

Own inquiries by a juror

Anish Bhasin reports on *Hoang v The Queen* (2022) 96 ALJR 452; [2022] HCA 14



In *Hoang v The Queen* (2022) 96 ALJR 452, the High Court clarified the scope of provisions in the *Jury Act 1977* (NSW) (*Jury Act*) which prohibit a juror from making their own inquiries for the purpose of obtaining information about any matter relevant to a trial, and require the immediate discharge of any juror who does so. The court adopted a broad construction of the provisions, finding that ‘matters relevant to a trial’ include, at least, matters of evidence given or addresses to the jury at trial, while a juror’s motive for making an inquiry was irrelevant.

Mandatory discharge under the Jury Act

Section 53A of the *Jury Act* provides for the mandatory discharge of jurors in certain circumstances, including if in the course of any trial the juror has engaged in ‘misconduct’ in relation to the trial, namely:

- (a) conduct that constitutes an offence against this Act, or
- (b) any other conduct that, in the opinion of the court ..., gives rise to the risk of a substantial miscarriage of justice in the trial ...

Under s 68C(1) of the *Jury Act* it is an offence for a juror to ‘make an inquiry for

the purposes of obtaining information about ... any matters relevant to the trial'. 'Making an inquiry' includes conducting any research, for example, by searching the internet for information.

The course of the trial

The appellant was tried in the District Court of NSW on indictment for 12 counts of sexual offences against children involving five complainants. The offences were alleged to have been committed while the appellant was a maths tutor between 1 January 2007 and 31 July 2014. The trial judge directed the jury at the start of the trial that they were not to search the internet for anything relevant to the trial.

As part of the Crown case a police officer gave evidence to the effect that there was no record of the appellant having held a 'working with children check'. A defence witness gave evidence to the effect that he was also a tutor, did not have a 'working with children certificate', and many tutors did not have one.

Before 4pm on a day of deliberation, the jury indicated that they had reached agreement on eight of the 12 counts. The following day, the jury foreperson sent a note to the trial judge stating:

This morning a juror disclosed that yesterday evening they google/looked up on the internet the requirements for a working with children check. The juror had previously been a teacher and was curious as to why they themselves did not have a check. They discovered the legislation, which was only introduced in 2013.

...

This information discovery of a juror making their own enquiry I do not feel has had an impact, however I understand my duty to notify you of this as per the written instructions at the commencement of this trial.

The trial judge decided to take verdicts on the eight counts reached the previous day before examining the relevant juror, on the basis that they were reached before any alleged misconduct occurred. The jury returned guilty verdicts on each of those counts, and also returned not guilty verdicts on two further counts. The trial judge then examined the jury foreperson

and the relevant juror, who confirmed the internet search had taken place. The juror was discharged and the remaining jurors later returned guilty verdicts on the two outstanding counts.

In written reasons provided several weeks later, the trial judge stated:

I declined to conduct the inquiry with the juror before taking the verdicts as I was of the opinion that I had sufficient information in [the note from the foreperson] that a breach had occurred. It was therefore mandatory that the juror had to be dismissed.

Appeal to Court of Criminal Appeal and High Court

The appellant appealed against his convictions on bases which included that the trial judge erred in failing immediately to discharge the juror upon being satisfied that she had conducted an independent inquiry in relation to part of the evidence.

Proper construction of s 68C(1) read with s 53A of the Jury Act

The Court of Criminal Appeal dismissed the appellant's appeal: *Hoang v R* (2018) 98 NSWLR 406 (N Adams J; Hoeben CJ at CL agreeing; Campbell J dissenting). The majority found that as the inquiry was for the purpose of the juror's own curiosity about her personal situation, rather than for the purpose of obtaining information relevant to the trial, an offence under s 68C(1) was not capable of being established and there was no misconduct under s 53A(2)(a) of the Jury Act: at [121], [123].

The High Court unanimously reversed this finding: at [27]–[38]. It found that s 53A(2)(a) of the Jury Act did not itself create an offence, but was concerned with 'conduct that constitutes an offence', which did not need to be established beyond reasonable doubt. However, such conduct comprises both the actus reus and mens rea of the relevant offence. An offence under s 68C(1) is committed when a juror makes an inquiry 'for the purpose of obtaining information about ... any matters relevant to the trial'. This includes, at least, information about matters of evidence given or addresses to the jury at trial. Provided that a juror undertook an inquiry for the purpose of obtaining information of that character, the mental element of the offence is

established. Inadvertent searching would not be captured.

However, a juror's motive for making an inquiry is not relevant. It is not necessary to show that the juror intended to use the information obtained in their deliberations.

The matter about which the juror made the inquiry was relevant to the trial: evidence had been given about it, and it was the subject of defence submissions and the trial judge's summing up. The juror's purpose was to obtain information about that matter, which was prohibited. It was irrelevant that the juror was curious as to why they themselves did not have a working with children check.

Mandatory discharge

Section 53A of the Jury Act requires the mandatory discharge of a juror who has engaged in misconduct. The High Court held (as the Crown had conceded below) that

a failure by a trial judge to immediately discharge a juror upon being satisfied of juror misconduct amounts to a failure to comply with a mandatory requirement under the Jury Act and is as such a fundament[al] defect leaving no room for the application of the proviso in s 6(1) of the *Criminal Appeal Act* [1912 (NSW)]: at [42].

As a result, the appeal was allowed due to the trial judge's failure immediately to discharge the juror: at [43]. The High Court upheld the two guilty verdicts reached after the juror was discharged, finding that the trial judge's instructions were adequate to address any risk that the remaining jurors improperly took the overturned guilty verdicts into account in reaching those verdicts: at [45].

Are all errors in dealing with misconduct allegation fundamental?

The majority in the Court of Criminal Appeal accepted that not all errors in dealing with a misconduct allegation constitute a fundamental defect in the trial process (such as failing immediately to discharge a juror after an erroneous finding of misconduct (at [140]), or erroneously discharging a juror who had not engaged in misconduct (at [156])). These issues did not require resolution by the High Court. **BN**