mr Smit said, Ms B had telephoned again, saying that Mr Petrie and Ms Faulks were intending to go back to Mr Petrie's apartment. She informed Mr Smit that the appellant had offered to give her a lift home. Ms B said that she was worried about the appellant and that if she were not careful he might "ravish"[1] her. In cross-examination, Mr Smit accepted that she was being light-hearted on the subject, "laughing and joking", and did not seem distressed. He asked whether Ms B wanted him to come and pick her up, but she responded that she would be fine. Mr Smit said that he spoke to Ms B again at about 11.30 pm. She said that

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[1] The transcript showed the word as "ravage", but it was common ground that it was a mistranscription of "ravish".

she was calling from a public phone box and sounded distressed. She told Mr Smit that she had had to get out of the appellant's apartment. He could hear the sound of a motorbike in the background. Ms B told him that she would meet him in town.

[17] Mr Smit finished his shift at around midnight. He drove past the appellant's apartment, which was in darkness. He went into the city centre, but did not encounter Ms B and did not see her again until the next day. He asked her then if everything had been all right the previous night. Ms B said that everything was fine and that he should not be angry at the appellant or blame him. She refused to explain herself further. In cross-examination, Mr Smit agreed that Ms B had given him "some indication that there had been something sexual that had occurred between her and [the appellant]". There was no suggestion, however, that she had been raped. After that conversation, Mr Smit had gone to work. He agreed that the appellant had approached him there and said that he wanted to explain what had happened. Mr Smit had responded by saying that Ms B had already talked to him about the matter, and it could be left at that.

[18] At the end of 1989, when Ms B had finished school, she and Mr Smit began to live together. About six months later, when they were discussing their relationship, she told him for the first time that the appellant had raped her. She described how, after hanging up the telephone after her call from the public telephone box, she ran up the road because she could hear the sound of the appellant's motorbike. He caught up to her and pulled her onto the motorbike, dragging her over the fuel tank. He then took her back to the unit and dragged her inside, where he raped her. Mr Smit agreed in cross-examination that what Ms B portrayed was essentially an abduction off the road.

[19] Ms Faulks, the school friend of Ms B, said in evidence that she had no recollection of any conversation with Ms B about an incident between herself and the appellant. The two had had no falling out. She agreed in cross-examination that it was unlikely she would forget having been told of a rape, and her memory was that there had been no such suggestion to her.

[20] Mr Petrie recalled an evening when he and Ms Faulks went to the appellant's apartment. The original intention was that they would have dinner with Ms B, the appellant, Mr Smit's sister and her boyfriend, Marcus. When he and Ms Faulks arrived at the apartment, Ms B was already there. The plan had changed: Mr Smit's sister and Marcus were no longer to be part of the group. Instead he, Ms Faulks, the appellant and Ms B had a meal. At one stage, he and Ms Faulks went into the appellant's bedroom for a period of about an hour. Emerging at one point to use the lavatory, he saw Ms B sitting on the kitchen bench. The appellant was, as he described it, "getting amorous…trying to get close to [Ms B]", who was pushing him off. She appeared to be in control and the appellant was not being aggressive, rather "leaning in" towards her. He, Mr Petrie, asked whether she was all right, but he could not recall her response. At about 11.00 pm he and Ms Faulks left the unit, expecting that Mr Smit would pick Ms B up at about 12.30 am. Mr Petrie agreed in cross-examination that they would not have left her there with the appellant if they thought there was anything to be concerned about. The appellant had, on five or ten occasions, expressed interest in Ms B to him. On a subsequent occasion he had told Mr Petrie that they had slept together that night.

[21] The male friend in whom Ms B said she had confided was called. He said that in 1990, Ms B told him that she had been raped. His recollection was that it had

something to do with a function at the casino and that the perpetrator was a friend of a friend or a work colleague. He thought there was a motorbike involved. The conversation had occurred in a context in which he had disclosed that he had himself been sexually abused.

The appellant's record of interview

[22] The appellant did not give evidence, but the Crown tendered a DVD recording of his interview with police on 17 March 2011. In it, he said that he recalled Ms B as a young girl, seventeen or eighteen years of age, seeking an apprenticeship at the casino. She was going out with someone, he could not now recall whom. He remembered that she liked partying. There was a group which socialised, consisting of Marcus and his girlfriend, a chef (Mr Petrie) who was going out with one of Ms B's friends, and Ms B. He was not himself interested in Ms B; he preferred older women. He confirmed that he had shared an apartment with Marcus. Ms B had come to dinner there one night, with Marcus and his girlfriend. Ms B's boyfriend was working. She rang him up and then went to a nightclub to meet him. The appellant thought she left in a taxi. He had not touched her or had sex with her. He confirmed that he owned a motorbike and was given to drinking rum.

The appellant's admissions

[23] The appellant made formal admissions under s 644 of the *Criminal Code* that he knew Ms B when he worked at the casino in 1988 and early 1989 and that on a night between 16 March and 16 April 1989, he and she were alone together for some hours at the flat where he was living and had sexual intercourse.

The application for a permanent stay of the indictment

[24] In August 2012, the appellant sought a permanent stay of the indictment on the ground of unfairness consequent on the delay in the making of Ms B's complaint to police and its investigation. That unfairness was identified as the loss of forensic evidence which might have been obtained from Ms B's body and clothing, the loss of the opportunity of obtaining evidence from the taxi driver who had driven her away from the appellant's unit, or from other occupants of the unit block, and the fading memories of the witnesses who did give evidence.

[25] The judge who heard the application noted that at the time of the events giving rise to the charge, Ms B was a child; she was aged 16 years and two months. There was a significant disparity between her age and that of the appellant. It should not be assumed that all complainants of sexual offences would react similarly; the error of stereotypical thinking about children and victims of sexual offences had been recognised in amendments to s 632 of the *Criminal Code*. It was difficult to "adjudicate upon the sufficiency of" Ms B's reasons for not complaining earlier. She had explained that she had told Ms Faulks and Mr Smit about the offence and they were dismissive of her. In addition, she had been discouraged by the experience of a friend who had made a rape complaint and given evidence at a trial which resulted in the acquittal of the accused. The delay in finalising the police investigation was satisfactorily explained by the facts that the complaint was made in one state while requiring investigation in another and that the location of the appellant had been problematic.

[26] Turning to the question of unfairness, his Honour did not regard the inability to locate the taxi driver as of significance; it was speculative to suppose that he would have had any memory of his fare. Ms B had not alleged that she suffered physical injuries which he was likely to have observed. The fading memories of the other witnesses were unlikely to disadvantage the appellant; Ms Faulks' inability to recall any complaint of rape would rather be to the Crown's disadvantage. The appellant himself seemed to recall a number of details of the occasion, notwithstanding his denial of having had sexual intercourse with Ms B. The evidence of the other witnesses was not of such significance that their loss of memory would result in an unfair trial. Only a very prompt complaint would have yielded anything of significance in the way of forensic evidence. His Honour did not accept that any trial would necessarily be unfair, nor that directions could not remedy such unfairness as was caused by delay.

[27] The appellant here repeated the arguments he had made at first instance as to the fading memories of witnesses, the absence of witnesses who might have seen or heard Ms B that night and the loss of forensic evidence, asserting that they should have led to a different result. As to specific error, he contended that the judge wrongly equated the delay with that involved in cases where there was a child victim who by reason of family dynamics was deterred from complaining. The relationship between Ms B and the appellant was not such as to explain her reluctance. It was said that Ms B had functioned in adult environments for some time: she admitted to drinking in licensed premises when she was fourteen, which entailed interacting with older people. (This admission emerged, in fact, at trial and was not evidence before the judge hearing the application.)

[28] The appellant submitted that the delay had caused him "insurmountable difficulties" in testing Ms B's evidence. Her involvement in therapies and her use of medication when giving evidence, the inconsistencies in her evidence and the difference between it and that of other witnesses manifested the unfairness to the appellant in bringing him to trial twenty-five years after the event, an unfairness which could not be properly addressed by directions.

Conclusions

[29] The complaint about the judge's observation as to Ms B's youth must be rejected. It was accurate: she was literally a child, raising obvious questions about her confidence and maturity not dispelled by a propensity for under-age drinking. She gave a rational explanation for delay which turned on her experience of not being believed and her trepidation about the process involved.

[30] In circumstances in which the act of sexual intercourse was admitted, the trial judge was right in thinking that forensic evidence would not have assumed much importance. An immediate physical examination of Ms B was unlikely to provide unequivocal evidence as to whether the admitted intercourse was consensual or not. Although she agreed in cross-examination that she had become dishevelled during the encounter with the appellant to the extent of having her clothes removed and her hair violently grabbed, whether or not she had tidied herself up as she dressed was not established. She did not claim to have manifested distress to the taxi driver or Ms Faulks or Mr Petrie, and she had no observable injuries. It seems improbable that their evidence as to her demeanour or appearance that night would have been of any consequence. Ms B gave no evidence of screaming or other noise made during the event, so again it is difficult to see what useful evidence could have been obtained from occupants of other units in the block.

[31] The therapy which Ms B undertook was not in fact shown to have any connection with her complaint against the appellant. But in any case, it is not discernible that counsel experienced any limitation in testing her evidence by reason of her past self-medication with Valium or the therapies she had undertaken; she was comprehensively and effectively cross-examined, to considerable forensic effect.

[32] Whether the matter had gone to trial quickly or not, the fundamental question was one of consent. The critical aspects of the case for the jury's consideration were always going to be Ms B's claim of having been forced into sex, and, to a lesser extent, the appellant's denial of that claim, through his plea of not guilty. Given Ms B's evident psychological frailty and deficiencies of memory, the delay was plainly to the Crown's disadvantage; and those frailties and deficiencies were of a type which could be, and were, dealt with by direction. The trial judge cautioned the jury that it could not convict without being satisfied that Ms B was an honest and reliable witness and gave a number of directions in that regard. A *Bromley*[2] direction was given concerning her psychological condition, the counselling she had received, her dissociative episodes, her rape nightmares and her need for validation. The trial judge addressed the problem of fading witness memories, giving a *Robinson*[3] direction as to delay and its impact on the fairness of the trial. He identified at length the inconsistencies in Ms B's evidence and the differences between her account and that of others.

[33] The circumstances did not give rise to unfairness incapable of being remedied by direction so as to warrant a permanent stay.[4] The judge who heard the application did not err in refusing it.

The refusal of leave to cross-examine on previous sexual experience

[34] Ms B had explained that she had no interest in the appellant as a prospective sexual partner, one reason for which was that he was too old. She responded in the affirmative to this proposition:

> "Indeed, his age was a matter of repulsion to you in terms of the prospect of having sex with him at your age at that time and his age at that time".

In light of that evidence, counsel for the appellant sought leave to ask questions concerning Ms B's statement to a police officer that at the age of fifteen she had lost her virginity having sex with a man some twenty years older.

[35] Section 4 of the *Criminal Law (Sexual Offences) Act* 1978 provides:

> "2 Without leave of the court -
>
> (a) cross-examination of the complainant shall not be permitted as to the sexual activities of the complainant with any person; and
>
> (b) evidence shall not be received as to the sexual activities of the complainant with any person.
>
> 3 The court shall not grant leave under rule 2 unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit."

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2 *Bromley v The Queen* (1986) 161 CLR 315.

3 *Robinson v The Queen* (1999) 197 CLR 162.

4 *R v Ferguson; ex-parte A-G (Qld)* (2008) 186 A Crim R 483; [2008] QCA 227 at [50].

[36] The trial judge noted that a similar application made at the previous trial had been refused. On that occasion, Ms B had given evidence that there were other reasons for her disinclination to have sex with the appellant. Given that it was similarly plain in the present case that the age difference was merely one of a number of reasons she would not have consented to sex, he did not consider the previous incident of her having had intercourse with an older man as of substantial relevance to the facts in issue. Nor did his Honour consider that cross-examination as to the incident would be likely to materially impair confidence in the credibility of Ms B's evidence; it was not a proper matter for cross-examination as to credit. He refused the application.

[37] The appellant submitted here that evidence of Ms B's having consensual sex with someone much older on a previous occasion was of substantial relevance to the likelihood of her having consensual intercourse with the appellant, the question of consent being the critical issue in the trial. Additionally, it was suggested the matter went to Ms B's credit, because she had said that Mr Smit was her "first proper boyfriend".

Conclusions

[38] As the trial judge pointed out, the age difference was not the exclusive reason for Ms B's finding the appellant unappealing. To demonstrate that she had found a different older man attractive would have been of very marginal assistance in resolving the issue of whether her encounter with the appellant was consensual. It cannot, in my view, be said that Ms B's having previously had sex with an older man was of *no* relevance; but his Honour could properly conclude that it was not of *substantial* relevance.

[39] The proposition that the fact that Ms B had previously had sex was inconsistent with her perception of Mr Smit as her "first proper boyfriend" seems to me to entail a rather unfortunate failure to distinguish between sexual activity and a romantic relationship. However that may be, there was no necessary incongruity between Ms B's earlier sexual experience and her perception of Mr Smit's role, and evidence of the former could not afford any rational basis for attacking her credit. The trial judge did not err in concluding that neither of the grounds for a grant of leave under s 4.3 was made out.

Unreasonable verdict

[40] The appellant's argument, in the words used in *Chidiac v The Queen*,[5] was that Ms B's testimony was

> "so unreliable or wanting in credibility that no jury, acting reasonably, could be satisfied of the accused's guilt to the required degree…"

with the result that the opinion of this court would be that

> "…the quality of the evidence was not such as …. to establish the guilt of the accused beyond reasonable doubt…"[6]

There were, it was submitted, discrepancies between Ms B's evidence and that of the witnesses, Smit, Petrie and Faulks, inherent absurdities in her narrative and changes in her testimony as between her statement, the committal hearing, the earlier trial and the current trial.

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5 (1991) 171 CLR 432.

6 At 444 - 445.

[41] As to the first point, Ms Faulks had no recollection of being told of the rape, although Ms B claimed to have informed her of it about a week after it occurred. Similarly, Mr Smit, who was supposed to have been told of it a month later, said that he first learned of it in mid-1990, over a year after it was said to have happened. The version he recalled was of the appellant's forcing Ms B back into the unit. On Mr Petrie's account, Ms B was well aware of the appellant's presence in the unit before he and Ms Faulks left it, contrary to her claim of being unaware of the appellant's presence there.

[42] The evidence of the other witnesses made Ms B's account implausible: on Petrie's evidence, the appellant was expressing a sexual interest in her at the time he and Ms Faulks left the unit, but instead of going with them she decided to stay. On Smit's evidence, she had declined a lift from him and was speaking light-heartedly of the appellant being about to "ravish" her. The following day she had told Mr Smit that she did not blame the appellant.

[43] The other aspect of Ms B's evidence said to make conviction on it unreasonable was the internal inconsistencies in her account as to whether she had previously rebuked the appellant when he expressed interest in her; whether she was lying or crouching on the street, whether the appellant got off his motorcycle and whether the street was poorly or well lit; whether she had had a falling out with Ms Faulks; and whether she had seen the appellant at the casino at the end of 1989. In addition, Ms B's own attribution of some of those inconsistencies to her suffering of post-traumatic stress disorder and her acknowledgment of her medication use and involvement in "suggestive" therapies before her complaint was made should have given the jury cause for concern about the reliability of her evidence.

[44] Another matter said to constitute an inconsistency did not, in my view, warrant that description. That was Ms B's inability to remember whether or not she knew about victims' compensation when she made her complaint to police, although she did not dispute that she had previously said that she did. That seems to me to go no further than an indication that her memory on the point had faded, rather than amounting to an inconsistency in her evidence.

Conclusions

[45] This Court must consider whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. But it

> "must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses."[7]

[46] Some of the aspects of Ms B's conduct which were said to make her account improbable might reasonably have been regarded by the jury as the product of her youth and lack of sophistication at the time of the events. She was 16. A failure to recognise more quickly, and extract herself effectively from, a dangerous situation with the appellant would not be remarkable. Similarly, her hesitation in telling others how advantage had been taken of her is explicable. The apparent inconsistency between her evidence and that of Ms Faulks and Mr Smit as to whether she had subsequently complained of rape might depend on the terms in which she made the complaint: how explicit and emphatic she was.

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7 *M v The Queen* (1994) 181 CLR 487 at 493.

[47] Generally in relation to the inconsistency between Ms B's account and that of the other witnesses, the jury might reasonably have concluded, given the lapse of time and the greater significance of events to Ms B, that on some matters their memories were less likely to be reliable on detail, rather than necessarily attributing all the discrepancies to inaccuracy on Ms B's part. In some respects the differences do not detract from the thrust of Ms B's account. Although her evidence of believing that the appellant had left the unit was inconsistent with Mr Petrie's recall, his description of Ms B's rebuffing the appellant's advances was consistent with her evidence that she had not had intercourse with him by choice. Similarly, Mr Smit's memory of Ms B telling him, with apparent distress, that she had to get out of the appellant's apartment suggests fear and resistance, not consensual activity. Less consistent with lack of consent was Mr Smit's evidence that Ms B had told him not to blame the appellant. On the other hand, it was open to the jury to conclude that Ms B's response to the events was one of uncertainty and reticence in making a complaint, with, possibly, an element of self-blame and embarrassment at allowing herself to be entangled in the situation.

[48] The inconsistencies internal to Ms B's evidence, about whether she had rebuked the appellant for making suggestive comments to her, whether he was on or off the motorbike, what the lighting was like and whether she was lying or crouching, seem of relatively little consequence. Ms B's false memory of encountering the appellant again at the end of 1989 and avoiding him might have caused the jury greater pause. But the jury in this case had the advantage, which this court does not, of hearing and seeing Ms B and the other witnesses give evidence; and to the extent that the deficiencies in Ms B's evidence cause any doubt about her reliability, it is of a kind and proportion which can be resolved by the jury's possession of that advantage.[8] As McHugh, Gummow and Kirby JJ observed in their joint judgment in *MFA v The Queen*,[9] it is not uncommon in trials for some aspects of the evidence to be unsatisfactory. Nonetheless,

> "[e]xperience suggests that juries, properly instructed on the law … are usually well able to evaluate conflicts and imperfections of evidence."[10]

[49] It was not suggested that Ms B had ever been inconsistent in her description of the core event of the rape. The jury had the appellant's admission that he had had sex with Ms B, so her account of the intercourse having occurred was undisputed. Her evidence that it was rape was supported by other factors making it improbable that the intercourse was consensual: her youth and relationship with Mr Smit (whom by all accounts, including the appellant's, she was planning to meet later that night), and the appellant's own emphatic denial when interviewed that anything of the sort had taken place.

[50] It was open to the jury to accept Ms B as an honest witness, attributing inconsistencies and discrepancies with the evidence of other witnesses to the lapse of time, and to find her reliable on the critical issue of how sexual intercourse took place. Accepting her account on that point, there could be no reasonable doubt, not only that she did not consent, but also (notwithstanding that the excuse of mistake was left, purely on the strength of the appellant's intoxication) that the appellant could not reasonably or honestly have believed that she had. The verdict was not unreasonable.

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8 At 494.

9 (2002) 213 CLR 606.

10 At 634.

Providing the jury with the DVD of the appellant's interview during its deliberations

[51] The trial judge raised with counsel whether the DVD recording of the appellant's interview with police, which was an exhibit, should be provided to the jury with the other exhibits during their deliberations. His discretion arose under s 99 of the *Evidence Act* 1977, which provides:

> "**Withholding statement from jury room**
>
> Where in a proceeding there is a jury, and a statement in a document is admitted in evidence under this part, and it appears to the court that if the jury were to have the document with them during their deliberations they might give the statement undue weight, the court may direct that the document be withheld from the jury during their deliberations."

[52] Defence counsel submitted that the judge should not allow the jury to have the DVD in the jury room; to do so would unduly highlight one aspect of the case. The jury could be told that if they wished to hear it again, the court would be reconvened for the purpose. The prosecutor, on the other hand, contended that the jury should be permitted to view it as they wished. The trial judge exercised his discretion in favour of permitting the jury to have the DVD, without any transcript. He reminded the jury in his summing up that they should understand the case had to be decided on all the evidence they had heard; they should not concentrate on merely one aspect of it, particularly an aspect to which they had access in the jury room.

[53] Here, the appellant submitted that where the record of interview was relied on only as showing lies on his part, there was a risk that the jury would place undue emphasis on that part of the Crown case, as opposed to the oral evidence given before them. Reference was made to various authorities: *R v Tichowitsch*,[11] as to the exercise of the discretion:

> "The overriding considerations must be that of ensuring the jury are in the best position to arrive at a true verdict, and ensuring that the accused receives a fair trial";[12]

a more general statement in *R v NZ*:[13]

> "The principle of a fair trial requires the court to adapt its procedures and/or to give directions to the jury wherever the circumstances of a particular trial give rise to a material risk that the jury may give disproportionate weight to particular evidence";[14]

and this observation in *R v H* (in respect of the videotaped evidence of a child tendered under s 93A of the *Evidence Act*):[15]

> "There is a real danger that in replaying a videotape, possibly many times, the jury may overemphasise that evidence, as against other evidence in the case, particularly cross-examination".[16]

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11 [2007] 2 Qd R 462.
12 At 469 per Williams JA.
13 (2005) 63 NSWLR 628.
14 Per Spigelman CJ at 632.
15 [1999] 2 Qd R 283.
16 Per McMurdo P at 290.

Conclusion

[54] Those statements are entirely uncontroversial. However, the trial judge here appreciated that he had a discretion as to whether to allow the DVD to go into the jury room, and exercised it after receiving submissions on the point; he was well-placed to assess the effect of doing so; and he gave an appropriate direction to the jury against giving disproportionate weight to the evidence. There is no reason to suppose the jury was not able to understand and act on that direction; and it may be noted that they requested a re-reading of part of Ms B's evidence, which suggested they were indeed paying proper attention to the oral evidence. No basis has been established for concluding that there was some error in this exercise of discretion.

The jury's note and the majority verdict direction

[55] Section 59A(2) of the *Jury Act* 1995 permits a trial judge to ask a jury to reach a majority verdict if, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation. The requisite majority, where the jury comprises 12 jurors, is 11. "Prescribed period" is defined by s 59A(6) of the Act:

> "(6) In this section –
>
> ***Prescribed period*** means –
>
> (a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods –
>
> (i) a period allowed for meals or refreshments;
>
> (ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;
>
> (iii) a period provided for the purpose of the jury being accommodated overnight; or
>
> (b) the further period the judge considers reasonable having regard to the complexity of the trial."

[56] The jury retired to consider its verdict at 11.14 am on Friday, 21 February 2014. At 3.07 pm that afternoon they were informed by the trial judge that he proposed then to allow them to go home and return the following Monday to continue deliberations. One of the jurors pointed out that they were part way through reviewing the DVD of the appellant's interview and asked whether they could finish watching it before departing. His Honour acceded and they retired again, the court being adjourned until the following Monday morning. On Monday, 24 February 2014, the jury returned to court for redirections at 12.31 pm before resuming their deliberations. Two hours later, they sent in a note indicating that they could not reach consensus. They returned to court and were given a *Black* direction before retiring once more.

[57] At 4.20 pm, another note in which the jury said they were having difficulty in agreeing was received. The trial judge advised counsel that it disclosed their voting pattern, which he did not intend to reveal. He observed that eight hours had expired

at 4.10 pm.[17] It was open to seek a majority verdict. He proposed to tell the jury of the majority verdict option and ask whether an 11/1 vote would resolve the issue. His Honour went on to make these observations:

> "I don't know how locked they are into their positions, but that's something I can do, I suppose; simply tell them that it's 11:1 and ask them to reconsider the matter.
>
> [Counsel indicated that they did not have any opposition to that course.]
>
> I think I might ask them whether an 11:1 vote will resolve the issue; it [may be] that they're entrenched in their position. We'll have the jury back thanks, please. I'll ask them also if they would like further time."

[58] Accordingly, the jury was brought in and the trial judge explained that the law allowed a majority verdict, agreed by 11 of their number, saying:

> "So I need to know, I suppose, from you whether that might resolve the situation and whether you want further time to consider, because now I can take a verdict of 11 of you."

He asked whether the jury wanted more time to consider that question. The speaker answered,

> "You could probably give us about half an hour and we can… [indistinct]".

Although that answer was not transcribed in full, it appears likely, in context, that he or she was indicating that a verdict could be reached within that period. The trial judge asked the jury to retire again, reiterating that a majority verdict entailed agreement among 11 of their members. The jury returned some 20 minutes later with a majority verdict.

[59] The appellant's amended ground of appeal was that, having received the jury note containing the jury's voting pattern,

> "The trial judged erred in:
>
> (a) not discharging the jury of his own motion;
>
> (b) determining the "prescribed period" under s 59A(6)(b) *Jury Act*; and
>
> (c) in asking the jury to reach a majority verdict under s 59A(2) *Jury Act* without disclosing the jury's voting pattern to the appellant".

Notwithstanding the syntax, the argument, as ultimately put, appeared to accept that (a) was an alternative, while the disclosure qualification applied to both (b) and (c): the trial judge should either have discharged the jury or disclosed the voting pattern before acting under s 59A. The appellant submitted that there were two decisions to be made by the trial judge to which the jury numbers were relevant. The first was whether the prescribed period should be taken as more than eight hours "having regard to the complexity of the trial"; the second was whether the trial judge should ask the jury to reach a majority verdict. Knowing the voting pattern could affect the judge's decision in either regard.

Conclusion on the relevance of jury numbers to the "prescribed period"

[60] I may say immediately that I do not accept knowledge of the jury numbers could in any circumstances have any relevance to the determination of the prescribed period

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[17] The grounds of appeal originally included a challenge to the trial judge's calculation that eight hours had elapsed, but s 59A(5) of the *Jury Act* precludes an appeal against such a determination.

under s 59A(6) of the *Jury Act*. The complexity of the trial may be assessed by reference to the legal issues involved, the evidence and perhaps the trial's duration; but whether a jury is united or divided in the process of reaching a decision cannot, in my view, have any bearing on the question. There was a half-hearted attempt to suggest that the trial judge had omitted, in determining the prescribed period, to consider whether the trial was complex. But counsel did not at the time suggest any complexity; nothing about the issues or evidence in the trial would warrant a view that it was complex; and the trial judge clearly did not think so, because he worked on the eight hour figure, as he made plain to counsel. In the absence of any suggestion that it was an issue, I do not consider that it was incumbent on his Honour to go the further step of saying that he had considered whether there was a question of complexity under s 59A(6)(b) and decided it in the negative.

The Victorian decisions on disclosure of jury numbers and the exercise of discretion

[61] The appellant placed particular reliance on two decisions of the Victorian Court of Appeal, *MJR v R*[18] and *HM v R*.[19] Two other decisions of the same court, *LLW v R*[20] and *Nguyen v R*,[21] given after the decision in *MJR* but before *HM v R*, are also of relevance. All of those decisions concerned s 46 of the *Juries Act* 2000 (Vic), which is in slightly different terms from s 59A(2) of the *Jury Act*. Section 46 of the *Juries Act* provides that where after at least six hours a jury in a criminal trial is unable to agree or has not reached a unanimous verdict, the court may discharge the jury or take a majority verdict. (A majority verdict, in a jury consisting of 12 jurors, is one on which 11 of them agree.)

[62] In contrast, the discretion in s 59A of the *Jury Act* is solely concerned with the taking of a majority verdict where it is unlikely that a unanimous verdict will be reached, while s 60 of the same Act gives a power to discharge a jury which cannot agree, without any time limitation. Thus, while in Victoria the discretion concerning the taking of the majority verdict necessarily involves consideration of whether the jury should be discharged, that is not the case in Queensland; although a judge who had exercised the s 59A discretion against taking a majority verdict might then go on to consider the exercise of the discretion under s 60.

MJR v R

[63] In *MJR*, the jury in a trial concerning a number of counts of incest and indecent acts sent the trial judge a note advising that it had reached majority verdicts on eight counts, identifying the majorities, and that on three counts there was an 11/1 majority in favour of conviction. The following morning, the trial judge gave a *Black* direction and informed the jury that he would take a majority verdict if it became clear that they were not going to reach a unanimous verdict. Soon after, an issue arose as to a juror's complaint of being harassed. When the court resumed in respect of that matter, another note was received saying that the jury had reached a majority verdict on three counts. That was conveyed to counsel. The appellant's counsel applied for the discharge of the jury, apparently on the basis of the harassment allegation. The trial judge rejected the application and, on the jury's intimation that there was no prospect of a unanimous or majority verdict on other counts, took a verdict on the three counts on which the jury had indicated a majority verdict.

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18 (2001) 33 VR 306.

19 (2013) A Crim R 349; [2013] VSCA 100.

20 (2012) 35 VR 372; [2012] VSCA 54.

21 [2013] VSCA 65.

[64] Ashley JA, with whom the other members of the court agreed, said, firstly, that a jury should not inform the trial judge of the precise votes cast in respect of any count. He referred to three English cases, *R v Townsend*,[22] *R v Oduro*,[23] and *R v Gorman*,[24] in which the view had been taken that where a jury's note indicated a division of opinion, with numbers given, the trial judge was obliged to communicate that fact to counsel, but not the details of the jury's voting. Ashley JA distinguished those cases on the basis that in none of them had the relevant note revealed a statutory majority for conviction. (In *Oduro* the majority was 7/5 in favour of conviction; while in each of *Townsend* and *Gorman* the majority (8/4 and 9/3 respectively) was in favour of an acquittal.) In contrast, in the case under consideration, the circumstance that the judge knew what counsel did not, that the exercise of the discretion to take a majority verdict would "certainly or at least very probably" result in conviction, constituted,

> "a critical distinguishing characteristic requiring disclosure to counsel, when ordinarily the specific voting intention of the jury (if, undesirably, it was disclosed to the judge) would not require such disclosure."[25]

[65] Thus, unusually, the trial judge should have revealed to counsel what he had been told by the jury in relation to the three counts on which there was an 11/1 majority for conviction. It was unnecessary for counsel to be informed of the state of votes with respect to the other counts. Through non-disclosure, counsel had been precluded from advancing a submission that the trial judge was not able (or could reasonably be perceived as unable) dispassionately to consider an application to discharge the jury without verdict or a submission that he should not take a majority verdict at that point. The ruling that the discretion to take a majority verdict should be exercised, in circumstances where the judge already knew that the jury had voted 11/1 for conviction, had "something of the appearance of a charade'.[26]

[66] There was, Ashley JA considered, an alternative to disclosure, which was for the trial judge to discharge the jury because of the difficulties which he would face in dealing with counsel's applications. If he had discharged the jury, the confidentiality of the jury's information would have been preserved. Whether the decision was viewed as the refusal to discharge the jury or the decision to take a majority verdict, it was vitiated. It could not be assumed that, had the appellant's counsel been apprised of the contents of the note, the rulings not to discharge and to take a majority verdict would have been the same.

LLW v R

[67] In *LLW v R*, the appellant was charged with four counts of rape and four alternative counts of an act of sexual penetration of a child. The jury, having previously advised the trial judge that it had reached a unanimous verdict on a particular count, provided her with a note informing her that they had resiled from that position and were deadlocked, setting out the voting breakdown in relation to each count. The judge informed counsel of the contents of the note, without revealing the numbers. She initially indicated that she did not think she would allow a majority verdict, given the content of the note, but subsequently altered that view and advised

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22 (1982) 74 Cr App R 218.
23 (1983) 76 Cr App R 38.
24 [1987] 1 WLR 545.
25 *MJR* at 316.
26 At 317.

counsel that she would give a majority verdict direction. Defence counsel unsuccessfully sought a discharge of the jury. The jury ultimately returned a verdict of guilty on one count of rape (not the count on which it had previously been unanimous) and was unable to agree on any of the other counts.

[68] The appeal against conviction was allowed for a number of reasons: the jury's apparent lack of understanding of the elements of the offences and how to deal with alternatives; the length of their deliberations; their change from unanimity on a particular count; and, as the last of the bases for allowing the appeal, that

> "the revelation by the jury to the judge of the voting patterns on each count, in circumstances where her Honour had not yet determined whether to allow a majority verdict to be brought in and had failed to reveal the contents of the note to counsel, denied the appellant procedural fairness."[27]

[69] There is no indication that the appellate court in *LLW* was informed of the voting break-down in the jury's note in relation to the count on which they convicted. Nonetheless, the court described the problem confronting the trial judge in that case as "almost identical" to that in *MJR*, in which the failure to inform counsel of the precise contents of a note meant that,

> "the judge was in possession of information that was highly relevant to the exercise of his discretion to allow a majority verdict to be taken, but counsel was deprived of that information."[28]

The description of the dilemmas posed in both cases as "almost identical" seems, with respect, something of an over-statement, failing as it does to acknowledge the critical aspect in *MJR*: that it was known that there was an 11/1 majority for conviction. Nor is there any recognition of the view taken in *MJR* that knowledge of the jury's voting intention in other circumstances would not require disclosure.

Nguyen v R

[70] In *Nguyen*, the rather unhelpful appeal ground was that there was a miscarriage of justice because the trial judge in a trial for attempted murder had "improperly" enquired as to how the jury was divided. What he had done was to ask in open court whether there was "more than one" juror on each side of the argument, and received a negative answer, which implied an 11/1 split, while not revealing in which way. The judge then in discussion with counsel expressed the view that in the circumstances he should give the majority verdict direction. Neither counsel demurred and the judge proceeded to advise the jury that it could deliver a majority verdict, although a unanimous verdict remained preferable. On appeal, counsel, who had also appeared at the trial, submitted, apparently without objection, that he had been taken by surprise by the judge's having changed his previous position that he would be "uncomfortable" about taking a majority verdict.

[71] The majority (Weinberg JA with Whelan JA agreeing) described the critical issue on the appeal as whether the judge was correct in allowing the jury to deliver a majority verdict once advised that there existed an 11/1 majority in favour of the verdict. It was, Weinberg JA said, unwise to ask whether there was "more than one" juror on each side of the argument; but there was no denial of procedural

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27 At 388.

28 At 386.

fairness, because the information was given in open court. Although the judge had expressed his view that the information "rather change[d] things", that statement was made in the context of his inviting submissions from counsel as to what should be done. Defence counsel might have applied for a discharge or asked for a further *Black* direction, but he did not. That was forensically explicable, given the difficulties the Crown faced in proving an actual intent to kill. His Honour observed,

> "This Court should be slow to set aside a conviction, effectively on the basis of a failure to discharge the jury, where counsel, having been fully aware of the fact that such an application might be warranted, did not pursue that course".[29]

[72] Weinberg JA went on to express the view that where the trial was properly conducted without any complaint made about the directions, it was difficult to see how it could be argued that there was a substantial miscarriage of justice merely because the jury were asked to deliver a majority verdict. The availability of information as to the numbers according to which the jury were divided did not of itself necessitate the discharge of the jury. However, his Honour rejected a submission by counsel for the Crown on the appeal that judges should routinely ascertain numbers from juries who seemed to be having difficulty arriving at a verdict. The common law had set its face against doing so, and the introduction of majority verdicts had not altered that situation.

[73] Priest JA took the view that it was a serious error for the judge to exercise his discretion to take a majority verdict once he became aware that there was a statutory majority. In the circumstances, the conclusion was irresistible that he had taken into account the information he had received from the jury in deciding to take a majority verdict. A substantial miscarriage of justice had resulted. As to the Crown's submission that judges should inquire of juries as to their voting numbers, Priest JA provided this analysis:

> "In my opinion, at least six complimentary propositions may be distilled from the authorities:
>
> - First, if six hours' deliberation time has elapsed, the judge may in open court ask the jury, through their foreman, whether there is any chance of agreement being reached.
> - Secondly, a jury ought never reveal voting figures (particularly disclosing votes in favour of one verdict or another), whether as a result of a direct inquiry or otherwise.
> - Thirdly, a judge should never inquire of the jury as to voting figures.
> - *Fourthly, should the jury, however, reveal voting figures to the judge, but those numbers do not reflect a 'statutory majority', the judge need not disclose that information to the parties.*
> - Fifthly, where a jury reveals privately to the judge that a 'statutory majority' exists, the judge must impart that information to the parties.
> - Sixthly, where a jury does reveal voting figures to the judge, he or she may discharge the jury on his or her own motion."[30] (Italics added.)

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29 At [21].

30 At [78].

HM v R

[74] In *HM v R*, the jury had provided a note to the trial judge disclosing its present voting numbers of 7/5. The trial judge revealed the effect of the note to counsel apart from the actual numbers, indicating that they were not sufficient for a majority verdict. Defence counsel proposed that the jury be discharged, but the trial judge instead directed the jury to continue deliberations and told them she would allow a majority verdict. Ultimately, the jury acquitted on one count, and by a majority of 11/1 found the appellant guilty on a second count.

[75] Whelan JA took the view that jury numbers should not be disclosed to the judge; but where they were, the trial judge should not reveal what those numbers were. *MJR* concerned an exception where the judge was considering taking a majority verdict and became aware that the requisite statutory majority for conviction existed: the exception which Priest JA had recognised in his analysis in *Nguyen*. It did not apply in the present case. The trial judge's view that it was not appropriate to disclose the numbers accorded with authority.

[76] The majority, however, consisting of Redlich JA and Kaye AJA, reached a different view. Previous decisions espousing the proposition that jury numbers disclosed by a jury to a trial judge should not be revealed did not concern the question of procedural fairness where the information might be relevant to a decision to be made by the trial judge. Ashley JA's opinion in *MJR* that it was unnecessary to disclose voting numbers on counts other than those involving the 11/1 split was unnecessary to resolving the question of whether the three majority verdicts were affected by procedural unfairness, because no verdicts had been returned on those other counts. In *LLW v R*, although the voting numbers were not made known to the appellate court, it had concluded that the trial judge's failure to reveal disclosed voting patterns to counsel denied the appellant procedural fairness.

[77] The trial judge, the majority in *HM* considered, was obliged to disclose the information provided by the jury to counsel because it was relevant to the questions whether the jury should be discharged or invited to deliver a majority verdict. The judge was not relieved of the obligation to disclose by the failure of counsel to request the information. There had been a denial of procedural fairness. Those conclusions of the majority were expressed in general terms, after a review of authority, rather than by reference to the facts of the particular case.

[78] It was in the context of considering whether any miscarriage of justice had resulted that Redlich JA and Kaye AJA turned to the question of precisely how the jury's voting numbers were relevant. The evidence in the case had taken only a single day, but after six hours of deliberation the jury was almost equally divided. Had counsel known the figures he would have been able to make a stronger argument against allowing the jury to return a majority verdict, an application which might have been successful; alternatively, the trial judge might have given greater emphasis to directing the jury that a juror should not abandon a conscientiously held position to accommodate the majority. The jury had in fact returned its verdict after three hours deliberation, following the judge's *Black* direction and advice that it could return a majority verdict. The significance of counsel's lack of opportunity to address the judge about the numbers revealed was to be judged in that context. The reasonable possibility could not be excluded that if counsel had been given the details, a discharge of the jury or a refusal to give a majority verdict direction might have resulted.

Discussion

[79] The appellant's submission that the jury figures should have been revealed runs counter to obiter remarks by this Court in *R v Millar (No 2)*.[31] In that case, the trial judge, having received a note from the jury advising that it was divided 10/2, disclosed that information to counsel. She declined to act on a submission that she should discharge the jury, and ultimately majority verdicts of guilty were returned on some counts, with unanimous acquittals on the others. The appeal included a ground that the trial judge had erred in failing to discharge the jury on learning that it was at an impasse. In that context, Gotterson JA, with whom the other members of the court agreed, observed that it was:

> "…a well established exception to the general rule that communications from the jury should be disclosed in open court that trial judges ought to keep jury voting figures to themselves in the unfortunate circumstance that they are made aware of them."[32]

Counsel for the appellant submitted, however, that we should follow the approach of the majority in *HM*, having regard to the obligation to follow the decision of another intermediate appellate court, unless convinced it was plainly wrong.[33]

[80] These statements of principle appear in the judgment of the majority in *HM*:

> "The right to procedural fairness – to a fair trial – is a fundamental right of each accused. Therefore, as a matter of principle, we consider that the tension between the dictates of procedural fairness, on the one hand, and the protection of the confidentiality of jury communications, on the other hand, must be resolved in favour of the former, in a case where the information revealed by the jury to the judge, may be relevant to a decision to be made by the judge in relation to the trial."[34]

and

> "It is…inconsistent with the principle of procedural fairness, for a judge to be apprised of the information concerning the state of deliberation of the jury – such as the precise numbers which constitute a majority and a minority – without the judge conveying that information to counsel, where argument of counsel and the decision of the trial judge may be influenced by such information".[35]

There is a difference, in my view, between relevance, which is the subject of the first passage, and the capacity to influence, which is referred to in the second. The capacity to influence was the reason the procedural fairness requirement arose in *MJR*: the existence of the statutory majority for conviction could give rise to an actual or perceived bias towards a particular result. The view taken there was that counsel could properly make submissions on that point, and was entitled to the information for that purpose. Whether the jury's voting numbers are relevant, on the other hand, depends on whether that information could properly feature in the trial judge's considerations under s 59A(2) (and, correspondingly, in counsel's submissions).

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31 (2013) 227 A Crim R 556.

32 (2013) 227 A Crim R 556 at 562.

33 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152; *CAL No Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 412.

34 (2013) 231 A Crim R 349, 358 at [28].

35 (2013) 231 A Crim R 349, 358 at [30].

[81] Generally speaking, the view has been that jury numbers should not be revealed to trial judges, and that where they are, the judge should not communicate them to counsel.[36] Has that situation changed in the light of majority verdict legislation? The Victorian cases earlier cited contain strong expressions of the view that jury voting numbers should not be revealed to the trial judge even in that situation.[37] Indeed, in *Nguyen*, the Crown's submission that judges should ascertain voting numbers from juries who appeared to be having difficulty in reaching a verdict was "emphatically rejected",[38] a response endorsed by all members of the court in *HM*.[39]

[82] Putting to one side for the moment the strong view expressed in those cases, there is an argument that knowing the jury numbers might well assist a judge in reaching a state of satisfaction as to the likelihood of the jury's reaching a unanimous verdict after further deliberation. Both counsel, however, urged against that view, pointing out that the long standing practice in this State was that judges not be told jury numbers, while s 70(4) of the *Jury Act* prohibited disclosure of jury information[40] if it was likely to be published to the public.

[83] The tenor and effect of s 70, which is headed "Confidentiality of jury deliberations" and is concerned with prohibiting publication, reinforce the time-honoured view against disclosure of jury voting numbers. The only part of the provision which might conceivably permit a court to ascertain jury voting numbers is s 70(6), which creates an exemption allowing the court to obtain information "to the extent necessary for the proper performance of the jury's functions". But while disclosure of jury numbers might arguably assist a trial judge in deciding whether it would be fruitful to seek a majority verdict, which might in turn make the jury's task of returning a verdict easier, it cannot be said that the disclosure is *necessary* for the jury's performance of its functions. A trial judge can reach a view on whether to ask for a majority verdict without receiving the information; the jury can similarly perform its role without providing it. I conclude that s 70(6) does not contemplate the disclosure of the jury's voting break-up to the trial judge in order to inform the exercise of the discretion under s 59A(2). Nor could the information properly be sought or received for the exercise of the discretion under s 60(1).[41]

[84] Since the prohibition on publication in s 70 prevents revelation of the jury's voting intentions for the purposes of s 59A(2), it follows that the statutory intent is that such information is not among the matters properly to be taken into account in the exercise of the discretion under that sub-section, and in that sense is not a relevant consideration. If the numbers by which a jury is split cannot be a proper consideration for the trial judge, it must also follow that submissions based on that information would concern an irrelevant consideration. And that must be generally true: the information cannot acquire relevance purely by reason of its inadvertent disclosure.

[85] But starting from that premise, there is some difficulty with the proposition in *LLW* and *HM* that counsel must be made aware of the precise numbers by which a jury is

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36 *R v Yuill* (1994) 34 NSWLR 179 at 190; *R v Kashani-Malaki* [2010] QCA 222 at [43]; *R v Black, Watts and Black* (2007) 15 VR 551 at 555.

37 *MJR v R* at 312-313; *LLW v R* at [70]; *Nguyen v R* at [78]; and *HM v R* at [5].

38 At [24]-[25].

39 At [37]-[38], [79].

40 "Jury information" includes information about votes cast in the course of jury deliberations.

41 The *Victorian Criminal Charge Book* contains a direction to the effect that the jury must not include on any note the numbers involved in any vote. It may be that giving a similar direction should be standard practice in Queensland.

divided in order to make informed submissions on whether the jury should be discharged or a majority verdict taken. The position was different in *MJR v R*, in which the 11/1 split in favour of conviction had the capacity to raise a reasonable perception that the judge could not bring a dispassionate mind to his exercise of discretion. One can envisage that counsel might want to make submissions about the propriety of the judge's proceeding in that context; but more generally, if jury numbers are not a proper consideration in the exercise of the judge's discretion, knowing them could not place counsel in a better position to make submissions.

[86] What is relevant to the exercise of discretion is the fact of the jury's disagreement; the numbers entailed in that disagreement cannot, for the reasons already discussed, have any proper relevance under s 59A(2) of the *Jury Act* to the judge's decision or counsel's submissions. Accordingly, I would depart from the approach of the majority in *HM*, that voting details must be relevant as to whether a jury should be discharged or invited to deliver a majority verdict; and, it follows, from their view that procedural fairness requires disclosure of more than the jury's indication of disagreement.

[87] In *Marshall v Director-General, Department of Transport*,[42] McHugh J made these observations, unanimously endorsed in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*:[43]

> "The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of the legislation in the court's jurisdiction."[44]

It is arguable, having regard to those observations, that the Victorian Court of Appeal's view of what is relevant in the exercise of discretion under the *Juries Act*, while properly taken into consideration, does not compel the same conclusion when considering similar discretions to be exercised under the *Jury Act*. But accepting the appellant's submission that *HM* should be followed in respect of decisions to be made under s 59A(2) absent a conclusion that it is clearly wrong, I have, with respect and reluctance, reached that conclusion, for the reasons I have canvassed. So far as disclosure of jury numbers which do not indicate a statutory majority for conviction is concerned, I regard the approach of Whelan JA in *HM* and that of the court in *MJR* as correct.

Conclusions

[88] Neither of the statements of principle in *HM* set out at [80] above has any practical application in this case. The voting information in the jury's note was neither relevant nor capable of influencing the trial judge's exercise of discretion. It is not known what the jury numbers were,[45] but it is plain from what was discussed between the judge and counsel that they were not 11/1, and, more significantly, that his Honour did not know what the result of asking for a majority verdict would be. Given his comments in that regard, there is no basis for thinking that the voting

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42 (2001) 205 CLR 603.

43 (2008) 233 CLR 259 at 270.

44 At 632-633.

45 The appellant's counsel indicated that knowledge of what they were was unnecessary to his argument.

figures could have influenced him in the exercise of his discretion; they told him no more than what he was entitled to ascertain, that the jury was not in agreement. This was not the exceptional case described in ***MJR*****,** where to request a majority verdict was to invite a foregone conclusion; it is unnecessary to express any final view as to what should occur in that situation.

[89] In the circumstances, I do not consider that there was any denial of procedural fairness to the appellant in not disclosing the jury's voting numbers before exercising the discretion to ask the jury to reach a majority verdict. Nor, correspondingly, was there any need for the trial judge to discharge the jury simply because he did not propose to make the disclosure. And as *Nguyen v R* makes clear, it was not incumbent on the trial judge to discharge the jury purely by virtue of the fact he had been made aware of jury numbers; *a fortiori* where those numbers were not determinative of whether a conviction would result.

Order

[90] I would dismiss the appeal.

[91] **PHILIPPIDES J:** I agree that the grounds of appeal should be dismissed for the reasons stated by Holmes JA.

[92] I wish to make some additional comments in relation to the grounds alleging errors relating to the trial judge's failure to disclose the jury's voting pattern revealed in the jury note. Section 59A *Jury Act* (Qld) relevantly provides:

> "…
>
> (2) If, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation, the judge may ask the jury to reach a majority verdict.
>
> …
>
> (6) In this section –
>
> …
>
> ***prescribed period*** means –
>
> (a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods–
>
> (i) a period allowed for meals or refreshments;
>
> (ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;
>
> (iii) a period provided for the purpose of the jury being accommodated overnight; or
>
> (b) the further period the judge considers reasonable having regard to the complexity of the trial."

[93] I agree with Holmes JA that failure to disclose the voting figures can have no relevance to the judge's determination of the prescribed period for the purpose of s 59A(6) *Jury Act* 1995.

[94] As to whether the trial judge erred in exercising his discretion to allow a majority verdict without first disclosing the voting figures in the jury note, it is to be observed that the present case was not one where the voting figures indicated a statutory majority and it is not necessary to determine the position that applies in such a case.

[95] The appellant placed reliance on the position taken by the majority in *HM v R* (2013) 231 A Crim R 349, that the revelation in a jury note of the jury's voting figures (even when not indicating a statutory majority) must be disclosed to counsel, as necessarily relevant to the exercise of the discretion to allow a statutory majority verdict, with the consequence that a failure to do so results in a denial of natural justice or requires a discharge of the jury. I agree for the reasons given by Holmes JA that the majority view in *HM* should not be adopted.

[96] As Holmes JA has explained, procedural fairness was not denied in the present case because the parties were informed that the jury was divided, but not provided with the details of the voting figures. Those voting figures were not relevant to the exercise of the discretion under s 59A(2) *Jury Act* to allow a majority verdict, nor to the exercise of the discretion in s 60 to discharge the jury.

[97] Section 59A requires the trial judge to be satisfied as to two preconditions before the discretion to allow a majority verdict may be exercised. The first concerns that the prescribed period has passed (being a period of at least eight hours or further period the judge considers reasonable having regard to the complexity of the case). The second concerns whether a unanimous verdict is unlikely. The satisfaction as to the unlikelihood of a unanimous verdict is made in the context of the prescribed period having passed, but no criteria is specified as to how satisfaction of that precondition is to be achieved. The most certain way is to question the jury about the prospect of unanimity, another is to give a *Black* direction after the prescribed period and wait a further reasonable time: see *R v McClintock* [2010] 1 Qd R 354 at 367. But, there is nothing in the terms of s 59A *Jury Act* to indicate that the jury's voting figures are a factor to be considered in reaching the required satisfaction.

[98] Rather, the *Jury Act*, in s 70, which is concerned with preserving confidentiality of jury deliberations, provides an indication to the contrary. In particular, s 70(4) prohibits publication of jury information (which includes votes cast by the jury in the course of its deliberations). That accords with the longstanding position reiterated in this Court in *R v Millar (No 2)* (2013) 227 A Crim R 556 against disclosure of voting figures. Furthermore, as Holmes JA has explained, the circumscribed nature of the inquiry allowed by a court pursuant to s 70(6) *Jury Act*,[46] being confined to information "to the extent necessary for the proper performance of the jury's functions", confirms the legislative intent that voting figures do not feature in the exercise of the judge's discretion in s 59A(2).

[99] It is thus evident that the *Jury Act* does not contemplate that the voting figures are relevant to the exercise of the discretion to allow a majority verdict. And such information does not become relevant to the exercise of the discretion because it is inadvertently disclosed to the judge, nor could it be the subject of pertinent submissions. Indeed, the intrusion into the confidentiality of jury deliberations which would necessarily follow, were submissions to be invited as to the voting pattern revealed in a jury note, would run counter to the evident legislative intent of s 70. Further, one may question the extent to which the precise voting figures may provide a useful basis for submissions. Individual jurors do not necessarily reach a particular conclusion by the same route and thus the jury figures may present a misleading picture of the extent and nature of the division of the jury. They may not reflect the true complexity of the jury's reasoning and lead to a type of

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[46] I note that the terms of s 70 and in particular s 70(6) differ from the equivalent Victorian legislation.

second-guessing of the jury's deliberations. Moreover, if after submissions, a judge were to fashion directions with an eye to the voting figures, for example in modifying or giving a stronger *Black* direction, that may lead to complaint of a perception that one faction of the jury was being favoured over another.[47]

[100] Where jury voting figures are revealed to the judge, the appropriate course for the judge to take is to disregard them. That is precisely what the trial judge did in the present case. In determining whether to exercise his discretion to allow a majority verdict, he was guided by his inquiry of the jury as to whether a majority verdict would resolve the situation and whether they wished to have additional time to consider that course. That approach cannot be faulted.

[101] I endorse Holmes JA's comments concerning the need to consider adopting, as a standard practice, the giving of a direction to the jury that voting figures should not be disclosed.[48] Clearly, if juries are directed in that manner, the issues raised in this case would be obviated.

[102] The appeal should be dismissed.

[103] **DALTON J:** I agree with the order proposed by Holmes JA and her reasons.

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47 See *R v Muto and Eastey* [1996] 1 VR 336 at 341 where, in a different context, exception was taken to the trial judge's giving of a *Black* direction in which he made a remark alluding to the voting numbers. After objection was taken that the comment might be understood as encouragement to the minority to give way to the views of the majority, further redirection was given to correct that possible perception.

48 This position was urged in *MJR* (2009) 33 VR 306 at 319 [74] and adopted in the Victorian Bench book: see also *LLW* (2012) 35 VR 372 at 386 [70], *HM* (2013) 231 A Crim R 349 at 360 [36] and *Nguyen* [2013] VSCA 65 at [24].