Court of Criminal Appeal
Supreme Court

New South Wales

Case Name:	Phan v R
Medium Neutral Citation:	[2018] NSWCCA 225
Hearing Date(s):	14 February 2018; 20 August 2018; Written Submissions 3 October 2018
Date of Orders:	12 October 2018
Decision Date:	12 October 2018
Before:	Hoeben CJ at CL at [1]; Price J at [2]; Fullerton J at [200]
Decision:	(1) Appeal upheld. (2) The appellant's conviction and sentence are quashed. (3) List the case for mention at the Sydney District Court on 26 October 2018 at 9.30am
Catchwords:	CRIME – conviction appeal – attempt to possess a commercial quantity of an unlawfully imported border controlled substance contrary to ss 11.1 and 307.5 of the Criminal Code (Cth) CRIME – procedure – four accused – verdicts returned against two accused when jury was constituted by 12 jurors – lengthy jury deliberations – jury notes – Black direction in respect of co-accused – "partial" Black direction in respect of co-accused and appellant – discharge of juror – order that trial continue with 11 jurors – Black direction in respect of co-accused and appellant – discharge of another juror – order that the trial continue with 10 jurors – illness of juror in jury room

– jury allowed to separate over Christmas – upon return of jury, third juror discharged – order that trial continue with 9 jurors – note from juror – examination by judge of juror and foreperson – jury discharged in respect of co-accused – jury not discharged in respect of appellant – guilty verdict returned shortly thereafter

CRIME – s 53C Jury Act – discharge of jurors – consideration of risk of substantial miscarriage of justice – secrecy of jury deliberations – maintenance of a fair trial – trial in progress beyond 2 months – order of jury deliberations – whether error in ordering continuation of trial with 9 jurors – anxiety disorder of discharged juror – unprecedented length of jury deliberations – reasonableness and well-being of remaining jurors – whether discharge of three jurors upset the balance of the remaining jurors – whether error in declining to discharge the jury following receipt of juror's note and examination of juror and foreperson – whether error in continuing trial after discharge of jury in respect of co-accused – whether discharged juror may have been a dissentient juror – benefit of hindsight – whether error in confining consideration of discharge to the likelihood of reaching a unanimous verdict – s 56(3) Jury Act – House v The King error – failure to consider whether the ability of the nine remaining jurors to carry out their function had been compromised – substantial miscarriage of justice – guilty verdict quashed

Legislation Cited:

Criminal Appeal Act 1912 (NSW), s 6
Criminal Code (Cth), ss 11.1, 11.5, 307.5
Judiciary Act 1903 (Cth), s 68
Juries Act 2003 (TAS), s 43
Jury Act 1977 (NSW), ss 22, 53B, 53C, 55F, 56
The Commonwealth Constitution, s 80

Cases Cited:

BG v R [2012] NSWCCA 139; (2012) 221 A Crim R 215
Black v The Queen (1993) 179 CLR 44; [1993] HCA 71
Brownlee v The Queen (2001) 207 CLR 278; [2001] HCA 36
Crofts v The Queen (1996) 186 CLR 427; [1996] HCA 22
Filipou v The Queen (2015) 256 CLR 47; [2015] HCA 29

	House v The King (1936) 55 CLR 499; [1936] HCA 40 Potter v The Queen [2007] EWCA 2485 R v Godson (1975) 1 WLR 549 Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81
Category:	Principal judgment
Parties:	Tri Thanh Phan (Appellant) Regina (Respondent) Attorney General for the Commonwealth (First Intervenor) Attorney General for New South Wales (Second Intervenor)
Representation:	Counsel: T Game SC and L Hutchinson (Appellant) W Abraham QC and M Kalyk (Respondent) S Donaghue QC and J Stellios (First Intervenor) M Sexton SC SG and C Winnett (Second Intervenor) Solicitors: Alexanders Lawyers (Appellant) Solicitor of Public Prosecutions (Cth) (Respondent) Australian Government Solicitor (First Intervenor) Crown Solicitor for New South Wales (Second Intervenor)
File Number(s):	2012/237246
Publication Restriction:	Restricted pending possible re-trial
Decision under appeal:	
Court or Tribunal:	District Court of New South Wales
Jurisdiction:	Criminal
Date of Decision:	05 January 2016
Before:	Williams SC DCJ
File Number(s):	2012/237246

JUDGMENT

1 **HOEBEN CJ at CL:** I agree with Price J and the orders which he proposes.

2 **PRICE J:** The appellant, Tri Thanh Phan, was charged with one count of attempting to possess a commercial quantity of an unlawfully imported border controlled drug, namely methamphetamine and heroin, contrary to ss 11.1 and 307.5(1) of the *Criminal Code* (Cth) ("the Code"). He was jointly tried on an indictment with Man Fu Vico Lee, Hin Yiu Tang, and Hung Kai Lok in the District Court at Sydney before Judge M Williams SC ("the judge") and a jury. With no disrespect to the co-accused, I will refer to them by their surnames.

3 Lee, Tang, and Lok were each charged with conspiracy to possess a commercial quantity of an unlawfully imported border controlled drug, namely methamphetamine and heroin, contrary to ss 11.5(1) and 307.5(1) of the Code.

4 The trial commenced on 13 July 2015 and the jury retired to consider its verdicts on 12 October 2015. The jury was, at that time, constituted by 12 jurors.

5 A verdict of guilty against Lee had been returned by the jury on 14 October 2015 which was the third day of the jury's deliberations. On 22 October 2015, the ninth day of deliberations, the jury returned a verdict of guilty against Tang.

6 On 5 January 2016, the jury which was then constituted by nine jurors, found the appellant guilty of the offence of which he had been charged. This was the forty-sixth day of the jury's deliberations. Earlier on that same day, the judge had discharged the jury in relation to Lok.

7 The appellant was sentenced to 14 years imprisonment with a non-parole period of 8 years by the judge. He appeals against his conviction upon the following grounds:

> "Ground 1: His Honour erred in ordering that the trial continue with nine jurors on 4 January 2016, following the discharge of Juror 3 on that date.
>
> Ground 2: His Honour erred in declining to discharge the jury on 5 January 2016, following receipt of MFI #115 and examination of Juror M and the foreperson on 4 January 2016.
>
> Ground 3: The trial miscarried by reason of the duration of, and the circumstances pertaining to, the jury deliberations and delivery of the verdict.
>
> Ground 4: His Honour erred in failing to hold that s 22(a)(iii) of the *Jury Act 1977* (NSW) is not picked up and applied by s 68(2) of the *Judiciary Act 1903* (Cth) to a trial on indictment in the District Court of New South Wales of a person who is charged with one or more offences against the laws of the Commonwealth."

8 There is no appeal against sentence.

The Indictment

9 The indictment upon which the appellant and the co-accused were arraigned before the jury was in the following terms:

> "The Director of Public Prosecutions of the Commonwealth of Australia, who prosecutes in this behalf for Her Majesty, charges on 11 June 2015 that
>
> Man Fu Vico LEE
>
> Hin Yiu TANG
>
> and
>
> Hung Kai LOK
>
> 1. Between about 17 January 2012 and 30 July 2012 at Sydney in the State of New South Wales and elsewhere, did conspire with each other, and diverse other persons, to possess a substance, the substance having been unlawfully imported, the substance being a border controlled drug, namely methamphetamine and heroin, and the quantity being a commercial quantity.
>
> Contrary to subsections 11.5(1) and 307.5(1) of the *Criminal Code* (Cth).
>
> And the said Director of Public Prosecutions further charges that
>
> Tri Thanh PHAN
>
> 2. On about 30 July 2012 at Sydney in the State of New South Wales did attempt to possess a substance, the substance having been unlawfully imported, the substance being a border controlled drug, namely methamphetamine and heroin, and the quantity being a commercial quantity.
>
> Contrary to subsections 11.1 and 307.5(1) of the *Criminal Code* (Cth)."

An overview of the Crown case against the co-accused (count 1)

10 On the Crown case, the conspiracy involved an agreement between Lee, Tang, Lok, and other co-conspirators including Chi Man Lam ("Lam"), to possess a commercial quantity of border controlled drugs, namely 233.07 kilograms of pure methamphetamine (approximately 300 kilograms gross) and 174.4838 kilograms of pure heroin (approximately 250 kilograms gross) ("the drugs").

11 The drugs were contained in two shipping containers which were part of the one consignment. The containers held a total of 40 pallets, which had been loaded in Bangkok, Thailand. The consignor was Siam Pinnacle Inter-Trading Co Ltd in Thailand and the consignee was the business "Best at Home".

12 It was the Crown case that the conspirators had registered “Best at Home” in Australia and rented a warehouse in Alexandria for the purpose of receiving the consignment.

13 The drug containers were intercepted by Customs after their arrival in Sydney on 18 July 2012. On examination, one container was found to contain pottery items that concealed 300 packages of methamphetamine. The other contained pottery items that concealed 720 packages of heroin.

14 The drugs were substituted by authorities with an inert substance. During the substitution process, there was an error such that the methamphetamine was apparently substituted with 306 replica packages and the heroin with 714 replica packages.

15 According to the Crown case, Lee and Tang were in Sydney from February and April 2012, respectively. They shared the role of manager or co-ordinator of the operation in Sydney. They took the delivery of three dry-run shipments; liaised and reported to co-conspirators in Hong Kong; managed all the expenses incurred in Sydney; oversaw the work of the other conspirators, and; arranged for the collection of packages by the appellant and Helio Lay (“Lay”). Lok arrived in Sydney on 19 July 2012. The Crown contended that Lok’s role was to unpack, count, and distribute the packages, and that he was not acting under duress.

16 The Crown case was that all four accused knew or believed that they were involved with border controlled drugs during the commission of the offences.

Lok’s case

17 In order to appreciate some of the issues for the jury’s consideration, it is necessary to shortly consider Lok’s case. Lok contended he was not part of any agreement to possess drugs and that he had come to Australia to pay off a gambling debt.

18 It was his case that he had been threatened in Hong Kong and that threat had been enhanced by his treatment in Australia, culminating in a threat to his life on 30 July 2012. In her closing address to the jury, Lok’s counsel referred to 13 matters which formed the basis of Lok’s duress and an inability to render the

threat ineffective which included his movement being restricted, his passport and phone being taken from him, his not going anywhere unaccompanied, and that he knew little English.

A summary of the Crown case against the appellant (count 2)

19 It was the Crown case that the appellant was recruited to collect and store the drugs, and that he knew, or believed, that the substance he was attempting to possess was a border controlled drug.

20 Lee received instructions from Kwai Leung Poon ("Poon"), an uncharged co-conspirator situated in Thailand, about Diew To ("To") and Lay who would be collecting the packages from the warehouse. Poon stressed that Lee should ensure that each party received the correct packages, namely, 50 large packages (methamphetamine) and 200 small packages (heroin) to one person, with the balance to be given to the other person.

21 Lee communicated the arrangements for the collection of the packages via telephone to Lam. Lam and Lok then divided up the packages in the warehouse in accordance with Lee's instructions.

22 On 30 July 2012, Lee met with To in Chinatown. To then met with the appellant, whom To had tasked with collecting the packages from the warehouse. According to the Crown case, To gave the appellant a mobile phone and instructed him to only use that phone for communications about the collection despite the appellant having his own mobile phone.

23 The first collection from the warehouse was made by Lay. Tang and Lok were present and three boxes containing 50 large replica methamphetamine packages and 200 small replica heroin packages were loaded into Lay's vehicle before Lay drove away. Lee reported to Poon that the collection by Lay was "healthy and safe".

24 The second lot of packages was collected by the appellant, who arrived at the warehouse at about 2.32pm. The appellant stopped his vehicle shortly after driving To to the Alexandria area, and was observed meeting To on the side of the road for approximately one minute.

25 Tang and Lok were present at the warehouse. Before opening the roller door to enable the appellant to reverse his vehicle into the warehouse, Tang checked the registration number of the vehicle, which had been communicated to him by Lee in a telephone call at about 11.47am.

26 Lok and the appellant loaded 14 boxes containing 256 large replica methamphetamine packages and 514 small replica heroin packages into the appellant's vehicle. Lok assisted the appellant in counting the packages.

27 The appellant made a note of the numbers of packages in a notebook provided by Tang. The appellant drove away, later delivering the packages to a "granny flat", which according to the Crown he had rented for that purpose, and unpacked some of the packages he had collected into plastic bags before his arrest.

28 The appellant had several conversations with police that were summarised by a federal agent. One of these summaries noted the appellant said that on 30 July 2012 To, who he knew as "David", gave him a phone with a number written on the back and a note with an address on Bowden Street, Alexandria and told him that he needed something to be collected. The appellant was renting two properties at the time; a house on Cathcart Street and a granny flat on Linda Street, Fairfield Heights. According to the appellant, David told him to take the items to Cathcart Street; no arrangement was made for David to collect them. David told the appellant he was not allowed to use the phone to contact anyone other than David. The appellant said he was expecting to be paid around $200 to $300 for doing the pick-up.

29 Concealed CCTV cameras had been installed and activated by the authorities prior to 26 July 2012. Exterior and interior footage depicted Tang and Lok assisting with the two collections of the packages by Lay and the appellant on 30 July 2012, including Lok loading the packages into the vehicles and assisting the appellant in counting the packages.

The appellant's case

30 No evidence was called on behalf of the appellant. Ms Moody, the appellant's trial counsel, told the jury that the only issue as far as the appellant was concerned was his knowledge as to what was in the packages that he had

collected. It was the appellant's case that he neither knew nor believed what they contained was a border controlled substance and there was no evidence he had ever asked what was in the packages.

31 Ten reasons were put by Ms Moody to the jury as to why they could not be satisfied beyond reasonable doubt that the appellant had any knowledge of the true nature of the cargo. Those reasons included that the appellant had ignorantly entered the existing conspiracy at the last minute and was not present for 99% of the time the investigation was on foot; that he had never met Tang nor Lok prior to collecting the packages; there was no evidence that he had ever met Lee; that he did not speak Cantonese; and that he had no expectation of being paid anything more than $200 to $300 for a service he provided as part of his regular business of labour and truck hire.

A brief chronology of the trial itself

32 After commencing on 13 July 2015 with 15 jurors, the evidence concluded on 17 September 2015. The Crown's closing address commenced on 17 September 2015 and finished just before lunch on 24 September 2015. Ms Moody's closing address commenced after lunch and was relatively short, being it appears, completed by mid-afternoon. Ms Moody's address occupies 19 pages of transcript. The closing address by counsel for the co-accused took place between 24 September 2015 and 8 October 2015. The judge's summing up commenced on Friday 9 October 2015. Following the weekend break, the judge re-commenced on Monday 12 October 2015 and upon concluding the summing up, his Honour conducted a ballot to eliminate three of the 15 jurors. The remaining jury of 12 retired to deliberate at 12.53pm.

A chronology of jury deliberations

33 The jury deliberated for a total of 46 days.

34 On Tuesday 13 October 2015, a jury note (MFI #65) was received seeking a copy of "the judge's summary". As the transcript was not yet available, the parties agreed to provide the jury with copies of the case summaries which had been provided to the judge by each party to be read out in his Honour's summing up.

35 On Wednesday, 14 October 2015, the jury were provided with the agreed bundles of case summaries. Later that day, a jury note (MFI #67) was received. It read:

> "The jury would like clarification on the verdicts and if we can deliver an individual verdict at any time throughout deliberation? If this is the case, we are able to deliver the verdict for the accused Mr Lee today."

36 The jury were informed that they could. The jury returned to court at 3.03pm and delivered a verdict of guilty against Lee.

37 On Thursday, 22 October 2015 (the ninth day of deliberations), the jury returned with a verdict of guilty against Tang.

38 On Tuesday 3 November 2015, the judge asked counsel what guidance, if any, should be given to the jury about the prospect of disagreement. Counsel were asked to consider the question until 5 November 2015.

39 On Thursday, 5 November 2015 (the seventeenth day of deliberations), counsel agreed that there was no need to say anything to the jury, as there had only been deliberations for "four or five days approximately in time" since Tang was convicted. On that same day, a jury note (MFI #73) was received seeking clarification as to the elements of duress, an issue raised in the case of Lok but with no application to the appellant's trial.

40 On Friday 6 November 2015, the jury were given directions about the elements of duress and were reminded that their verdict must be unanimous. Later that day, another jury note (MFI #73(2)) was received seeking further directions as to Lok's knowledge and its bearing upon duress. Counsel were given the weekend to consider their response.

41 On Monday 9 November 2015, further directions were given to the jury in relation to the timing of Lok's knowledge and duress as it related to the elements of conspiracy.

42 On 10 November 2015, a jury note (MFI #75) was provided to the judge, stating:

> "We are having difficulty coming to a unanimous decision for the verdict of one of the accused. Are you able to give us any directions on how to proceed from here?"

43 Lok's counsel put to the judge that an enquiry should be made as to whom the note related and if it were Lok, a *Black*[1] direction should be given. The appellant's counsel supported this submission stating that "certainly we'd like to know which accused that they are stuck on".

44 When the jury returned to the courtroom, the judge ascertained from the jury "that it [was] the accused Mr Lok presenting difficulty". His Honour gave the jury a *Black* direction in respect of Lok and the jury retired to further consider its verdicts at 2.28pm.

45 Later that afternoon, a jury note (MFI #76) was received seeking clarification as to some aspects of duress. His Honour allowed counsel to consider the response overnight and the jury was excused for the day.

46 On the following day, the judge directed the jury in relation to duress in response to the jury's question in MFI #76. The jury continued its deliberations.

47 A further note (MFI #77) from the jury concerning duress was received on 17 November 2015. The judge asked counsel to consider their submissions overnight and the jury was released at 3.55pm.

48 On the next day, the judge further directed the jury as to duress in response to the question in MFI #77. The jury continued its deliberations.

49 On Thursday 19 November 2015 (the twenty-fifth day of deliberations), the judge asked counsel what guidance, if any, should be given to the jury considering that they had been deliberating for 17 days since Tang was convicted. Counsel for the Crown said that nothing further should be done, and counsel for the appellant made no suggestions.

50 On 20 November 2015 (the twenty-sixth day of deliberations), a jury note (MFI #78) was received regarding what needed to be established in the appellant's case. It read as follows:

> "In regards to the elements of the charge in count 2 point 1 we require clarification. 'That [the appellant] intentionally attempted to possess the substance inside the packages in the boxes he collected at [the] warehouse.' When it refers to point 1 to the substance inside the packages in the box – does [the appellant] need to know or believe that the substance referred to in

[1] Black v The Queen (1993) 179 CLR 44; [1993] HCA 71 ("Black").

> point 1, was a border controlled drug. Or, do we take this as a separate point as point 2."

51 Counsel agreed upon a response and the jury were directed by the judge that points 1 and 2 should be read as a single proposition.

52 On Thursday 26 November 2015 (the twenty-ninth day of deliberations), a jury note (MFI #79) requested a copy of judge's summing up for his Honour's:

> "…word for word description of what was said in court, particularly in regards to [the appellant]".

53 The note also sought further "clarification on the elements of count 2 and further explanation on the [indictment]." The extract of the summing up relating to the appellant was provided to the jury by the judge and his Honour brought to the jury's attention a minor correction to the elements of the offence which had been made on the document.

54 On Tuesday 1 December 2015, a jury note (MFI #82(2)) was received requesting certain video evidence. On 2 December 2015, the jury were directed by the judge that the video contained nothing relevant to the case and were informed of the Crown's concession that the woman depicted in the video was an unidentified female and not the appellant's girlfriend.

55 On 3 December 2015, a jury note (MFI #85) was received seeking court transcripts of the judge's directions in relation to duress. On Monday 7 December 2015, a copy of the requested transcripts was provided to the jury.

56 On 9 December 2015 (the thirty-seventh day of deliberations), a jury note (MFI #87) was received from the jury notifying the judge that two jurors had holiday leave booked over the upcoming Christmas period: one between 19 December 2015 and 3 January 2016; the other from 25 December 2015 to 13 January 2016. The note asked what would happen if deliberations were continuing after that time.

57 In the course of discussions between the judge and counsel concerning the jury's note, Ms Moody said that her concern was that "it is becoming oppressive for the [appellant] given the length of time and the length of deliberations". She said that if they didn't have a verdict by Friday, she would consider asking the judge for a discharge of the jury in the circumstances:

> "…just because there clearly is a difficulty that the jury is having. And especially the way they appear to vacillating between both accused. One minute there is a question about one or a number of questions about one and they seem to be entirely focused and the next minute they are moving to the next one and then back again".

58 The judge asked counsel to give him a written note of their respective positions before the Court resumed on Friday. The jury was released to return on Friday morning.

59 On Friday 11 December 2015, Ms Moody, with the support of Lok's counsel, asked the judge to give a direction to the jury which included the following:

> "You will recall that, some weeks ago, you indicated to me that you were having difficulty coming to a verdict in relation to Mr Lok. I directed you then that I had the power to discharge you in relation to any individual accused should you be unable to reach a verdict. I note the time you have been dedicated to your deliberations and simply say to you that if at any time you are experiencing any similar difficulty, please let me know."

60 Such a direction was referred to by trial counsel as a "partial" *Black* direction. It was further submitted by the appellant's counsel that the jury should be instructed that in relation to the query regarding holiday arrangements, there was still time "between now and next Friday, so perhaps we will cross that bridge when we come to it, should you still be deliberating then".

61 After further discussions between the judge and counsel, the jury returned to the courtroom and were informed by the judge that he would give them an answer to jury note MFI #87 at 2pm. The jury were asked to continue their deliberations and to put the questions of holidays out of their mind.

62 At 2.32pm, the judge gave the jury a "partial" *Black* direction. His Honour also told the jury that if their deliberations had not been finalised by Friday 19 December 2015, he had the power to discharge one juror and to continue with a jury of 11. If the matter was not then finalised by Thursday 24 December 2015, he had the power to discharge one further juror and to continue with a jury of 10. The judge reminded the jury that "in any case, whether a jury of 12, 11 or 10 ultimately delivers the verdicts… the verdicts must be unanimous".

63 On Wednesday 16 December 2015, the judge, after submissions from counsel, examined the foreperson about her travel plans in court and in the absence of the other members of the jury. She told the judge that the trip was for a family

reunion in Bali and the accommodation had been booked in May. She explained that she would not lose the cost of the flights but would forfeit accommodation costs if the trip was cancelled. The foreperson (who subsequently was referred to as "Juror 1") left the courtroom. Shortly afterwards the jury returned, and as there was a sick juror they were asked to leave for the day and return at 12.30pm the next day.

64 After the luncheon adjournment, counsel for Lok and the appellant jointly submitted that the test under s 53B(d) of the *Jury Act* had not been met; that Juror 1 should not be discharged and should instead be asked to cancel her plans. In the alternative, counsel for Lok submitted that the juror should not be discharged and that the jury should be given an extra three days break.

65 His Honour turned to the question of whether the jury should continue with 11 members, if Juror 1 was discharged. His Honour decided that the parties should consider this question further and send their submissions to him. The trial adjourned to 12pm the next day pending written submissions from counsel.

66 On 17 December 2015 (the forty-first day of deliberations), counsel for the appellant and Lok jointly opposed the discharge of Juror 1 and the continuation of the trial with 11 jurors. Their submissions included that three additional days of delay was not significant in the overall duration of the trial, nor did the disadvantage outweigh the derogation of the right to a fair trial for the accused if the jury was reduced to 11. The Crown argued that there was nothing extraordinary about the trial that would prevent the juror being discharged. The Crown observed that the cases of the two overlapped to a degree, as part of the material in Lok's case involved consideration of the time that he and the appellant were together in the warehouse.

67 The judge then considered whether the discharge of the single juror could be circumvented by asking the jury directly whether there was any prospect of reaching a verdict. Counsel for the appellant and Lok supported that enquiry. However, the Crown opposed the jury being questioned on the basis that no jury note had indicated difficulty in reaching agreement in respect of the appellant. The Crown submitted that if the question was asked, it should only

be asked after the foreperson had been dismissed, so as not to pressure the jury.

68 The judge delivered his judgment determining that he would discharge Juror 1 pursuant to s 53B(d) of the *Jury Act*, and ordered that the trial continue with 11 jurors pursuant to s 53C(1)(b) of the *Jury Act*. In the judgment, his Honour opined at [31] that it was not reasonable to require Juror 1:

> "…to forego a long planned family overseas reunion, a commitment made before the commencement of this trial and beyond any reasonable estimate of the likely length of the trial".

69 When considering whether the trial should continue with 11 jurors, his Honour said that he had taken into account the submissions from counsel but considered that "none of them point to a reason as to why there is a risk of a substantial miscarriage of justice". His Honour observed at [6]:

> "It appears to be common ground that the jury in this trial has been deliberating for longer than any jury in this state or country has ever done so according to the recollections, research, or memory of counsel. As will be apparent that is a significant factor in the decisions which I am required to make at this stage."

70 In this appeal, the appellant does not take issue with the correctness of the judge's decisions on 17 December 2015.

71 On Monday 21 December 2015, the judge asked the jury to let him know whether they were still having difficulty reaching a unanimous decision in respect of Lok. In relation to the appellant, his Honour said:

> "As to [the appellant], if you want me to consider anything about your consideration of his trial then please feel free to do so in a note about that, and of course if I can be of any further assistance in relation to you in terms of directions in the case please let me know, send me a note."

72 The next day a jury note (MFI #98) was received, which stated:

> "Your Honour re decision on Mr Lok. The jury are still deliberating although we do have some specific points that we would appreciate some clarification upon. We will outline these in a subsequent note to be delivered later today. Re decision on [the appellant], again we are still deliberating and will outline specific questions shortly. We appreciate your patience."

73 Later that day, at 3.35pm, another jury note (MFI #100) was received seeking further directions in relation to duress. It was agreed that counsel would consider this question overnight. This was the sixth jury note received relating to duress in the 34 days of deliberations following Tang's verdict.

74 Ms Moody then made an application for the jury to be discharged entirely on the basis that the length of the deliberations was becoming oppressive upon the appellant, that the jury had already had the benefit of a partial *Black* direction and a full *Black* direction five weeks earlier in relation to Lok. Ms Moody argued that the evidence in relation to the appellant was of extremely short compass, the time in deliberations was exceptional and unprecedented, and that any verdict reached was likely to be unsafe and unsatisfactory.

75 Counsel for Lok also made an application for the examination and discharge of the remaining jurors; echoing the arguments of the appellant's counsel, and adding that the frequent notes about holidays and requesting time off indicated that the jury had lost sight of their role.

76 On 23 December 2015, the judge directed the jury on duress and the jury resumed its deliberations. On the question of discharge, his Honour had received written submissions from the Crown and asked for any oral responses from each of the accused's counsel. Counsel for Lok submitted that the jury was still on the issue of duress which they were deliberating on a month ago. Ms Moody submitted that the length of time taken by the jury was not commensurate with the complexity of the issues in the appellant's case and that the time taken was itself demonstrative of the jury's difficulty in reaching a decision. It was further submitted that a *Black* direction would be inadequate, and that the whole jury should be discharged on the basis that no sensible verdict could be delivered at this point. The Crown submitted that the length of time of deliberations was simply an insufficient basis to discharge a jury.

77 The judge turned to the question of the discharge of Juror 2, and it was agreed that the juror could be examined that afternoon but not notified of his discharge until after the jury had returned an answer about deliberating the following week. The judge informed the jury that the Court was available to sit three days in the next week (the week beginning 28 December 2015) if they would like to continue deliberating, emphasising there was no pressure to do so. By a note (MFI #107) later that day, the jury informed his Honour that due to juror commitments some members of the jury were unable to sit during that period and that a jury member was unable to attend on 4 January 2016.

78 Juror 2 (the second of the two jurors with travel plans, the subject of MFI #87) was brought into court and questioned by the judge. The juror confirmed that he had tickets issued on 20 July 2015 to travel from Sydney to Los Angeles on 25 December 2015 and returning to Sydney on the morning of 13 January 2016. The juror said that he was going away with his best mate as he had just turned 21, that he would not consider changing his plans so as to return to Sydney on 5 January and he would suffer major financial loss resulting from the non-refundable ticket, a number of internal flights, accommodation and event tickets that had already been paid for. The juror left the courtroom being told by the judge to resume deliberating with the balance of the jury.

79 His Honour then delivered his judgment dismissing the applications of counsel for each accused to discharge the jury as a whole. Later that day, the judge gave the jury a "full" *Black* direction in relation to both the appellant's and Lok's cases. This was the forty-fourth day of the jury's deliberations.

80 On 24 December 2015, a jury note (MFI #109) was received at 11.05am which read:

> "Unfortunately a member of the jury is unwell and we believe should rest at home and perhaps seek medical attention. Sincere apologies for any inconvenience."

81 The judge told counsel that he had been told the juror was very unwell and was lying on the floor of the jury room. His Honour proposed to send the juror home immediately to which counsel did not object. It was confirmed that the sick juror was not Juror 2.

82 Submissions were then made on the discharge of Juror 2. Lok's counsel argued that he should not be dismissed and that the jury of 11 should not sit again until his return on 13 January 2016. The Crown submitted that, if the juror was dismissed, the trial should continue with 10 jurors. Ms Moody supported Lok's application, and further, opposed the Crown's submission. Ms Moody referred to the entitlement of the appellant to 12 jurors and the inability of the jury to reach an agreement for a lengthy period of time. The judge gave judgment and discharged Juror 2 pursuant to s 53B(d) of the *Jury Act* and ordered that the trial continue with 10 jurors. In the course of his reasons, his Honour said at [5]:

> "The Crown submits, for the reasons set out in submissions on the applications dealt with last week and for the reasons accepted by me on that occasion, that the trial should continue with a jury of 10. Nothing has occurred which causes me to alter the view that I expressed in the reasons on 17 December for continuing with a jury of 11. In short, I do not see that there is any risk of a substantial miscarriage of justice if this trial continues with a jury of 10, in the circumstances which have been set out in my preceding reasons and incorporated into these brief reasons."

83 In this appeal, the appellant does not take issue with the correctness of the judge's decisions on 24 December 2015.

84 After further discussion, the jury was informed that they were allowed to separate until Monday 4 January 2016 and further directions were given to the jurors by the judge concerning their obligations during the Christmas break.

85 Between the afternoon of 24 December 2015 and 3 January 2016, no jury deliberations took place.

86 On 4 January 2016, on the recommencement of jury deliberations, the Court received a medical certificate. The judge said the following as to its contents:

> "That note in short records that doctor had seen Juror number 3 on the second occasion on 24 December, and that was the day on which the juror was unable to attend court, and the doctor opines that he's suffering from a recurrence of a severe anxiety disorder as a result of his jury duty and is no longer fit to serve on jury duty…"

87 The judge discharged Juror 3, unopposed by counsel for each of the accused.

88 The Crown submitted that the trial should continue with nine jurors. Ms Moody contended that continuing with nine jurors would amount to a miscarriage of justice. Her argument was founded on a quarter of the jury having been lost over only five sitting days, the jury's indecision, the unprecedented lengthy deliberations, and the discharge of one juror ostensibly for mental health reasons brought about by conditions in the jury room. Ms Moody further alluded to the potential of an imbalance if the jurors who had been discharged happened to favour an acquittal. She distinguished *Brownlee v The Queen* (2001) 207 CLR 278; [2001] HCA 36 ("*Brownlee*"), upon which the Crown relied in its written submissions, on the basis that: (a) the two jurors in that case were discharged during the course of the trial, rather than deliberations, (b) that their discharge was not opposed by counsel for the defence, and (c) that it was a relatively short trial. Ms Moody observed that the jury had

indicated in MFI #98 on 22 December 2015 that they had a number of questions to ask in relation to the appellant but these questions had not been forthcoming (see above [72]).

89 Counsel for Lok argued that the loss of three jurors would dramatically imbalance the jury; that the discharge of the third juror was a clear indication that the jury had become problematic and as such, the community could have no comfort in any verdict that the jury might deliver. *Brownlee* was sought to be distinguished on the basis that it was decided in vastly different circumstances. Counsel's submissions included that any reasonable person would immediately come to the conclusion that the trial could not continue and the jury should be discharged. He argued that while one did not know what was happening in the jury room, counsel said that "we've had… the strongest indication of something that would trouble any trial judge". The Crown replied that the circumstances identified were speculative. Whilst Ms Moody's submission was that the jury had been unable to agree, the Crown argued that contention was contrary to the jury note that said they were still deliberating.

90 At the conclusion of submissions, the judge delivered judgment. His Honour refused the application to discharge the jury and ordered that the trial continue with nine jurors pursuant to s 53C(1)(b) of the *Jury Act*. In the course of his reasons, his Honour said at [11]:

> "As I have said in previous judgments, many of the submissions necessarily involve speculation as to the jury's potential evading patterns or course of deliberation. It was suggested that juror 3 may have been at loggerheads with the rest of the jury and may have been the dissentient holding out for an acquittal, but that need only be stated to be seen to be speculation which could not properly inform the exercise of the discretion in question here."

91 His Honour was unable "to make any conclusion as to whether there was any balance of views in the jury or whether discharging one, two or three jurors is likely to upset any such balance whether described as delicate or otherwise". His Honour went on to say:

> "[20] The consideration that Kirby J at [147] of *Brownlee* as to what constitutes a valid or appropriate trial by jury are, in my view, of some significance. When one adds to those factors the observations by Gleeson and McHugh JJ referred to in the Crown's submissions as to the recognition and contemporary standards as to jury trial in State legislation such as s 22 which specifically permits the number of jurors to be reduced below ten but not below eight, in

> the circumstances of this case there is nothing in the circumstances which demonstrates to me a risk of a substantial miscarriage of justice if the jury were to continue deliberating in circumstances where, in particular, questions have recently been raised as to Mr Lok's case and where Black directions have been given to the jury very recently.
>
> [21] For those reasons I am of the opinion, as required by s 53C(1)(b), that there is no risk of a substantial miscarriage of justice and I order that the trial continue with a jury of nine."

92 On that same day, a jury note (MFI #115) was received from "Juror M" (who was not the foreperson) which indicated that a unanimous verdict was not likely to be possible in relation to the juror's deliberations on Lok. The note stated:

> "Your Honour. As you're aware we have been deliberating for several months now regarding the accused Mr Lok. Each Juror has reached their verdict approximately six weeks ago. Since that time deliberations have continued. Recently you asked whether additional time will assist us to reach a unanimous decision? Sadly this letter only contained the majority's opinions/wishes to continue deliberations. The minority clearly voiced that further deliberation would be of no assistance – but this information has not been conveyed to you. I ask for clarification and direction as to how we the jury should move forward when individual verdicts and decision-making have not and continue not to be respected and further deliberation is proving unconstructive, toxic and futile."

93 As a result of this note, the judge examined Juror M in Court. When questioned, Juror M confirmed that a unanimous verdict was unlikely in respect of Lok. The examination occurred as follows:

> "HIS HONOUR: Does the note only relate to the accused, Mr Lok?
>
> JUROR M: Yes.
>
> HIS HONOUR: So from that answer –
>
> JUROR M: Yes, but it could - kind of, kind of. I can't really answer that too much more than that.
>
> HIS HONOUR: But it's principally directed to Mr Lok, is it?
>
> JUROR M: Yeah, yep.
>
> HIS HONOUR: Has the jury been deliberating about both Mr Lok and [the appellant] in the time since the verdicts were entered in relation to the other two accused?
>
> JUROR M: Yes.
>
> HIS HONOUR: Is your view that it is unlikely that, even if given further time for deliberation, the jury would not be able to reach a unanimous verdict about Mr Lok?
>
> JUROR M: Yep, definitely, that's my view."

94 Ms Moody submitted that the judge should further ask Juror M about the possibility of coming to a verdict in the appellant's case. His Honour rejected the submission, stating "I think that's better to come in the traditional way from the foreperson at this stage". Ms Moody responded that the difficulty in that approach was that the foreperson had ceased to be a representative of the jury. His Honour said he would ask the foreperson certain questions and would, in light of her answers, determine whether to ask her about the appellant.

95 The foreperson was then questioned; who expressed the view it would be likely that, if given further time the jury would be able to reach a unanimous verdict in the trial of Lok, and the appellant. The examination occurred as follows:

> "HIS HONOUR: Firstly, is it likely that, if the jury were given time for further deliberation, the jury would be able to reach a unanimous verdict in the trial of Mr Lok?
>
> FOREPERSON: I believe so.
>
> HIS HONOUR: On what basis do you say that?
>
> FOREPERSON: I don't believe that we've gone through everything that needs to have [been] gone through in terms of evidence. I still think there's things that we can go through.
>
> HIS HONOUR: Are there further questions that you have in mind or that the jury has in mind formulating? Don't tell me what the questions are, but if you have some particular questions that you contemplate the jury asking in the near future, is that the situation?
>
> FOREPERSON: I don't believe it's questions that we would pose necessarily to yourself and the barristers, but I think it's points of view that we are able to discuss in the jury room.
>
> HIS HONOUR: Can I ask whether, in relation to [the appellant], that if the jury was given time for further deliberation, you would be likely to reach a unanimous verdict?
>
> FOREPERSON: Yes.
>
> HIS HONOUR: Are there particular questions which the jury has in relation to [the appellant] which can be brought to my attention, without identifying those questions at the moment?
>
> FOREPERSON: Again, I think it's a matter for us to discuss rather than questions at this point. The reason being is that we sort of dealt with one, put them down and went back to another one, so we sort of lost our momentum a little bit, and I think we just refresh.
>
> HIS HONOUR: The reason for my question about that is that, you'll remember that before the Christmas break on the Monday afternoon, on the Tuesday morning you sent a note saying that there would be more questions coming about [the appellant] and Mr Lok and questions came in about Mr Lok after that, but nothing emerged during that week before Christmas in relation to [the

> appellant]. Is the position that you do not believe that you're in a position to pose any questions in relation to [the appellant's] case in the short term?
>
> FOREPERSON: In the short term, yes.
>
> HIS HONOUR: But your view, given the oath that you've taken, is that further deliberation in each case may lead to a unanimous verdict?
>
> FOREPERSON: I think so. I think we owe it to do it, given a little bit more time."

96 The foreperson withdrew, and submissions and discussion took place.

97 Ms Moody renewed her application that Juror M should be brought back in and categorically asked about the possibility of reaching a verdict in relation to the appellant, given that the foreperson had answered both questions in the affirmative. The Crown submitted that the answers given by the foreperson were "qualitatively different", that Juror M's views were not representative of the views of everybody of the jury, and that further questioning would place undue pressure upon her.

98 His Honour resolved to release the jury for the day and hear further submissions from counsel in the morning.

99 On 5 January 2016, the final day of deliberations, the Crown submitted that the jury should be discharged in relation to Lok only, and was supported by counsel for Lok.

100 Ms Moody made submissions in support of an application that the jury should be discharged in the appellant's case. She submitted that the jury had been deliberating for three months and had been deliberating on Lok and the appellant since 22 October 2015, when the verdict was returned in respect of Tang. She submitted that the foreperson was somewhat ambivalent in her responses about the possibility of the jury reaching a verdict in the appellant's case. She then renewed her application for Juror M to be further questioned. She argued that the environment in the jury room had become too toxic to continue; his Honour observed that part of Juror M's note may have only related to deliberations in the case of Lok. Ms Moody further contended that the evidence in relation to the appellant was of very short compass and that the majority of the jury was keeping the minority prisoner. She submitted that it was essential that the jury be discharged in order to avoid a miscarriage of justice.

The Crown repeated its submission that his Honour could not be satisfied that the jury could not reach a verdict in relation to the appellant, given that the note and questioning did not relate to the appellant.

101 The judge decided that the jury should be discharged in relation to Lok, which had been positively agreed to by counsel for Lok and the Crown. The judge then found at [16]:

> "…I am unable to find that the note from Juror M when considered in the light of her evidence means that the jurors are unlikely to be able to reach a unanimous verdict in the case of [the appellant]. … I do not accept the submission put by counsel for [the appellant] that there is a war of wills or some process of intimidation occurring in the jury room in relation to deliberations concerning [the appellant]".

102 His Honour decided that the jury would not be discharged in relation to the appellant because his Honour was "unable to find that it is unlikely that the jurors will reach a unanimous verdict" and that "there is a reasonable basis for permitting the jury… a little bit more time for consideration of [the appellant's] case".

103 The following then occurred:

(1) At 11.33am the judge discharged the jury in relation to Lok;

(2) At 11.35am the jury deliberations in relation to the appellant continued;

(3) At 12.45pm a note was received from the jury which indicated that a verdict had been reached, and the jury returned with a verdict of guilty against the appellant at 1.04pm.

Relevant legislation

104 In considering the grounds of appeal, the following sections of the *Jury Act* are of relevance:

> **19 Numbers of jurors in criminal proceedings**
>
> (1) Except as provided by section 22, in any criminal proceedings in the Supreme Court or the District Court that are to be tried by jury, the jury is to consist of:
>
> (a) 12 persons, or
>
> (b) if the Court makes an order under subsection (2) for the selection of additional jurors—12 persons together with the number of additional jurors ordered by the Court,
>
> returned and selected in accordance with this Act.
>
> ...

22 Continuation of trial or inquest on death or discharge of juror

Where in the course of any trial or coronial inquest any member of the jury dies or is discharged by the court or coroner under Part 7A, the jury shall be considered as remaining for all the purposes of that trial or inquest properly constituted if:

(a) in the case of criminal proceedings, the number of its members:

(i) is not reduced below 10,

(ii) is reduced below 10 but approval in writing is given to the reduced number of jurors by or on behalf of both the person prosecuting for the Crown and the accused or each of the accused, or

(iii) is reduced below 10 but not below 8 and the trial has been in progress for at least 2 months,

…

(c) in the case of a coronial inquest, the number of its members is not reduced below 4,

and if the court or the coroner, as the case may be, orders that the trial or coronial inquest continue with a reduced number of jurors under Part 7A.

53C Discretion to continue trial or coronial inquest or discharge whole jury

(1) If a juror dies, or the court or coroner discharges a juror in the course of a trial or coronial inquest, the court or coroner must:

(a) discharge the jury if the court or coroner is of the opinion that to continue the trial or coronial inquest with the remaining jurors would give rise to the risk of a substantial miscarriage of justice, or

(b) if of the opinion that there is no such risk and subject to section 22, order that the trial or coronial inquest continue with a reduced number of jurors.

(2) A court or coroner that discharges a jury under subsection (1) (a) may stay the proceedings on such terms as the court or coroner thinks fit if a party gives notice of an intention to lodge an application for leave to appeal for review of the decision under section 5G of the *Criminal Appeal Act 1912*.

…

56 Discharge of jury that disagree in criminal proceedings

…

(3) Where a jury in criminal proceedings has retired, and the jury consists of 10 persons or less, the court in which the proceedings are being tried may discharge the jury if it finds, after examination on oath of one or more of the jurors, that it is unlikely that the jurors will reach a unanimous verdict.

The appeal

Ground 1: His Honour erred in ordering that the trial continue with nine jurors on 4 January 2016, following the discharge of Juror 3 on that date.

Ground 2: His Honour erred in declining to discharge the jury on 5 January 2016, following receipt of MFI #115 and examination of Juror M and the foreperson on 4 January 2016.

Ground 3: The trial miscarried by reason of the duration of, and the circumstances pertaining to, the jury deliberations and delivery of the verdict.

Argument

105 These grounds of appeal can be conveniently dealt with together.

106 Mr Game SC contended that the continuation of the trial following the discharge of Juror 3 gave rise to a substantial miscarriage of justice in the form of a non-consensual verdict in the appellant's case for reasons which were not properly addressed in his Honour's judgment of 4 January 2016.

107 Another argument was that the judge erred in failing to infer disharmony in the jury room from the note following the discharge of Juror 3. Mr Game contended that, contrary to the judge's findings, it would not have amounted to "impermissible speculation" to have relied upon the note in this way as his Honour appeared, on one hand, to accept the doctor's opinion to the effect that the relapse in the juror's anxiety came about as a result of the deliberation process, yet on the other hand, dismissed any submission as to a potentially stressful environment in the jury room as speculative.

108 Mr Game noted the judge's reliance upon *Brownlee* and pointed out that the discharge application did not rely on the number of remaining jurors as giving rise to a substantial miscarriage of justice in isolation, but rather the significantly reduced number of jurors and the reason for the discharge of Juror 3 together with the other factors operating upon the trial at that time. Reference was made to the different factual circumstances in *Brownlee*.

109 In relation to ground 2, Mr Game submitted that, following the receipt of the note of Juror M (MFI #115), and the examination of Juror M and the foreperson, the judge erred by failing to find that it was unlikely that the jury would reach a unanimous verdict and declining to discharge the jury pursuant to s 56(3) of the *Jury Act*.

110 Mr Game asserted that there was conflict and discrepancy between the evidence of Juror M and the foreperson, and that the judge resolved this by placing “inappropriate preference” on the evidence of the foreperson over Juror M.

111 Mr Game submitted that the judge appeared to accept the contents of MFI #115 and Juror M’s evidence in so far as it related to Lok, but that it was unrealistic to confine this evidence to deliberations on one accused. It was submitted that the evidence indicated “an oppressive environment had been created by ‘the majority’ refusing to acknowledge or convey the views of ‘the minority’” that “gave rise to a real risk of a compromised verdict in respect of all deliberations and was not liable to be cured with further time deliberating”.

112 Mr Game argued that the judge failed to consider the “culmination of circumstances” that required the discharge of the jury in relation to the appellant. Mr Game contended that the judge treated the application to discharge as if it was “about a jury that disagrees”, and that this reading of the application only applied to Lok. It was submitted that the application to discharge in relation to the appellant required a consideration of more circumstances than disagreement among the jury, as was submitted by trial counsel, and that a failure to consider these circumstances by the judge constituted an appealable error in accordance with *House v The King* (1936) 55 CLR 499; [1936] HCA 40.

113 As to ground 3 of the appeal, Mr Game’s submission was that the trial miscarried by reason of the “extraordinary circumstances” outlined in grounds 1 and 2. The impugned circumstances primarily relied on were the discharge of three jurors during deliberations to a jury of nine; the passage of time after the jury’s retirement to consider its verdict; the numerous and frequent interruptions to deliberations; the unanimous verdicts that had been returned in respect of two co-accused months before the verdict was returned on the appellant; and the evidence in the form of jury notes, the discharge of Juror 3, and the testimony of Juror M, of an inability on the part of the jury to reach agreement.

114 Ms Abraham QC for the Commonwealth Director of Public Prosecutions submitted that the following principles are relevant in considering ss 22 and 53C of the *Jury Act*:

> "(1) An accused person ordinarily has an entitlement to a unanimous verdict of 12 jurors.
>
> (2) The presumptive benefits of 12 jurors is to provide a group that (at least) constitutes a more representative sample of the community, is large enough to facilitate effective group deliberation, and provides a collective ability to determine guilt to the appropriate 'beyond reasonable doubt' standard.
>
> (3) Despite the ordinary position, utilitarian considerations, the complexity and length of many contemporary trials and the costs to the community and an accused person in delays caused by re-trials has meant that the continuation of lengthy trials with less than 12 jurors may greater serve the interests of justice than discharging a jury.
>
> (4) Where the Court has a positive reason to continue a trial with less than 10 jurors (e.g. in the case of lengthy trials), the Court must continue the trial with less than 10 jurors (but more than 8 jurors) unless there is something that would mean that to do so would risk a substantial miscarriage of justice."

115 Ms Abraham argued that none of the factors relied upon by the appellant, either individually or in combination, gave rise to a risk of a substantial miscarriage of justice. The circumstances of the case including the length, complexity, number of accused and the nature of the jury notes reflected that the decision to proceed was entirely appropriate.

116 This was not a case, Ms Abraham said, where it was known what verdict the juror dismissed on 4 January 2016 (or on the other occasions) would have entered. Furthermore, the dismissal of Jurors 1, 2 and 3 did not lead to any concern as to impropriety within the jury room that would be capable of "infecting" the remainder of the jury. Ms Abraham contended there was no evidence that the recurrence of a severe anxiety disorder of Juror 3 was the result of anything other than robust discussion among the members of the jury.

117 Ms Abraham submitted that few, if any, inferences could be reasonably drawn from the length of jury deliberations, and suggested that much time was spent by the jury considering the case against Lok, given that numerous questions were asked by the jury in respect to Lok and subsequently the jury were unable to reach a verdict in his case.

118 Ms Abraham acknowledged that the judge did not expressly state each of the matters put to him by the appellant's counsel in his judgment. However, Ms Abraham submitted that, in effect, these were the same matters that were put before his Honour in December and directed this Court's attention to the earlier judgments. Ms Abraham argued that in the judgment of 17 December 2015, the relevant legal principles and authorities on the topic of s 53C of the *Jury Act* were set out and discussed. As such, Ms Abraham submitted that "any later judgment must be considered in the context of earlier judgments". It was Ms Abraham's further submission that there was no substantial change of circumstances between the December period and the application on 4 January 2016, except for the discharge of Juror 3, that would require the judge to expressly address each of the peripheral matters put to him once again.

119 Ms Abraham submitted that the note of Juror M could only support an inference that the jury were unable to come to a unanimous decision in respect of Lok, and that no note was written by any member of the jury in relation to the jury being unable to come to a unanimous decision in respect of the appellant. Ms Abraham submitted that Juror M's evidence indicated that the jury "hadn't discussed the appellant for a while and so she's not [in] a position to say" whether the disagreement extended beyond Lok's case. Ms Abraham pointed to the fact that the jury only needed 1 hour and 31 minutes to return a verdict of guilty in relation to the appellant after being discharged in relation to Lok.

120 Further, Ms Abraham argued that the judge was correct in applying the s 56(3) test rather than the test in *Webb v The Queen; Hay v The Queen* (1994) 181 CLR 41; [1994] HCA 30 ("*Webb*"), as that test concerns "whether an irregular incident involving a jury… gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that a juror or jury has not discharged or will not discharge the task impartially". Ms Abraham noted that the judge found that there was "no war of wills and there was no intimidation and that that note did not establish that that had occurred in respect of [the appellant]". Ms Abraham contended that the appellant's submissions involved overturning these factual findings of the judge, which were submitted to be clearly open.

121 In relation to the "culmination of circumstances", Ms Abraham submitted that a consideration of the length of time of the deliberations "must be in the context of there being four accused". Ms Abraham also pointed to the complex nature of Commonwealth trials and highlighted that the jury were actively engaged in deliberations, in that "[t]hey were asking questions when they considered it appropriate to ask questions… They were prepared to speak up if they thought they needed to speak up". Ms Abraham submitted that any consideration of the length of time must be "careful", as it is "unknown how much of the time is devoted to [the appellant], but the bottom line is they obviously were spending a good deal of time on Lok simply by the jury's questions".

Consideration

122 Section 53C(1)(a) of the *Jury Act* imposes an obligation on a trial judge who discharges a juror in the course of a trial, to discharge the jury if the judge is of the opinion that to continue the trial with the remaining jurors would give rise to the risk of a substantial miscarriage of justice. However, if the trial judge is of the opinion that there is no such risk, the trial judge is required to order the trial continue with a reduced number of jurors as long as the numbers do not fall below the statutory minimum in s 22 of the *Jury Act*. The opinion is to be formed on all of the material then available to the Court.

123 The decision for the judge on 4 and 5 January 2016 was whether the trial should continue with nine jurors. A permissible number was below 10 but not below 8 as the trial had been in progress for more than two months.[2]

124 What may constitute a "substantial miscarriage of justice" has been considered where those words appear in s 6(1) of the *Criminal Appeal Act 1912* (NSW). In *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81, the plurality (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) said at [44]:

> "No single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given…" (Emphasis added.)

125 As was observed in *Crofts v The Queen* (1996) 186 CLR 427 at 440; [1996] HCA 22 ("*Crofts*"), "[n]o rigid rule can be adopted to govern decisions on an application to discharge a jury…"

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[2] Jury Act 1977 (NSW) s 22(a)(iii).

126 More recently, in *Filipou v The Queen* (2015) 256 CLR 47; [2015] HCA 29 ("*Filipou*") the plurality (French CJ, Bell, Keane and Nettle JJ) said at [15]:

> "By 'substantial miscarriage of justice' what is meant is that the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal which was fairly open to him or her or that there was some other departure from a trial according to law that warrants that description…"

127 The third limb of s 6(1) is of relevance in this appeal. The third limb covers cases where, by reason of irregularity or otherwise, an accused has not received a trial according to law or has not received a fair trial.[3] The plurality further explained at [15]:

> "Where the third limb is engaged, if the Court of Criminal Appeal has concluded that the appellant has not received a fair trial it will follow that it has concluded that there has been a substantial miscarriage of justice. But where, despite some other identified irregularity, the Court of Criminal Appeal is satisfied that the appellant has received a fair trial according to law and not otherwise been deprived of a chance of acquittal that was fairly open to him or her, once again the proviso will operate…"

128 The same principles can be said to apply to decisions on the continuation of a jury trial with fewer than 12 members. The overriding principle must be the maintenance of a fair trial.[4]

129 Whether or not the trial should continue is a matter within the trial judge's discretion which is only reviewable by this Court in accordance with the principles of *House v The King* (1936) 55 CLR 499 at 506; [1936] HCA 40.

130 In reviewing a trial judge's decision for continuing the trial, this Court is not confined to the judge's reasons. In *Crofts*, Toohey, Gaudron, Gummow and Kirby JJ said at 441:

> "Nevertheless, the duty of the appellate court, where the exercise of discretion to refuse a discharge is challenged, is not confined to examining the reasons given for the order to make sure that the correct principles were kept in mind. The appellate court must also decide for itself whether, in these circumstances, the result of the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice."

131 Where matters of evidence or a trial judge's directions are not in issue, the inscrutability of a jury's verdict may present a difficulty for an appellate court. In *Potter v The Queen* [2007] EWCA 2485, Lord Justice Moses observed at [30]:

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[3] Filipou (2015) 256 CLR 47; [2015] HCA 29 at [14].
[4] Crofts (1996) 186 CLR 427 at 440; [1996] HCA 22.

> "…Since juries are not required to give reasons for their verdict, the only objective assurance that the process by which the jury has reached its conclusion is rational, lies in the fair conduct of a trial. A rational conclusion demands a fair process. A trial must be managed to enable those objectives to be achieved…"

132 The jury retired to consider its verdict on 12 October 2015. The judge provided the jury with agreed bundles of case summaries on 14 October 2015, and advised the jurors that they could deliver a verdict against any of the accused, at any time, throughout their deliberations. On that same day, the jury returned a verdict of guilty against Lee.

133 On 22 October 2015, the ninth day of deliberations, the jury returned a verdict of guilty against Tang. At the time these verdicts were delivered, the jury was constituted by 12 members.

134 The bulk of the evidence of the Crown's case concerned these accused. The sole issue for the jury's consideration in the case of the appellant was whether the Crown had proved beyond reasonable doubt that he knew or believed the substance inside the packages in the boxes he collected at the warehouse was a border controlled drug. The principal issue in the Crown case against Lok was duress.

135 After the verdicts against Lee and Tang, another verdict was not returned for some 10 weeks and 6 days. This was the verdict of guilt against the appellant that was delivered on 5 January 2016 by the jury then constituted by nine members. It is to be noted that during that time the Court did not sit due to the following reasons (other than on weekends):

(a) On six separate days, due to juror illness;

(b) On one day due to a juror travelling;

(c) On two days due jurors attending funerals;

(d) On one day due to a juror attending a family member's graduation;

(e) Ten days due to the Christmas break;

(f) Half days on most Friday's; and

(g) Half days on four further occasions.

136 The following is a summary of the jury's deliberations after the verdicts of Lee and Tang:

(i) On 5 November 2015, two weeks after returning a verdict of guilty in relation to Tang, a jury note was received seeking clarification as to the elements of duress, an issue raised in relation to Lok only. The next day, the jury were given directions about the elements of duress and were reminded that their verdict must be unanimous. Further clarification as to duress was sought that afternoon.

(ii) On 10 November 2015, the jury indicated in a note to the judge that they were having difficulty reaching a unanimous decision. The judge ascertained from the jury that the difficulty was in relation to Lok, and gave the jury a *Black* direction in relation to that accused.

(iii) Further clarifications were sought by the jury as to duress in the following week.

(iv) On 20 November 2015, a jury note was received by the judge in relation to the elements of the appellant's case. This was the first reference in a jury note to the appellant's case which was almost one month after the verdict was returned against Tang.

(v) On 26 November 2015, a jury note was sent to the judge requesting a copy of the judge's summing up "particularly in regards to [the appellant]" and for further explanation on the indictment.

(vi) On 1 December 2015, the jury sought certain video evidence. The next day the jury were directed that the video contained nothing relevant to the case and that the woman in the video was not the appellant's girlfriend.

(vii) On 3 December 2015, the jury sought court transcripts of the judge's directions in relation to duress.

(viii) On 9 December 2015, the jury notified the judge that two jurors had holidays booked over the upcoming Christmas period (departing 19 December and 25 December); the note asked what would happen if deliberations were continuing after that time.

(ix) On 11 December 2015, the judge reminded the jury that he had the power to discharge them in relation to any individual accused should they be unable to reach a verdict, and asked them to let him know if they were experiencing any similar difficulty. This direction was considered by counsel to be a "partial" *Black* direction (see [59]-[60] above). The judge also told the jury that he had the power to discharge an individual juror but that ultimately their verdict must be unanimous.

(x) On 17 December 2015, counsel for Lok and the appellant opposed the discharge of Juror 1 and the continuation of the trial with 11 jurors. The judge discharged Juror 1 and ordered that the trial continue with 11 jurors pursuant to s 53C(1)(b) of the *Jury Act*.

(xi) On 21 December 2015, the judge told the jury that if they needed assistance in the appellant's case, they were free to send him a note. The jury informed the judge that they were still deliberating and would "outline specific questions shortly" (see [72] above).

(xii) On that same day, another jury note was received seeking further directions in relation to duress.

(xiii) On 23 December 2015, Juror 2 was questioned by the judge as to his travel plans after which Juror 2 was told to resume deliberating with the balance of the jury. The judge delivered a judgment dismissing the applications of counsel for each accused to discharge the jury as a whole. Later that day, the judge gave a *Black* direction to the jury in relation to both the appellant's and Lok's cases.

(xiv) At 11.05am on 24 December 2015, the judge received a jury note that informed him that a juror was unwell. Counsel were told by the judge that a juror was very unwell and was lying on the jury room floor. His Honour sent the juror home. The sick juror was Juror 3.

(xv) After hearing submissions from counsel for Lok and the appellant, that Juror 2 should not be discharged and the trial should not continue with 10 jurors, the judge discharged Juror 2 and ordered that the trial continue with 10 jurors pursuant to s 53C(1)(b) of the *Jury Act*. An order was made for the separation of the jury until 4 January 2016.

(xvi) On 4 January 2016, on the recommencement of jury deliberations, the judge received a medical certificate concerning Juror 3 in which the doctor opined that the juror was "suffering from a recurrence of a severe anxiety disorder as a result of his jury duty and is no longer fit to serve on jury duty" (see [86] above). Juror 3 was discharged.

(xvii) Counsel for Lok and the appellant opposed the continuation of the trial. The judge ordered that the trial continue with nine jurors pursuant to s 53C(1)(b) of the *Jury Act*.

(xviii) On that same day, a jury note was received from "Juror M" (who was not the foreperson) which indicated that a unanimous verdict was not likely to be possible in relation to the juror's deliberations on Lok. Juror M was then

examined in court by the judge, and when questioned, confirmed that the note was "principally directed" to Lok and that a unanimous verdict was unlikely.

(xix) The judge also examined the foreperson, who gave evidence that it was her view that further deliberations in each case may lead to a unanimous verdict.

(xx) On 5 January 2016, the Crown and counsel for Lok submitted that the jury be discharged in relation to Lok. The appellant's counsel argued that the jury should be discharged in the appellant's case.

(xxi) The judge discharged the jury in relation to Lok, but ordered that the appellant's trial continue.

(xxii) At 11.35am, the jury continued to deliberate.

(xxiii) At 12.45pm, the judge received a jury note that indicated a verdict had been reached. The jury returned a verdict of guilty against the appellant at 1.04pm.

137 Although a jury's deliberations are secret, it is evident from the jury notes and the length of the deliberations that the jurors were experiencing difficulties with reaching verdicts in respect of Lok and the appellant. It appears that the question of duress in the case against Lok particularly troubled the jurors. The jury was given a *Black* direction in respect of Lok's trial on 10 November 2015 and a *Black* direction in respect to both accused on 23 December 2015. The jury was unable to reach a unanimous agreement prior to the discharge of the jury in Lok's trial on 5 January 2016.

138 The first jury note concerning the case against the appellant was not sent to the judge until 20 November 2015 which was the twenty-sixth day of deliberations.

139 It is plain from the communications from the jury that the jurors would consider the case against one of the accused and move on to the case of the other. The foreperson confirmed that this was the case when he told the judge on 4 January 2016 (see [95] above):

> "…The reason being is that we sort of dealt with one, put them down and went back to another one, so we sort of lost our momentum a little bit, and I think we just refresh."

140 The path by which the jurors moved towards their verdicts was entirely for them. They were entitled to move from once case to the other. The deliberative

process is the jury's prerogative and no question arises about its appropriateness.

141 It is important to recognise that there are no legislative limits imposed on jury deliberations that specify the maximum time that a jury may deliberate. There are specific provisions for minimum periods of deliberation before a majority verdict can be taken.[5] These provisions do not apply to Commonwealth offences.

142 A trial judge is ordinarily in a better position than this Court to assess whether a jury should be discharged, having regard to the length of a jury's deliberations and communications with the judge.[6] A trial judge usually sees the members of the jury on a daily basis, and is able to make some assessment of the relationship between the jurors and the atmosphere of the jury room.

143 In the present trial, the judge's familiarity with the members of the jury extended over some six months.

144 Nevertheless, where the integrity of a jury verdict requires reflection, the number of issues before the jury, their complexity, the jury notes and length of deliberations may provide objective indicators as to whether an accused has had a fair trial.

145 In the present appeal, the length of time of the jury's deliberations presents a troubling feature. After retiring to deliberate, the verdicts against Lee and Tang were delivered on the third and ninth day, respectively. Thereafter, the focus of the jury's deliberations in accordance with the judge's directions and submissions of trial counsel were on single issues. In relation to the appellant, the issue was one of knowledge, and the issue was duress in respect of Lok. This was not a trial where the jury was required to consider multiple counts against the accused. The length of time of the jury's deliberations cannot be explained by there being four accused or what was said by Ms Abraham to be the complex nature of Commonwealth trials.

146 Unsurprisingly, the prolongation of deliberations had an impact on the jury. Jurors 1 and 2 were discharged due to their holiday commitments. Juror 3 was

[5] See for example: Jury Act 1977 (NSW) s 55F(2)(a); Juries Act 2003 (TAS) s 43(1).
[6] Crofts (1996) 186 CLR 427 at 432; [1996] HCA 22.

very unwell and lying on the jury room floor on 24 December 2015. Notwithstanding the Christmas break, this juror was unable to return to the jury. The juror's doctor explained that the recurrence of a severe anxiety disorder was a result of jury duty.

147 In both reasons for judgment continuing the trial following the discharge of Juror 1 and Juror 2, the judge acknowledged the unusual length of the jury deliberations.

148 In the judgment delivered on 17 December 2015, his Honour said at [6]:

> "It appears to be common ground that the jury in this trial has been deliberating for longer than any jury in this state or country has ever done so according to the recollections, research, or memory of counsel. As will be apparent that is a significant factor in the decisions which I am required to make at this stage."

149 In subsequently referring to the length of the deliberations, his Honour observed that the public interest demanded that criminal trials be prosecuted with a minimum of delay in the interests of fairness to the accused and considerable expense had been incurred by the parties. These were factors in favour of continuing the trial.

150 In the judgment delivered on 23 December 2015, the judge noted the Crown's submission that there was no statutory basis to discharge a jury because of the length of the deliberations. In neither judgment was there any reference to the impact that deliberations of such length may have had upon the jurors and the integrity of their verdicts. The correctness of the judge's decisions to continue with the trial after the discharge of Jurors 1 and 2 is not challenged in this appeal.

151 Ground 1 of the appeal asserts that the judge erred in continuing the trial with nine jurors following the discharge of Juror 3 on 4 January 2016. Following the receipt of the medical certificate, Juror 3 was discharged by the judge. None of the parties opposed the discharge of the juror.

152 After hearing submissions from the Crown, counsel for Lok and the appellant (see [88]-[89] above), the judge decided to continue the trial with nine jurors. In his judgment, his Honour noted the *obiter dicta* remarks of Gaudron, Gummow and Hayne JJ in *Brownlee* that a real question arose as to whether a jury below

ten was consistent with the requirements of s 80 of the Constitution. His Honour also referred to the observations of Gleeson CJ and McHugh J that s 80 needed to be interpreted in the light of contemporary standards as to trial by jury, and to the remarks of Kirby J as to the functional considerations to be borne in mind.

153 The judge referred to the argument by counsel for the accused that something was occurring in the course of the jury's deliberations which would involve a risk of a substantial miscarriage of justice. The judge said that the suggestion that Juror 3 may have been at "loggerheads with the rest of the jury and may have been the dissentient holding out for an acquittal" was speculation (see [90] above).

154 His Honour acknowledged the unprecedented length of the jury's deliberations but noted that the jury had indicated on 21 November [sic] in MFI #98 that they were still deliberating and would have some specific questions about Lok and the appellant. Further questions were received in relation to Lok on 22 December which had been dealt with but none had emerged in the appellant's case. The judge said that he gave a *Black* direction at 3.45pm on 23 December before sending them home.

155 It was unclear, his Honour said, whether the jury deliberated at all before being sent home at 11.40am on 24 December. His Honour explained that the jury had had very little, if any, time to deliberate since receiving the *Black* direction.

156 As to the submissions made by Lok's counsel concerning the significance of the doctor's medical certificate, his Honour said at [16]:

> "But the submissions … invited speculation as to whether that juror's anxiety disorder was firstly disclosed and secondly had any influence on the balance of the jurors."

157 The judge was unable to conclude "as to whether there was any balance of views in the jury or whether discharging one, two or three jurors is likely to upset any such balance whether described as delicate or otherwise".

158 His Honour noted the different factual circumstances in *Brownlee* to those before him and made particular reference to Kirby J at [147] as to what

constitutes a valid or appropriate jury trial (see [91] above). His Honour concluded that:

> "…in the circumstances of this case there is nothing in the circumstances which demonstrates to me a risk of a substantial miscarriage of justice if the jury were to continue deliberating in circumstances where, in particular, questions have recently been raise as to Mr Lok's case and where Black Directions have been given to the jury very recently".

159 His Honour's reference to receiving MFI #98 on "21 November" appears to be a slip. This note was in fact received on 21 December. Nothing turns on this misstatement.

160 It was open to the judge on the material then before him to reject the argument that Juror 3 may have been the dissentient holding out for an acquittal. In *BG v R* [2012] NSWCCA 139; (2012) 221 A Crim R 215 ("*BG*"), Adamson J (McClellan CJ and McDougall J agreeing) concluded that there were three categories of case in which the question whether the trial should continue with the remaining jurors when one juror has been discharged may arise. Her Honour said at [103]:

> "…These are:
>
> (1) Where there is no indication how the discharged juror would have voted;
>
> (2) Where there is evidence from which it can be inferred prospectively that the discharged juror would, if not discharged, have voted for an acquittal; and
>
> (3) Where it can be inferred, but only with the benefit of hindsight, that the juror who was discharged would, if not discharged, have voted for an acquittal."

161 On the material before the judge, the present case falls within the first category of cases in her Honour's analysis as there was no indication of how Juror 3 may have voted. When the judge came to consider this issue, he correctly rejected the submission as speculation.

162 The same may be said for his Honour's conclusion that the discharge of three jurors was likely to upset the balance of the jury. Unlike this Court, the judge did not have the benefit of hindsight.

163 The judge did not accept the submissions made by Lok's counsel as to the significance of the doctor's medical certificate on the basis that they invited speculation as to whether Juror 3's anxiety disorder was disclosed and had any influence on the balance of the jury. The doctor's opinion was that the

recurrence of the disorder resulted from jury duty. This opinion was supported by the juror being found unwell on the floor of the jury room before the Christmas break. Whilst the doctor's opinion may not have been known to the jurors, it was the jury who informed the judge by a jury note that the juror was unwell, should rest at home and seek medical attention.

164 It is not being speculative to infer that a cause of the recurrence of the illness was the length of the jury's deliberations. Although a degree of disagreement in the jury room may be expected, the inability of the jury to reach a unanimous verdict in the cases of Lok and the appellant is unusual. The jury's consideration of Lok's case cannot explain the inability to reach an agreement in the appellant's case as the jury was well aware that they could deliver a verdict against an accused at any time.

165 As the judge was required to decide whether to continue the trial with nine jurors would give rise to the risk of a substantial miscarriage of justice, the reasonableness and well-being of the remaining jurors had to be considered.

166 It is plain that the judge took into account that the jury had returned after a ten day break. At that time, there was little to indicate that Juror 3's illness may have affected the remaining jurors' reasonableness and well-being. It was open to the judge to conclude that whatever impact Juror 3's illness had upon the remaining jurors could amount to no more than speculation.

167 His Honour also took into account that a *Black* direction had been given on 23 December and there had been little opportunity for deliberation since that time. It was appropriate for his Honour to do so on the material before him.

168 In my opinion, it was open to the judge to reach a conclusion that there was no risk of a substantial miscarriage of justice by continuing the trial with the remaining nine jurors. In reaching that conclusion, the judge did not take into account anything which he ought not to have taken into account nor did he fail to consider any matter which he ought to have considered. His Honour's reasons are to be considered in combination with the judgments of 17 and 23 December 2015.

169 I would reject ground 1 of the appeal.

170 Within a few minutes of asking the jury of nine to resume their deliberations, the judge was informed that a court officer had received a note from an individual juror. This note was marked MFI #115.

171 The note provides insight into tensions within the jury room. Juror M wrote that:

> "…individual verdicts and decision-making have not and continue not to be respected and further deliberation is proving unconstructive, toxic and futile."

172 Although Juror M in an answer to a question from the judge initially agreed that the note only related to Lok, there was some ambivalence in that response. When asked by the judge:

> "But it's *principally* directed to Mr Lok, is it?" (Emphasis added.)

Juror M replied:

> "Yeah, yep."

173 Juror M expressed the view that the jury would not be able to reach a unanimous verdict about Lok. The Judge rejected the appellant's counsel's submissions that she should be asked about the possibility of coming to a unanimous verdict in the appellant's case.

174 Unlike the judge, this Court does not have the benefit of seeing Juror M and assessing her at the time she was questioned. However, an insight into her demeanour is obtained from the submissions made by Ms Moody on the next day:

> "MOODY: A little more time your Honour, three months they've had and her answer, the forewoman's answer was 'I think so', when asked if it was likely a unanimous verdict would be brought in relation to [the appellant] and Juror M's answer in relation to whether the note related to [the appellant] as well, her answer to that was ambivalent with the words 'kinda' used and if your Honour will recall she held up her hand in a rocking motion from side to side indicating the uncertainty in relation to the letter.
>
> HIS HONOUR: Yes but it would have been very easy for her to say 'yes it definitely applies to [the appellant] I should have written that in the letter' but she was very hesitant to adopt and to embrace that."

175 When questioned by the judge, the foreperson expressed a different opinion on the ability of the jury to reach a unanimous verdict in Lok's case. It was her view that further deliberation in each case may lead to a unanimous verdict.

176 His Honour asked the foreperson whether the jury had any questions in relation to the appellant (see [95] above). The foreperson's response included:

> "FOREPERSON: Again, I think it's a matter for us to discuss rather than questions at this point…"

177 The foreperson informed the judge that she did not believe she was in a position to pose any questions in relation to the appellant's case in the short term.

178 On the following day, the Crown asked the judge to discharge the jury in relation to Lok. In the course of the Crown's submissions, the Crown said:

> "In that regard, in considering the responses of the two jurors, we say this that that those two responses on oath are in themselves indicative of the problem that the jury is having in terms of the nature of the lack of agreement as to an unanimous verdict to date. If I can put it this way, they agree that they disagree as to the nature of the disagreement but their views as to what the future holds differ. One says that they are not likely that they will reach a unanimous verdict for Lok given more time and another says it is likely they will reach a verdict for Lok given more time."

179 Counsel for Lok agreed that the jury should be discharged in relation to his client.

180 Ms Moody submitted that the jury should be discharged in relation to her client which the Crown opposed (see [100] above). Ms Moody put to the judge that it was "…absolutely essential that a miscarriage of justice is avoided by this trial continuing in relation to [the appellant] with a jury as divided and toxic as this one".

181 The judge discharged the jury in relation to Lok but declined to do so in the case of the appellant. His Honour said at [16]:

> "…I am unable to find that the note from Juror M when considered in the light of her evidence means that the jurors are unlikely to be able to reach a unanimous verdict in the case of [the appellant]. At its highest that evidence is equivocal or ambiguous as the Crown submits and I do not accept the submission put by counsel for [the appellant] that there is a war of wills or some process of intimidation occurring in the jury room in relation to deliberations concerning [the appellant]".

182 His Honour went on to say at [18]:

> "I will say no more at this stage as to whether any particular timeframe should be imposed other than noting that it is common ground that I have a discretion to discharge the jury in relation to [the appellant] at some stage if I come to the view that the jury deliberations have taken an unreasonably long time."

183 Ground 2 of the appeal asserts that the judge erred in declining to discharge the jury on 5 January 2016, following the receipt of MFI #115 and examination

of Juror M and the foreperson on 4 January 2016. The assertion in Ground 3 is that the trial miscarried by reason of the duration of, and circumstances pertaining to, the jury deliberations and delivery of the verdict.

184 In declining to discharge the jury in respect of the appellant, his Honour's reasons for judgment were confined to the question of the unlikelihood of the jurors reaching a unanimous verdict. Although the judge did not expressly say so, his Honour was considering s 56(3) of the *Jury Act* which permits a trial judge with a jury of less than 10 members to discharge the jury, if the judge finds, after the examination on oath of one or more of the jurors, that it is unlikely that the jurors will reach a unanimous verdict.

185 In argument in this Court, there was some discussion as to whether the judge was correct in applying what was referred to as the s 56(3) test or the test in *Webb* which was expressed by Mason CJ and McHugh J at 46-47:

> "…In our opinion, the test that his Honour should have applied was whether, despite the warning that he proposed to give to the jury, the circumstances of the incident would still give a fair-minded and informed observer a reasonable apprehension of a lack of impartiality on the part of the juror".

186 Ms Abraham argued that the judge was right to apply the s 56C(3) test and referred to the jury only needing 1 hour and 31 minutes to return a verdict of guilty in relation to the appellant after being discharged in relation to Lok.

187 I do not think that the quick return of the verdict against the appellant after the jury was discharged in Lok's trial provides support for the approach taken by the judge as it raises the question, with the benefit of hindsight, that Juror 3 may have been a dissentient holding out for an acquittal.

188 In *BG*, Adamson J considered *R v Godson* (1975) 1 WLR 549 ("*Godson*"), where the UK Court of Appeal quashed the conviction on the basis that a material irregularity had occurred. In *Godson*, a juror was prevented from returning to the jury room after he was found making a telephone call outside the jury room. The juror was discharged, however, his voting intentions were not known. The remaining 11 jurors returned a verdict of guilty a relatively short time after the juror's discharge. The UK Court of Appeal considered that there was "abundant room for speculation" for possible injustice to the appellant. The analysis by Adamson J was that the circumstances of "that case gave rise to

more than mere speculation, since the inference was fairly open that the discharged juror was the sole dissentient".[7]

189 In the present matter, the jury was unable to reach a unanimous verdict in either trial before the Christmas break. A *Black* direction was given in both trials on 23 December. Juror 3 was very unwell and was lying on the jury room floor on 24 December. He was sent home on that day and did not return to the jury. Juror 2 was discharged on 24 December and an order was made for the separation of the jury until 4 January. Juror 3 was discharged when the jury returned on 4 January. The jury did not deliberate on that day as MFI #115 was received from Juror M and the judge released the jury for the day. At 11.33am on 5 January, the jury was discharged in relation to Lok and resumed their deliberations in the appellant's trial at 11.35am. The judge received a jury note at 12.45pm that indicated a verdict had been reached. The jury returned with a verdict of guilty against the appellant at 1.04pm.

190 The views of Juror's 2 and 3 were not known at the time of the juror's discharge. Nevertheless, the timing of the verdict such a short time after the nine jurors resumed their deliberations leads to the reasonable inference that to continue with the remaining jurors gave rise to the risk of a substantial miscarriage of justice. With the benefit of hindsight, a fair-minded informed observer could conclude that either Juror 2 or Juror 3 (or both of them) was holding out as a dissenting juror for an acquittal of the appellant, or at least was unwilling to convict. A fair-minded informed observer could also conclude that the reason Juror 3 was unwell and lying on the jury room floor on 24 December and suffered from a recurrence of a severe anxiety disorder was that he was in the minority. This is more than mere speculation. In my opinion, the case falls within the third category of Adamson' J's analysis in *BG*.

191 In any event, Ms Moody's submissions to the judge went beyond the issue of the likelihood of disagreement in the jury. Her submissions raised once again the risk of a substantial miscarriage of justice which his Honour appears not to have considered after the receipt of MFI #115. Ms Moody was right to do so as the tensions in the jury room, and the conflict in the testimony of Juror M and

[7] BG [2012] NSWCCA 139; (2012) 221 A Crim R 215 at [129].

the foreperson had come to the Court's attention. Considered in combination with the length of the jury's deliberations and the recurrence of Juror 3's anxiety disorder, the reasonableness and well-being of the remaining nine jurors could not be ignored.

192 Although the extent of the disharmony in the jury room was unclear from Juror M's evidence, the judge was aware of the medical opinion that Juror 3's illness resulted from jury duty. Furthermore, the jury had been unable to reach a unanimous verdict in the appellant's trial even though they had been directed upon the single issue of knowledge and had been out on verdict since 12 October 2015. There was a reasonable possibility that the tension in the jury room was not confined to disagreement over Lok's verdict.

193 The appellant had been deprived of the views of three jurors in the jury room. The judge was obliged to consider, on what was known or could be inferred from what had transpired in the jury room, whether the ability of the nine remaining jurors to carry out their function had been compromised. In my respectful opinion, the judge erred in not re-considering, on the material then available, whether to continue the trial would give rise to the risk of a substantial miscarriage of justice.

194 In all the circumstances, it is my conclusion that the appellant has not received a fair trial and it follows that there has been a substantial miscarriage of justice.

195 Accordingly, grounds 2 and 3 of the appeal have been established.

196 In view of my conclusion that there has been a substantial miscarriage of justice, it is unnecessary to consider ground 4 of the appeal.

197 The appellant has been bail refused and in custody since 31 July 2012. A new trial will be the third trial that the appellant will stand for the alleged offence. However, the alleged offence is very serious and the appellant was sentenced by the judge to 14 years imprisonment with a non-parole period of 8 years.

198 It will be a matter for the Commonwealth Director of Public Prosecutions to decide whether to proceed with a third trial.

Orders

199 I propose the following orders:

(1) Appeal upheld.

(2) The appellant's conviction and sentence are quashed.

(3) List the case for mention at the Sydney District Court on 26 October 2018 at 9.30am.

200 **FULLERTON J:** I agree with Price J.

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