NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PROHIBITED BY S 201 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA421/2022
[2023] NZCA 470

BETWEEN	A (CA421/2022) Appellant
AND	THE KING Respondent

Hearing:	26 July 2023
Court:	Mallon, Moore and Palmer JJ
Counsel:	M G Robinson for Appellant C A Brook for Respondent
Judgment:	28 September 2023 at 2 pm

JUDGMENT OF THE COURT

The application to obtain and admit evidence of juror deliberations in an appeal against conviction is declined.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] On 3 June 2022, following a 10-day trial before Grice J in the Wellington High Court, a jury found A guilty by majority verdicts of two charges of sexual violation by rape[1] and one charge of kidnapping.[2] He had earlier pleaded guilty to one charge of sexual conduct with a dependant family member.[3] He was acquitted on five other sexual charges relating to the same complainant. He has filed an appeal against conviction alleging, inter alia, improprieties in the jury's deliberations resulting in a miscarriage of justice.[4]

[2] In support of this ground of appeal, A wishes to admit evidence of jury deliberations.[5] In the first instance, he asks this Court to direct that an amicus curiae be appointed to interview the foreperson.[6]

[3] The Crown opposes the application on the basis that the proposed interview seeks to elicit inadmissible evidence and the circumstances fall short of the requisite statutory threshold.

[4] This judgment deals with the application for directions.

Background

[5] A was represented at his trial by Mr Robinson who appeared as counsel before us on the present application.

[6] On 14 June 2022, some 11 days after the verdicts, the jury's foreperson contacted Mr Robinson by email. He expressed concern about the jury's

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1 Crimes Act 1961, ss 128(1)(a) and 128B; maximum penalty 20 years' imprisonment.
2 Section 209; maximum penalty 14 years' imprisonment.
3 Section 131(1); maximum penalty seven years' imprisonment. He was sentenced to seven years and six months' imprisonment: see *R v A* HC Wellington CRI-2021-035-761, 5 August 2022.
4 The other grounds of appeal are concerned with the admissibility of propensity evidence and the refusal of a non-party disclosure application.
5 Evidence Act 2006, s 76.
6 An application to adduce fresh evidence on appeal is made under r 12B of the Court of Appeal (Criminal) Rules 2001.

decision-making process.[7] He attached a poem written for the appellant in which he inferentially suggested the jury had made the wrong decision.

[7] Mr Robinson responded on 16 June 2022 noting that his professional obligations precluded him from discussing the jury's decision but suggesting that the foreperson contact the trial Judge or Registrar if he had concerns.

[8] Despite this caution, the foreperson responded to Mr Robinson with further email correspondence containing specifics about the jury's deliberations. He alleged the jury had been improperly influenced by prejudice, undue pressure and predetermination, amongst other improprieties. Excerpts of the email are reproduced below:

> … I don't have a moment's doubt in my mind that my fellow jurors, whilst they might have thought they were doing their duty for the most part let their prejudices blind them to amongst other things, the presumption of innocence until proven guilty beyond reasonable doubt. … Many things trouble me about this case, not least, on the first day, having to remind my fellow jurors that they should not be talking about the defendant as if he was guilty when we had only begun hearing the evidence against him. During deliberation, having a fellow juror talk about how we could get involved in some horse trading to sort out the verdicts I found appalling. Another juror managed to sway others into making decisions (changing their decision in some cases) based on the collective will of the majority. I was put under some pressure to follow their decisions for this reason. It is difficult not to come to any other conclusion than this poor man's fate was not decided in the correct manner. These things went completely against our very clear directions as outlined by her Honour Judge Grice [sic]. My decisions were based on the facts and evidence presented. In my considered opinion, far from proving the defendant's guilt they in fact provided numerous examples beyond reasonable doubt that the defendant was in fact innocent and should be found not guilty.

[9] Mr Robinson advised that he was unaware whether the foreperson provided any additional information to the High Court. Assuming he did not, Mr Robinson asks this Court to consider appointing an amicus curiae to interview the foreperson in order to ascertain the reasons for his views. Mr Robinson says that until such information is obtained, it will be difficult for the Court to assess whether the evidence should be admitted in the appeal against conviction.

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[7] It appears that the foreperson spoke to Mr Robinson on the phone prior to this, however no record or transcript of this call is before the Court.

Relevant law

[10] The general rule at common law is that jury verdicts are required to remain inscrutable.[8] The position in New Zealand is now governed by s 76 of the Evidence Act 2006, which provides:

> **76 Evidence of jury deliberations**
>
> (1) A person must not give evidence about the deliberations of a jury.
>
> (2) Subsection (1) does not prevent the giving of evidence about matters that do not form part of the deliberations of a jury, including (without limitation)—
>
> (a) the competency or capacity of a juror; or
>
> (b) any conduct of, or knowledge gained by, a juror that is believed to disqualify that juror from holding that position.
>
> (3) Subsection (1) does not prevent a person from giving evidence about the deliberations of a jury if the Judge is satisfied that the particular circumstances are so exceptional that there is a sufficiently compelling reason to allow that evidence to be given.
>
> (4) In determining, under subsection (3), whether to allow evidence to be given in any proceedings, the Judge must weigh—
>
> (a) the public interest in protecting the confidentiality of jury deliberations generally:
>
> (b) the public interest in ensuring that justice is done in those proceedings.

[11] This Court in *Neale v R* described s 76(3) as "a very narrow escape hatch" and "a very difficult standard to reach".[9] The example often cited to illustrate the threshold required is the English case of *R v Young*, where a jury resorted to the use of a ouija board to determine guilt.[10]

Discussion

[12] It is first necessary to determine whether the proposed enquiries will result in evidence that is "intrinsic" or "extrinsic" to the jury deliberations process.[11] The

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8 *R v Connor* [2004] UKHL 2, [2004] 1 AC 1118; and *Attorney-General v Scotcher* [2005] UKHL 36, [2005] 1 WLR 1867.

9 *Neale v R* [2010] NZCA 167 at [12].

10 *R v Young* [1995] QB 324 (CA).

11 *Rolleston v R* [2020] NZSC 113, [2020] 1 NZLR 772 at [28].

former is captured by the exclusionary rule in s 76(1) and must not be admitted unless the s 76(3) threshold is met, while the latter is admissible under s 76(2).

[13] It was common ground at the hearing that this is a case involving intrinsic evidence. As Ms Brook submitted for the Crown, it is difficult to see how any enquiries of the foreperson would not lead quickly to evidence being obtained about the detail and dynamics of the jury's deliberations.

[14] It follows we are easily satisfied the proposed enquiries are captured by the exclusionary rule in s 76(1). The application thus falls to be determined by reference to s 76(3). The question is whether the particular circumstances are so exceptional that there is a sufficiently compelling reason to allow that evidence to nonetheless be given.

[15] It is a not uncommon phenomenon of trial by jury that some jurors do, with the benefit of hindsight, regret making findings of guilt. However, the principle of finality is of paramount importance, as is the need to maintain public confidence in the administration of justice. The latter would be undermined if enquiries were made into the dynamics and processes of a jury's decision-making and what happened inside the jury room in the absence of compelling evidence that something had truly gone wrong in the course of deliberations, such as the introduction of extraneous material by one juror that is viewed by others or the adoption of fanciful and wholly unreliable measures to determine guilt.[12] As the Supreme Court noted in *Rolleston v R*:[13]

> (a) Secrecy promotes candour in the process of collective decision-making and the prospect of later publication of jury conversations would have a chilling effect on such candour.
>
> (b) Secrecy protects the finality of the jury's verdict by ensuring that post-verdict appeals do not descend into blow by blow post-mortems of the collective deliberation process.
>
> (c) Relatedly, secrecy protects public confidence in the collective decision making of juries by preventing inevitable disagreements within the jury room from becoming the subject of ongoing wider community debate and controversy.

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12 Such as the ouija board in *R v Young*, above n 10.

13 *Rolleston v R*, above n 11, at [24].

> (d) Secrecy protects jurors by ensuring that they are not drawn into subsequent appeals and that they are not exposed to criticism or worse by members of the community who may not agree with the views jurors express about the case in deliberations.

[16] In the present case, the foreperson was simply expressing to Mr Robinson his view about the dynamics which operated within the jury. For example, in his email, he stated, "[a]nother juror managed to sway others into making decisions" and that he (the foreperson) was "put under some pressure to follow their decisions". In his poem he appears remorseful that his efforts to persuade the other members of the jury to his point of view were ineffective. For example, he writes, "I did what I could, but it wasn't enough". On its face, this is no more than the usual process of jury discussion through which ultimately each juror either becomes sure a charge is proven or is left with a reasonable doubt. It is analogous to *Neale v R*, where one of the jurors wrote a letter to the trial Judge (and others) stating that she felt bullied by another juror into finding the defendant guilty.[14] That was not found to be sufficient to meet the exceptionality threshold in s 76(3). There counsel requested that directions appointing an independent barrister be made for the purpose of obtaining an affidavit from the juror, following which the Court would be in a position to consider whether the ground of appeal merited further attention. In dismissing the application for directions, this Court held:

> [13] This application comes nowhere near the required standard under s 76(3). The juror has felt remorseful, after the verdict. She had "capitulated" during deliberation to the other members of the jury. This, without more, could never be a ground for further inquiry by the Court under s 76(3).

[17] The foreperson in the present case also claims that his fellow jurors "for the most part let their prejudices blind them". That is the extent of the evidence before the Court on that point. There is no further particularisation of what prejudices might have been in play or how they might have operated to improperly influence the result. While the Supreme Court in *Rolleston* considered the possibility that actual or apparent bias on the part of a juror could be sufficient to establish a miscarriage without the need for an enquiry into intrinsic evidence, that comment was made in the context of a potential association or pre-existing relationship between juror, defendant

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[14] *Neale v R*, above n 9.

and witness.[15] The present assertion of bias is much more general and non-specific and invites the Court to embark on a "fishing expedition unsupported by a credible evidential narrative".[16]

[18] As for the foreperson's claim that he heard a juror talk of "horse trading to sort out the verdicts", the expression "horse trading" is capable of multiple meanings, including unprincipled compromising ones. However, there is no suggestion that this occurred or that the juror's comment, if made and correctly remembered and recorded, was taken seriously or acted upon by other jurors. The mixed verdicts suggest that the jury undertook a discriminating and evaluative process in reaching its decision on each charge. They acquitted the appellant of five sexual charges (including charges of unlawful sexual connection and various indecencies) and found him guilty by majority of two charges of sexual violation by rape and one charge of kidnapping. All charges related to the same complainant whose credibility was central to the jury's findings.

[19] Mr Robinson acknowledged at the outset of his oral submissions that he faced an uphill battle. In the course of argument, he accepted that he was not aware of any authority where intrinsic aspects of a jury's deliberations similar to the present have led the Court to direct an enquiry be made. Indeed, *Neale* is one of five cases relied on by the Crown in which the exclusionary rule has operated to protect the secrecy of internal jury deliberations in similar circumstances.[17] Mr Robinson also conceded that there was no evidence to support a link between the communications from the foreman and the propensity evidence challenge.

[20] It follows we are satisfied that the present application falls well short of the exceptional circumstances threshold. There is no compelling reason to allow the evidence to be given by the juror.

[21] We accordingly decline to make the direction sought that an amicus curiae be appointed to interview the foreperson, or any other directions to obtain evidence of the

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15 *Rolleston v R*, above n 11, at [31].
16 At [43].
17 *R v Tainui* [2008] NZCA 119; *Derrick v R* [2011] NZCA 163; *Dale v R* [2016] NZCA 104; and *Whare v R* [2022] NZCA 332.

jury deliberations. It follows that the application to adduce further evidence is also declined.

Result

[22] The application to obtain and admit evidence of juror deliberations in an appeal against conviction is declined.

Solicitors:
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