SUPREME COURT OF QUEENSLAND

CITATION:	*R v HCF* [2021] QCA 189
PARTIES:	**R** **v** **HCF** (appellant/applicant)
FILE NO/S:	CA No 253 of 2020 DC No 4 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Hervey Bay – Date of Conviction: 20 October 2020; Date of Sentence: 22 October 2020 (Reid DCJ)
DELIVERED ON:	3 September 2021
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2021
JUDGES:	Morrison and Mullins JJA and North J
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where the appellant was convicted after a trial of one count of maintaining a sexual relationship with a child with circumstances of aggravation, four counts of indecent dealing with a child under 16, and one count of unlawful carnal knowledge – where a juror disclosed to other members of the jury that he had conducted his own research – where a juror disclosed to other members of the jury a bias – where the learned trial judge authorised the Sheriff of Queensland undertake an investigation pursuant to s 70(7) of the *Jury Act 1995* (Qld) – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted after a trial of six sexual offences – where the appellant was sentenced to nine years' imprisonment for maintaining a sexual relationship with a child with circumstances

of aggravation with sentences for the remaining sexual offence sentences to be served concurrently – whether the sentence was manifestly excessive

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

R v CBQ [2016] QCA 125, considered
R v F [2001] QCA 137, considered
R v Hall [1971] VR 293; [1971] VicRp 35, distinguished
R v KJB [2002] QCA 448, considered
R v Panozzo (2003) 8 VR 548; [2003] VSCA 184, considered
R v Peter; R v Anau; R v Ingui; R v Banu (2020); 286 A Crim R 372[2020] QCA 228, considered
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, cited
R v SAU [2006] QCA 192, considered
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, followed

COUNSEL: S A Lynch for the appellant/applicant
D L Meredith for the respondent

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

[1] **MORRISON JA:** The appellant was charged with 25 sexual offences, committed in respect of two complainants. His trial commenced on 13 October 2020.

[2] At the conclusion of the Crown case, the learned trial judge directed acquittals on six charges.[1] Of the remaining 19 charges, the appellant was convicted on six and acquitted on 13.

[3] The six counts on which appellant was convicted were:

(a) Count 1 – maintaining a sexual relationship with a child, with two circumstances of aggravation, namely indecent dealing and exposing the complainant to an indecent act;

(b) Counts 3, 4, 5 and 14 – indecent dealing with a child under 16; and

(c) Count 17 – unlawful carnal knowledge.

[4] Two days after his conviction the appellant was sentenced in the following way:

(a) Count 1 – 9 years' imprisonment;

(b) Count 3 – 12 months' imprisonment;

(c) Counts 4 and 5 – 2 and a half years' imprisonment;

(d) Count 14 – six months' imprisonment; and

(e) Count 17 – 4 years' imprisonment.

[5] The appellant challenges his convictions on two grounds:

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1 Counts 8, 10, 11, 12, 13 and 23.

(a) there was a miscarriage of justice by reason of a juror conducting investigations and other jurors not reporting the conduct; and

(b) there was miscarriage of justice by reason of the juror not disclosing to the Court a stated bias.

[6] The appellant also seeks leave to appeal against his sentence, contending that it was manifestly excessive.

Background to the trial

[7] The trial commenced on 13 October 2020, and evidence finished the following day. Because of delays with the transcripts the Court did not sit the following day, 15 October. On the morning of Friday, 16 October 2020, the Crown closed its case. At that point two reserve jurors who had been empanelled were discharged.

[8] After legal argument the learned trial judge directed acquittals in respect of six counts. The jury retired later that day.

[9] The following Monday, 19 October 2020, the jury continued to deliberate, in the course of which they sent four notes to the learned trial judge. The following day, 20 October 2020, they sent a further note and then returned with a verdict in the afternoon. Sentence was then adjourned to a later date.

[10] On the day after the verdicts were delivered, a juror (**Juror Y**) hand delivered a letter to the Registrar. The letter read:

> "Issue for the Judge – Jury Issue – (Keep or throw away)
>
> 1. At the beginning of the trial – one juror adamantly stated that he would not convict, as he had a legal dealing regarding his interactions with a 13 yr. old child when he was young. He openly and honestly disclosed that to us.
> 2. On Monday this week, during deliberations, he discussed some willingness to a verdict of carnal knowledge – AND that this was based on his internet research on the weekend – w.r.t lighter sentencing for such.
> 3. After he and others realized from their discussions sentencing was not significantly different – he restated his absolute opposition to either.
> 4. Based on a jury polling, his vote would not alter the ability to obtain a unanimous decision – but both his background & his external actions gives me concern."

[11] The letter caused the learned trial judge to conclude that there were grounds to suspect that the juror (**Juror X**) may have been guilty of bias or an offence related to his membership of the jury, or the performance of his functions as a member of the jury. Before delivering the reasons for that conclusion his Honour gave a copy of the letter to the parties. As a consequence of the finding referred to above the learned trial judge authorised the Sheriff of Queensland to carry out an investigation into those questions.

[12] The investigation ordered by the learned trial judge was pursuant to s 70(7) of the *Jury Act 1995* (Qld). It relevantly provides:

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

[13] The learned trial judge considered whether it was appropriate to continue with the sentencing of the appellant pending the completion of the report. Ultimately he concluded that he should do so given that the jury's verdicts still had legal efficacy and were appropriately taken.

Directions at the commencement of the trial

[14] The learned trial judge gave directions to the jury on 13 October 2020, on the first day of the trial. The directions were in explicit terms and covered:

(a) the need to pay careful attention to the evidence and ignore anything that they had heard or read about the case, or similar cases, out of Court;

(b) that they should not discuss the case with anyone except members of the jury;

(c) that it was important "that you do not get on the internet and look anybody up"; further, having given some examples of cases in which people had abused that rule, the jury were told "Don't do it";

(d) that to act contrary to those directions was a serious matter:

> "Don't do the things that I've urged you not to do because as I say it [sic] offence at law to look up anything about the defendant. It's an offence by way of contempt of court if you look up anything about any of the witnesses or about any of the legal principles because I've given you clear directions about that issue so don't run the risk of that happening. Sorry to have gone on about it so long but it's a real problem, particularly with electronic searches that are available now and affects, potentially, the fairness of criminal trials".

(e) that if someone outside the jury told them something about the trial, they were not to reveal it to the other jurors but to raise it with the judge by way of a note;

(f) further, that "if anybody on the jury lets you know that he or she has looked up anything on the internet or has spoken to their family about the case, just quietly give the bailiff a note saying there's something you want to discuss"; the trial judge then explained that having received such a note he could get the relevant juror in and find out what had happened; the trial judge continued, "so if one person disobeys that direction I hope that the others can by dealing with it in that manner overcome that";

(g) that it was "vitally important that you don't attempt to investigate or enquire about anyone ... involved in the case … It would be unjust if you act on this information that is not evidence"; and

(h) that there had been cases where trials had been aborted or convictions quashed because juries had made inquiries or investigations, and therefore they were not to consult sources which included material on the internet; that included the express statement "Don't conduct your own research on any matters of law".

The Sheriff's report

[15] For the purposes of the appeal the appellant applied for access to the Sheriff's report, appropriately redacted. That access was not opposed by the Crown. As a consequence both parties received a redacted copy of the report some days prior to the appeal being heard. Each side made submissions based on the report, referring to its contents.

[16] The report was based on the responses received to inquiries made of all of the jurors, including the two reserve jurors. Six jurors, including Juror Y (the author the letter), responded by email. One of those six jurors was a reserve juror who added nothing because they had been discharged prior to deliberations. No response was received from eight jurors, including Juror X (the juror whose conduct was referred to in the letter).

[17] As will appear, it will be necessary to set out some detail of the individual jurors' responses, from the Sheriff's summary of them. I do so conscious of several matters. First, this is an unusual step given that a jury's deliberations are not normally exposed. Secondly, this Court was not made aware of the report or its contents until the appellant applied for access to it and the letter from Juror Y.[2] Thirdly, access was granted so that the appellant and the Crown could make such submissions as they wished, based on the (redacted) contents of the report. Fourthly, each side made submissions as to what the relevant contents of the report signified. Fifthly, even though it is an unusual case where this Court has access to and is asked to have regard to such a report, there is authority that supports that step.[3]

[18] However, it is sufficient for present purposes to refer to the findings of the report.

[19] On the issue of whether Juror X may have been guilty of bias or an offence relating to his membership of the jury or his performance of the functions of as a member of the jury, the following findings were made:

(a) the responses from the jurors supported the comments made in the letter in so far as they referred to Juror X's comments at the commencement of deliberations; those comments concerned his unwillingness to convict based upon his own previous experience concerning his interaction with a 13 year old child;

(b) the recollections of the responding jurors were similar in nature and pointed to a belief that Juror X announced early in the trial that he would not find the

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2 Notwithstanding that the trial judge had given a copy to the parties at the time of his ruling, counsel for the appellant on this appeal did not have a copy.

3 *Higgins v The Queen* [2018] NSWCCA 258, 275 A Crim R 333, at [21]-[22], [38]-[42], [55]-[56], [89]-[106]; *Higgins v R* [2020] NSWCCA 109; *Agelakis v R* [2020] NSWCCA 72.

appellant guilty of the charges because of his own previous similar experiences;

(c) there were differing opinions as to the level of bias exhibited by Juror X, but it was clear that the responding jurors believed that Juror X demonstrated a bias, in that he was unable to impartially consider the facts of the matter before the Court, and referred in conversation to his own similar circumstance when he was younger; and

(d) some responding jurors were of the belief that Juror X might have been able to put that bias aside.

[20] There was no evidence to suggest that Juror X was acting dishonestly in his disclosures to the other jurors.

[21] In relation to whether there had been offences under the *Jury Act*, the report concluded:

(a) two of the jurors who responded said that Juror X admitted to searching online in relation to penalties for the offences with which the appellant was charged; and

(b) whether or not such a search was actually conducted was unknown, but it was sufficient to conclude that members of the jury believed that Juror X had done so.

[22] As to whether there had been a possible contempt of court the report concluded:

(a) the learned trial judge had given directions which could leave the jury members in no doubt that internet searches were prohibited; that extended beyond searches in relation to the appellant, and included research in respect of legal principles;

(b) the learned trial judge went to great lengths to ensure that the empanelled jurors were aware of their obligations as jurors, and were informed that it would be a contempt of court to conduct research on matters of law or other matters related to the trial;

(c) Juror X ought to have known not to make his own inquiries about the matter and even if he did not make those inquiries, he led others on the jury to believe he did; and

(d) the other members of the jury who believed that Juror X had made his own inquiries ought to have known to bring the matter to the attention of the Court by writing a note to the trial judge, as directed by the trial judge and as outlined in the Guide to Jury Deliberations which the jury had been given.

[23] The Sheriff's report concluded that the matter should be referred to the Queensland Police for investigation as to whether Juror X should be prosecuted.

Appellant's submissions – miscarriage of justice

[24] Mr Lynch of counsel, appearing for the appellant, submitted that there had been a miscarriage of justice because the conduct of Juror X and the responses of the other jurors constituted departures from regular and duly recognised processes of law and

were, in the circumstances, a "serious departure from the essential requirements of the law".[4]

[25] The submissions advanced included the following points:

(a) had Juror X disclosed his bias (based on his previous experience) before or during the trial, he would likely have been discharged;

(b) subject to what he told the other jurors, there was a prospect that the entire jury would have been discharged pursuant to s 56(1)(a) of the *Jury Act*;

(c) clear directions were given to the jury that the jurors were not to conduct their own investigations into legal principles, and all jurors were advised that if they became aware that that had happened then they should advise the Court;

(d) Juror X had stated a bias which was not reported by him to the trial judge, and which was not in accordance with his oath or affirmation;

(e) the remaining members of the jury did not report their knowledge of that stated bias;

(f) Juror X undertook an internet search in respects of legal principles during the deliberations;

(g) the fact that he had done so was known to other jurors, and was the subject of discussion with them during deliberations;

(h) notwithstanding their knowledge the other jurors did not report the fact that Juror X had conducted such searches;

(i) relying on *R v Hall*,[5] where a departure from regular and duly recognised process of law is involved, the question of miscarriage of justice depends not upon the effect of the departure on the verdict, but on whether there has been a serious departure from the essential requirements of the law;

(j) relying on *R v Panozzo*,[6] the integrity and perception of the integrity of the role of the jury in the legal system is a matter of considerable importance, and it is only if the community can be entirely confident that the proper procedures have been followed that the reality and perception of integrity of the process can be maintained;

(k) relying on *R v Peter*,[7] the impartiality of the jury is fundamental to a fair trial, and requires not only that the jury are impartial, but also that they are seen to be impartial by all fair-minded people; and

(l) responding to the Crown's submissions, the Court could not conclude that the evident bias on the part of Juror X was in favour of the appellant in all respects; such information as was known about the jury during deliberations, and from the verdicts, meant that such a conclusion was simply a matter of speculation.

[26] Mr Meredith of counsel, appearing for the Crown, submitted that the appellant could not show that there was a miscarriage of justice. The jury had been properly constituted and the trial was run according to law. Even though Juror X might have

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4 In this regard reliance was placed on *R v Hall* [1971] VR 293 at 299.
5 [1971] VR 293 at 299.
6 (2003) 8 VR 548 at 555.
7 [2020] QCA 228.

been discharged had his bias become known to the trial judge, it did not follow that there had been a miscarriage of justice when the evidence suggested that Juror X's attitude was in favour of the appellant, and not against him. Relying on *R v Szabo*,[8] the test in a case such as this was based on whether an ordinary fair-minded and informed member of the public would entertain a reasonable suspicion that justice had miscarried. Because Juror X displayed attitudes that were not against the interests of the appellant, such a conclusion could not be reached.

[27] Further, even if there was an irregularity then the proviso in s 668E(1A) of the *Criminal Code* was applicable, as there had been no miscarriage of justice, either substantial or otherwise.

Consideration

[28] There can be little doubt that the conduct of Juror X displayed a bias based upon his own personal previous experience and if it were true that he had conducted internet research connected with the sentences for rape and carnal knowledge, he acted contrary to the directions of the learned trial judge and contrary to the oath or affirmation he took as a juror.

[29] The responses by other jurors (including Juror Y) supported what was said in the letter. That is, at the beginning of the trial Juror X stated he would not convict based on his personal experiences in the past. The findings in this respect in the report were that Juror X announced that position to the other jurors early in the trial, causing at least some of the jurors[9] to believe that Juror X had demonstrated a bias in that he was unable to impartially consider the facts of the matter before the Court. The responses varied as to whether the bias was maintained during the course of deliberations.

[30] It is also plain from the Sheriff's report that members of the jury believed Juror X had conducted internet searches concerning the penalties for rape and unlawful carnal knowledge. That belief was obviously based upon what Juror X said to them in the course of deliberations. Juror X also led the jurors to believe that he had a disposition in relation to convicting which was affected by his view that unlawful carnal knowledge would attract a lesser penalty.

[31] The report did not make a finding as to whether Juror X had actually conducted the internet searches to which he referred. However, there can be no doubt that if Juror X conducted those internet searches it was against the express and very clear directions by the learned trial judge.

[32] It is important to note that this case involves Juror X revealing to other members of the jury that he had (apparently) conducted internet research connected with the trial. As the report found, other members of the jury believed that he had done so. Those other members of the jury were well aware of the clear directions of the learned trial judge that a juror should not do so, but more to the point that if they became aware that another juror had done so, they were to raise it with the trial judge. The letter which first raised any issue concerning Juror X was given to the trial judge after the verdicts were entered. Plainly, the jury continued deliberations with Juror X after forming the belief that he had carried out impermissible internet

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8 [2001] 2 Qd R 214; [2000] QCA 194, at [52]-[53] and [56].

9 Bearing in mind that only six of the 14 jurors responded to the Sheriff's inquiries.

research. Not only were other members of the jury of the belief that he had conducted that research, at least some of them gave responses to the Sheriff which indicated that the fact of the internet research and its ramifications had been the matter of debate within the jury's deliberations.

[33] Finally, there can be little debate that the jurors had been directed that conducting research on matters of law or other matters related to the trial would be a contempt of court. That underlies the seriousness of Juror X's conduct if it was true that he conducted internet research. Be that as it may, the fact remains that other jurors formed the belief that Juror X had done so contrary to the trial judge's express directions, yet did nothing to bring that to the attention of the trial judge at the time. Instead, the jury continued deliberations and delivered verdicts.

[34] In *R v Peter*,[10] this Court commented upon the fact that impartiality of a jury is fundamental to a fair trial:

> "[12] The jury's role is central to the criminal justice system, as stated in *Panozzo*:
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> > 'The integrity and the perception of the integrity of that system is a matter of considerable importance. Only if the community can be entirely confident that the proper procedures have been followed will the reality and perception of integrity of the process be maintained.'
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> [13] The impartiality of the jury is fundamental to a fair trial. It requires not only that the jury are, but also that they are seen to be, impartial by all fair-minded people. The actual and apparent impartiality of the jury is promoted by a number of processes and provisions of the Act, including the random selection of the jury panel and the random selection of the jury from the panel as provided in s 41, the peremptory right of challenge in s 42, the entitlement to challenge for cause in s 43 and special procedures for challenge for cause in s 47. In addition, the integrity of the system is preserved by the power conferred on a judge to discharge a juror, or the jury, prior to the final stage of jury selection (that is, when all jurors and reserve jurors are selected and sworn but the jury panel is not yet discharged: s 45). A judge may at that stage discharge a juror pursuant to s 46 if it is considered there is reason to doubt the impartiality of the person selected. A judge may also discharge the entire jury at that stage, pursuant to s 48, which provides:
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> > '(1) Before the court finishes the final stage of the jury selection process, the judge may discharge all the persons selected to serve as jurors if the judge considers that the challenges made to persons selected to serve on the jury or as reserve jurors have resulted in a jury of a composition that may cause the trial to be, or appear to be, unfair.

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10 [2020] QCA 228 at [12]-[14]; internal citations omitted.

> (2) If all the persons selected to serve as jurors are discharged, another jury must be selected from the jury panel.'
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> [14] Furthermore, the judge has a discretionary power to discharge a juror or the jury at any later stage where the integrity or the perception of the integrity of the system is compromised. Thus, a judge may discharge a juror for contravention of a condition as to separation or restriction of communication pursuant to s 53(10) and s 54(4) if the judge considers 'the contravention appears likely to prejudice a fair trial'. The judge may also pursuant to s 56(1)(a) discharge a juror where it appears to a judge that the juror is not impartial or ought not, for other reasons, be allowed to act as a juror at the trial. Significantly, a judge, under s 60 of the Act, may also discharge the entire jury without it giving a verdict where they cannot agree on a verdict or 'the judge considers there are other proper reasons" for doing so."

[35] The reference to a jury not only being required to be impartial, but also seen to be impartial by all fair-minded people, is derived from what the High Court said in *Webb v The Queen*:[11]

> "It follows that the test to be applied in this country for determining whether an irregular incident involving a juror warrants or warranted the discharge of the juror or, in some cases, the jury is 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 discharged or will not discharge its task impartially."

[36] In my view, absent proper consideration of the report a fair-minded and informed member of the public would reach the conclusion that both Juror X and other members of the jury had not discharged their task impartially. That is applicable to Juror X both by his reported bias and his announcement that his internet searches had affected his view about whether to convict or not. As for the other members of the jury, believing that Juror X had conducted such searches and hearing his announced position on that basis, they did not report that serious breach of duty to the trial judge.

[37] The submissions on behalf of the Crown were that there was no miscarriage of justice because Juror X, both by his declared position at the start of the trial and by his announced position as a result of researching on the internet, was favourably disposed towards the appellant and opposed to the interests of the prosecution.

[38] The letter which first raised concerns with the learned trial judge ended with the note that "Based on a jury polling, [Juror X's] vote would not alter the ability to obtain a unanimous decision". On its face that statement suggests that Juror X's conduct made no difference to the outcome, at least so far as the convictions were concerned.

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11 (1994) 181 CLR 41 at 53. See also *Smith v Western Australia* (2014) 250 CLR 473; [2014] HCA 3, [54].

[39] The responses referred to in the Sheriff's report lend support for that conclusion:[12]

(a) Juror A said Juror X indicated from the beginning that he did not believe the evidence and that the defendant was not guilty on all charges; at the time the jury asked the judge for directions about a hung jury, Juror X was not moving from his not guilty position; but then "After a few days he gave in to guilty of a few charges";

(b) Juror Y (the juror who sent the letter), said of Juror X's impact: "there were a small minority number of jurors who supported his views, over time, and most probably this would not have affected the totality of decisions";

(c) Juror B said that when Juror X revealed he had researched sentences online and was unwilling to convict, he (Juror B) "brought everyone's attention to this, and I said very explicitly 'It's not appropriate for you to base your decision on what you think the sentence will be – you can't do that'; Juror B summarised the events by saying "because I had identified [Juror X's] bias, he had withdrawn his protest, and thus it seemed that the ultimate conclusion of the trial was to continue as it otherwise would have. Simply put, it seemed inconsequential";

(d) Juror C said he was not aware of any bias on the part of any juror; and

(e) Juror D said that after Juror X's initial announcement (that he would not find the defendant guilty regardless of the evidence), Juror X "did not indicate any bias and neither did any other panel members"; Juror D added that "this jury member [Juror X] did not follow through on his threat and the final jury verdict is testament to this".

[40] The reference by Juror Y to the note sent to the trial judge asking about a hung jury is an important marker in the chronology of the deliberations. The jury retired at 12.50 pm on Friday 16 October 2020.[13] They had only been deliberating for 1 hour and 43 minutes when the hung jury note was sent.[14] The note asked "What will happen in the event of a hung jury?"[15] The learned trial judge directed the jury that it was far too premature to be talking about a hung jury, and that they should "listen to the points of view of your fellow jurors and consider how what they say is their reasons for coming to pick particular conclusions might impact your own views" and "if you talk about it, you might very well work through it".[16]

[41] The jury resumed deliberations the following Monday, 19 October 2020. Several more notes were sent, asking various questions as to topics such as consent, carnal knowledge and maintaining.[17] Then, late in the day, the jury sent a note saying "We have decided on some counts in unison, but remain hung on other counts".[18] Some jurors wanted to go home for the day. The learned trial judge directed them in these terms:[19]

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12 I have omitted reference to Juror E (the reserve juror) as that response added nothing because Juror E had been discharged prior to deliberations.

13 AB 68 line 4.

14 AB 69 line 13 to AB 70 line 19.

15 Exhibit MFI F.

16 AB 71 lines 13-27.

17 Exhibits MFI G, H and I.

18 Exhibit MFI J.

19 AB 89 lines 30-38.

> "I have got your note. I am not inclined to do anything in terms of taking verdicts, or anything, at the moment. It is obviously important to the parties – and by the parties I mean to the defendant and to each of the complainants, but it is also important matter for the community – that serious criminal matters be resolved, if possible, by a unanimous jury verdict. So I am going to ask you to give it some more time; see if you can talk amongst yourselves. If you get to the stage where you really just cannot reach agreement, I can talk to you about that, and about how you might try to resolve things. All I can really say is that you have got to listen to the fellow jurors and discuss it."

[42] The jury were sent home. By early afternoon the next day (20 October 2020) the jury sent a note to the learned trial judge saying, "We have reached a decision in unison for all counts except 1.4 (rape) and 17 (rape)"[20] and asking for assistance on how the verdicts might be answered when called. Further directions were given and the jury retired at 2.37 pm. At 2.49 pm they returned with their verdicts, which were announced count by count. On each occasion the jury were asked if the speaker's announced verdict was the verdict of them all, and on each the jury signified that it was the verdict of them all.[21] Where there is no dissent to a verdict or timely correction it will be presumed that the verdict is the verdict of the whole jury. As was said in *Higgins v The Queen*:[22]

> "55 In resolving what lies in issue, account must also be taken of what was decided in *NH v Director of Public Prosecutions (SA)* (2016) 260 CLR 546. It was held at [26], however:
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> > What is "conclusively inferred", where there is no dissent and no timely correction, is that the verdict delivered by the foreperson is the verdict of the jury. The presumption that the verdict is correctly communicated is rebuttable when it is not delivered in the sight and hearing of all jurors or if it can be shown that one or more of the jurors was not competent to understand the proceedings. As a general principle, the presumption will not be rebutted by evidence admitted simply to show that a juror did not agree with the verdict or that the juror's apparent agreement resulted from a misapprehension.
>
> (Footnotes omitted.)"

[43] A fair reading of the responses, seen in the light of the chronology of deliberations, supports the conclusion that all of the verdicts delivered by the jury were genuinely unanimous and unaffected by the conduct of Juror X. Further, in so far as Juror X announced his position, both at the start of the trial and by his searches, it was a position that favoured the appellant and was contrary to the prosecution's interest. There is no hint in the responses by other jurors that Juror X's stance persuaded them from the path they otherwise would have taken. Once again the responses indicate that

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20 Exhibit MFI K.
21 AB 335-342.
22 [2018] NSWCCA 258 at [55].

the verdicts, both of acquittal and conviction, were genuinely unanimous. It cannot be demonstrated that any juror joined in the verdicts as a result of Juror X's conduct, and the presumption that the verdicts were correctly entered is therefore not displaced.[23]

[44] Applying the test from *Webb v The Queen*, the fair-minded and informed member of the public must be taken to know the juror's responses as exposed in the Sheriff's report. Knowing that, the fair-minded and informed member of the public would not have a reasonable apprehension or suspicion that the juror or jury has not discharged its task impartially.

[45] Further, the responses from the jurors shed some light on why they may have concluded that they did not need to report Juror X's conduct to the trial judge. Juror A said Juror X had altered his position. Juror Y said that he thought Juror X was not so much siding with the defence as finding "a means to somehow justify his past issues", but that Juror X's position "would not have affected the totality of decisions". Juror B said that after he was confronted Juror X "had withdrawn his protest, and thus it seemed that the ultimate conclusion of the trial was to continue as it otherwise would have … it seemed inconsequential". Juror D[24] said that whilst Juror X's initial announcement of unwillingness to convict was "shocking", it was not "enough to contemplate discussions with the judge", as it was "after all the first morning". Juror D said there were no issues after that, as Juror X did not indicate any bias and neither did any other juror.

[46] Mr Lynch, for the appellant, contended that the Court could not draw the conclusion that Juror X's conduct was pro-defence and anti-prosecution, as that was mere speculation. I respectfully disagree.

[47] The submission that speculation is involved in any conclusion that juror X's conduct was pro-defence and anti-prosecution would have greater force but for the fact that in this particular case one knows much about the jury's verdicts. Normally that is a matter shrouded in mystery because no inquiry is permitted. This is a rare case where the Sheriff was directed to conduct an investigation under s 70(7) of the *Jury Act* and that investigation has permitted the mind of the jury to be probed and exposed. The consequent report contains responses from jurors which illuminate the issue of the impact of Juror X's conduct. In considering the issues raised on the appeal this Court cannot ignore what the report reveals.[25]

[48] Similarly, if one applied the test in *Webb v The Queen*, the fair-minded and informed member of the public would be taken to know what the report reveals. No response by the jurors suggested that Juror X's conduct influenced the eventual verdicts. To the contrary, as outlined above, one can conclude that the verdicts all reflected the unanimous view of the jury. It is the additional information from the Sheriff's report that permits a level of certainty that would otherwise be denied in relation to the impact of Juror X's conduct.

[49] Further, that information neutralises any question of whether verdicts were compromised verdicts. Juror X's stance was in favour of the appellant at all points.

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23 *Higgins v The Queen* [2018] NSWCCA 258 at [59]-[61].

24 Who had served on other juries in the past.

25 *Higgins v The Queen* [2018] NSWCCA 258, 275 A Crim R 333; *Higgins v R* [2020] NSWCCA 109.

Therefore, one can have a degree of confidence that on those counts where a verdict of guilty was returned, the verdict was not the product of some sort of compromise.

[50] This is not a case like *Hall* and *Panozza* where the departure from regular and duly recognised process of law was as to the lawful constitution of the jury itself. Further, whilst Juror X's conduct conflicted with his oath or affirmation and the trial judge's directions, the jurors' responses show that there has not been a serious departure from the essential requirements of the law after all. The conduct of Juror X, both in demonstrating his outward bias and in conducting private research during the course of the trial, is to be deplored. However, the material before the Court shows that there was no miscarriage of justice, as the verdicts remained true for the whole jury.

[51] I would dismiss ground 1 of the appeal on the basis that it has not been demonstrated that there has been a substantial miscarriage of justice.

Sentence application

[52] The appellant was convicted after a trial, of six offences involving sexual assault. The most serious charge was count 1, maintaining a sexual relationship with a child under 16 years with two circumstances of aggravation, that had involved unlawful and indecently dealing with that child, and exposing that child to an indecent act. The other offences consisted of one count of unlawful carnal knowledge and four offences of indecent treatment.

[53] The greatest sentence was nine years' imprisonment, imposed on count 1 (maintaining). The other counts had lesser concurrent sentences imposed. For the purposes of this application the focus of the submissions was on the nine-year sentence.

[54] The learned trial judge noted a number of features about the offending which can be summarised by the following points:

(a) the appellant was born on 27 October 1964 and was therefore 25 years and older during the course of maintaining the sexual relationship;

(b) the abuse of the child started in about 1988 when she was only five or six years of age;

(c) the abuse continued for a decade;

(d) the complainant was a very vulnerable young girl whose disadvantages included her own parents being unable to look after her, and her being placed in care;

(e) the appellant was the uncle of the complainant;

(f) the relationship between them was characterised by physical violence and emotional blackmail;

(g) during the course of the maintaining period the complainant was abused frequently and about twice a week from the age of 14;

(h) the nature of the offending included rubbing of the appellant's penis on her, particularly on her vagina, masturbating and ejaculating on her body, and at least one act of penile penetration;

(i) taking into account offending that took place in a State other than Queensland, the offending continued for a period of 12 years;

(j) the appellant had no relevant criminal history; and

(k) the conduct of the trial indicated a lack of remorse.

[55] The learned trial judge took into account a number of factors relevant to the offence of maintaining a sexual relationship with a child. These were factors enumerated by this Court in *R v SAG*.[26] His Honour identified that the significant factors were:

(a) the young age of the child victim;

(b) the lengthy period for which the relationship continued;

(c) that there was a protective relationship with the appellant being the girl's uncle, and she having been placed in the care of the Department of Children's Services and with her grandparents (the appellant's parents);

(d) that the relationship was characterised by physical violence and emotional blackmail; and

(e) there had been at least one act of penile penetration.

[56] The learned trial judge also referred to aspects of the appellant's personal history. This included his reasonably good work history, completion of schooling to year 10, his engagement in the construction and mining industry, his suffering a significant heart attack at about age 47 with the consequence that he was thereafter on a disability pension. Further, his Honour referred to the fact that the appellant had been (until recently) involved in a 20 year relationship and was the father of five children, aged between 11 and 26.

[57] Mr Lynch's submissions focussed on the fact that comparable cases suggested that eight years' imprisonment was the appropriate sentence.

[58] The learned sentencing judge was referred to cases which had been urged upon him as comparable, including *R v KJB*[27] and *R v CBQ*.[28] His Honour indicated that each of those decisions had given him "significant assistance in determining what is the appropriate sentence in this case".[29]

[59] *KJB* involved a sentence of eight years' imprisonment following a plea of guilty for the offence of maintaining an unlawful relationship of a sexual nature, with a circumstance of aggravation (rape). The offence was committed over a period of three years from when the complainant was about 12 years old. The relationship commenced shortly before the complainant's 13th birthday. The conduct included touching and kissing of her breasts, performing oral sex on one occasion and once or twice penetrating her vagina with his fingers. On at least two occasions the complainant was raped. The offender was 32 years old when the relationship commenced, and he was married to the complainant's mother. The offender in that case was remorseful and cooperated with police.

[60] This Court refused a challenge on the basis that the sentence was manifestly excessive. That and the fact that *KJB* involved a period of offending of only three years compared to the 10 to 12 years in this case means that *KJB* does not support

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26 [2004] QCA 286 at [19].
27 [2002] QCA 448.
28 [2016] QCA 125.
29 AB 122 line 8.

the proposition that the present sentence was manifestly excessive. In fact, the contrary might be said to be the case.

[61] *CBQ* was again a case where a plea of guilty was made to a count of maintaining a sexual relationship. The period of the relationship was two years and four months. There were circumstances of aggravation including indecent treatment, rape and unlawful carnal knowledge. He was sentenced to nine years' imprisonment and challenged that sentence on the ground that it was manifestly excessive. The application also required an extension of time as it was 12 months out of date.

[62] The issue before this Court turned on two factors:

(a) whether the principle that the offender's mental disorder lessened his moral culpability had been given sufficient weight; and

(b) the offender had demonstrated substantial progress towards rehabilitation between the times of the offending and the sentence.

[63] Those two factors were determined against the offender. For that reason his challenge to the sentence failed. However, apart from that the Court observed that the sentence which was imposed for the maintaining count (nine years) was consonant with those imposed in comparable cases, namely *R v D*,[30] *R v KAI*,[31] *KJB* and *R v SAU*.[32] The application for an extension of time was refused.

[64] The factors noted about *CBQ* above demonstrate why the learned sentencing judge considered *CBQ* was of assistance to him. It certainly does not demonstrate that the sentence imposed here was manifestly excessive.

[65] Two other cases referred to by the appellant, *R v SAU*[33] and *R v F*,[34] do not support the proposition that the present sentence was manifestly excessive. They involved eight-year sentences on pleas of guilty to maintaining an unlawful sexual relationship. The offending was for much shorter periods of time than in the present case and with complainants who were considerably older at the commencement. In each case the application to challenge the sentence based on manifest excess was refused. That the application was dealt with on the basis of a refusal of leave, rather than a resentencing, together with the factors I have already mentioned, make each of those cases of little use on the contention that the present sentence was manifestly excessive.

[66] In my view, it has not been demonstrated that the sentence imposed was manifestly excessive. That application should be refused.

Conclusion

[67] For the reasons given above I would propose the following orders:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

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30 [1996] QCA 363.
31 [2002] QCA 378.
32 [2006] QCA 192.
33 [2006] QCA 192.
34 [2001] QCA 137.

[68] **MULLINS JA:** I agree with Morrison JA.

[69] **NORTH J:** I agree with Morrison JA.