SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2022 0086
S EAPCR 2022 0135

RAMSAY ALEC (A PSEUDONYM)[1] Applicant

v

THE KING Respondent

JUDGES:	PRIEST, WALKER and TAYLOR JJA	
WHERE HELD:	Melbourne	
DATE OF HEARING:	24 August 2023	
DATE OF JUDGMENT:	5 September 2023	
MEDIUM NEUTRAL CITATION:	[2023] VSCA 208	First Revision: 6 September 2023
JUDGMENT APPEALED FROM:	*DPP v Alec (a pseudonym)* (County Court of Victoria, Judge Doyle, 15 March 2022) (Conviction); [2022] VCC 569 (Sentence)	

CRIMINAL LAW – Appeal – Conviction – Incest and associated offences involving stepson – Judge met privately with child complainant – No objections to meeting from counsel – No record of meeting – Whether substantial miscarriage of justice because of private meeting – Principle of open justice requires court proceedings to be open to scrutiny – Apprehension of partiality – Meeting occasioned substantial miscarriage of justice – Appeal allowed – New trial ordered.

Criminal Procedure Act 2009 s 276.

Re JRL; Ex parte CJL (1986) 161 CLR 342, *R v Caine* (1990) 48 A Crim R 464, *Carson (a pseudonym) v The Queen* [2019] VSCA 317 applied; *R v Dunne* (1929) 21 Cr App R 176, *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122, *City of St Kilda v Evindon Pty Ltd* [1990] VR 771 discussed.

CRIMINAL LAW – Appeal – Conviction – Jury allowed to separate prior to verdict – Jurors reconvened in jury room at different times prior to time for recommencement of deliberations – Some jurors left jury room unaccompanied by jurykeeper and returned prior to recommencement of deliberations – Jury asked question about whether they could read

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[1] To avoid the possibility of identifying the alleged victim of a sexual offence, these reasons for judgment have been anonymised by the adoption of a pseudonym in place of the name of the applicant.

transcript and other material while in jury room prior to recommencement of deliberations – Jury instructed they could look at exhibits and other material – Jury 'deliberating' when discussing, debating or considering issues with view to reaching a decision – Reading of transcript and exhibits do not of themselves constitute deliberations – No substantial miscarriage of justice – Ground dismissed – Guidance regarding reconvening provided by Court.

Juries Act 2000 ss 49, 50.

Youssef v The Queen [2019] VSCA 240, *Papazoglou v The Queen* (2014) 45 VR 457, *R v Young* [1995] QB 324 discussed.

CRIMINAL LAW – Appeal – Conviction – Evidence of uncharged acts – Not relied on to establish tendency – Defence counsel sought direction dealing with use of 'other misconduct' evidence – No warning regarding tendency evidence sought – Whether substantial miscarriage of justice because trial judge did not warn against impermissible use of evidence as tendency evidence – Forensic choice made by defence counsel – No substantial miscarriage of justice – Ground dismissed.

Juries Directions Act 2015, ss 27, 29, 30.

CRIMINAL LAW – Appeal – Conviction – Incest and associated offences involving stepson – Whether jury should have entertained a reasonable doubt about applicant's guilt – Jury not bound to entertain reasonable doubt – Features relied upon to impugn evidence within jury's capacity to evaluate – Ground dismissed.

Criminal Procedure Act 2009, s 276.

M v The Queen (1994) 181 CLR 487, *Pell v The Queen* (2020) 268 CLR 123 discussed.

Counsel

Applicant	Mr T Kassimatis KC with Ms G Connelly
Respondent	Mr P Bourke KC

Solicitors

Applicant	Tony Hargreaves & Partners
Respondent	Ms A Hogan, Solicitor for Public Prosecutions

PRIEST JA
WALKER JA
TAYLOR JA:

Introduction

1 Between 28 February and 15 March 2022, the applicant, then aged 52 years,[2] was tried in the County Court for sexual offences against his stepson, 'TB'. All of the alleged offending was said to have occurred in 2016, when TB was aged 10,[3] either between 1 January and 16 August (charges 1 to 13) or 16 October and 31 December (charges 14 to 19).

2 On 15 March 2022, the jury empanelled to try the applicant found him guilty of committing an indecent act with a child under the age of 16[4] (six charges – charges 1, 3, 5, 8, 11 and 17) and incest[5] (eight charges – 2, 4, 6, 7, 12, 13, 18 and 19). The jury acquitted him of a further charge of committing an indecent act with a child under the age of 16 (charge 14) and two charges of incest (charges 15 and 16).

3 Following a plea, on 27 April 2022 the trial judge sentenced the applicant to a total effective sentence of 14 years' imprisonment, with a non-parole period of 9 years and 9 months.

4 Subsequently, the applicant filed applications for leave to appeal against both conviction and sentence.

5 With respect to conviction, the applicant relied on four grounds:

> 1. A substantial miscarriage of justice occurred because the jury was permitted, whilst separated and incomplete, to deliberate or consider their verdicts.
>
> 2. The jury's guilty verdicts are unreasonable and cannot be supported having regard to the evidence.
>
> 3. A substantial miscarriage of justice occurred because the [judge who conducted the special hearing[6]] met with the complainant privately [in advance of that hearing].
>
> 4. A substantial miscarriage of justice occurred because the trial judge did not warn the jury against impermissibly using the evidence led at trial of the Applicant's alleged uncharged offending, as tendency evidence.

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2 His date of birth is 15 July 1969.

3 He was born in mid-2006.

4 *Crimes Act 1958* (as amended by the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*), s 47(1). The maximum penalty is 10 years' imprisonment.

5 *Crimes Act 1958* (as amended by the *Crimes (Sexual Offences) Act 1991*), s 44(1). The maximum penalty is 25 years' imprisonment.

6 Ground 3 of the appeal referred to the 'trial judge'. However, the judge who conducted the special hearing was different from the judge who later presided over the trial.

6 At the conclusion of oral argument in this Court on 24 August 2023 with respect to conviction, we were of the view that ground 3 had to succeed. We thus made orders granting leave to appeal; allowing the appeal; setting aside the convictions; and ordering a new trial. These are our reasons for those orders.

Overview

7 By way of brief overview, the applicant married TB's mother, 'TJ', in the Philippines in May 2010. The three moved to Melbourne in March 2011, when TB was aged four. After the move, the applicant (who had two children from a previous marriage) and TJ had two further children together, 'WJ', a son, and 'WS', a daughter.

8 In 2016, the family home was situated in an eastern suburb of Melbourne. It had three levels, the lowest level being a workshop and storage area. There were two bedrooms each on the middle and upper levels, the master bedroom being on the top floor. The applicant, a remote vehicle operator, worked on rotation, spending four weeks away working, and four weeks at home.

9 TB fixed the time at which the incidents founding the charges occurred in 2016 by reference to a family camping trip, which took place between mid-August and mid-October of that year. All but the last incident were alleged to have occurred prior to that trip.

10 TB first complained to his mother — in the applicant's presence — on 28 September 2019, when aged 13. His mother took TB to the police the following day, and he participated in a VARE[7] interview on 30 September 2019. Police arrested and interviewed the applicant later that same day. He denied the alleged offending and called evidence of good character at trial.

11 TB's evidence at trial consisted of the VARE interview, together with evidence given at a special hearing[8] on 30 June 2021 (by which time TB had turned 15). The following summary of the alleged offending is drawn from those sources.

The first incident: charges 1 and 2

12 On a day before the camping trip in 2016, TB was outside feeding the chooks and the applicant was in the workshop. The applicant asked TB to come into the workshop and kneel in front of him. TB complied because he was afraid the applicant would strike him. The applicant then had TB stroke his penis (charge 1) and 'suck his dick' (charge 2). During penile-oral penetration the applicant ejaculated into TB's mouth. At the time, TJ was at 'hot yoga'.

The second incident: charges 3 and 4

13 There was a subsequent occasion when the applicant beckoned TB to come into the workshop. The applicant unzipped his pants, and forced TB to masturbate him

7 Video and Audio Recorded Evidence. See *Criminal Procedure Act 2009*, ss 366 and 367.
8 See *Criminal Procedure Act 2009*, ss 372.

(charge 3) and put the applicant's penis into his mouth (charge 4). In the course of penile-oral penetration, the applicant again ejaculated into TB's mouth. At that time, TJ was in the kitchen making dinner.

The third incident: charges 5 and 6

14 On another occasion, when TB was again feeding the chooks, the applicant called him into the workshop. TB was made to kneel, masturbate the applicant (charge 5), and take his penis into his mouth (charge 6).

The fourth incident: charges 7 and 8

15 One evening, while TB was lying on his top bunk bed — WJ was on the bottom bunk — the applicant came into the bedroom. The applicant unzipped his pants and climbed a 'creaky' ladder to the top bunk. With one hand on the bed railing, he used his other hand to hold TB's head. He pulled TB's head towards him and pushed his penis into TB's mouth (charge 7). TB said he could feel the applicant's pubic hair against his lips. At the same time, the applicant took TB's hand and had TB masturbate him (charge 8).

The fifth incident: charges 11, 12 and 13

16 On another occasion when TJ was at hot yoga, TB was home alone with the applicant. TB went into WJ's bedroom to put away some toys. The applicant entered the room holding a small face towel. He told TB to kneel, unzipped his pants and forced TB to masturbate him (charge 11). The applicant then penetrated TB's mouth with his penis (charge 12). He then told TB to turn around and pushed him down so that he was on his hands and knees. The applicant then rubbed lubricant onto his penis and penetrated TB's anus (charge 13), causing TB pain. Ultimately, the applicant withdrew his penis and ejaculated onto TB's bottom, which he then wiped with the towel.

Acquittals: the sixth, 'Peppa Pig', incident: charges 14, 15 and 16

17 As we have indicated, the applicant was found not guilty by the jury on charges 14, 15 and 16. The prosecution case on these charges was that TB went to feed the chooks, while his mother was cooking a roast in the kitchen, and his siblings WJ and WS were watching 'Peppa Pig' on the television. It was alleged that TB was called into the workshop and made to kneel and masturbate the applicant's penis (charge 14). The applicant then forced his penis into TB's mouth (charge 15). He then told TB to stand up and lie down on a white stool, before positioning TB on his stomach. The applicant then rubbed lubricant on his penis and penetrated TB's anus (charge 16), before ejaculating onto TB's bottom.

Uncharged acts during the camping trip

18 TB alleged that, during the family's camping trip to New South Wales in 2016, the applicant twice entered the shower block when he was showering and anally or orally raped him.

The final incident: charges 17, 18 and 19

19 The final incident occurred between mid-October 2016 and 31 December 2016, after the camping trip. Once again, the applicant had TB join him in the workshop. There he caused the complainant to masturbate (charge 17) and then fellate him (charge 18). The applicant then produced a bottle of lubricant and penetrated TB's anus with his penis, ejaculating on his bottom (charge 19).

Conviction ground 3: Judge's private communication with witness

20 As we have said, after full argument we were of the view that ground 3 — which contends that a substantial miscarriage of justice occurred because the judge 'met with the complainant privately' — had to succeed. In circumstances that we will come to, the judge, who conducted the special hearing, met privately with TB before TB gave evidence at that hearing. It was a fundamental irregularity that he did so.

21 Almost a century ago, Lord Hewart LCJ, in *R v Sussex Justices; Ex parte McCarthy*, declared that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[9]

22 A few years later, in *R v Dunne*,[10] his Lordship was concerned with a conviction which depended upon the uncorroborated sworn evidence of a seven-year-old girl whom the trial judge had first examined privately in his room so as to determine whether she was capable of giving sworn evidence. Giving the judgment of the Court, Lord Hewart said:

> It goes without saying that what the Judge did in that matter was suggested purely by feelings of kindness and consideration for the youthful witness. The question for this Court is, can a conviction stand after an incident of that kind has occurred? It is admittedly an incident without parallel. Admittedly, nobody in this Court, either from his own experience or from researches into the authorities, can adduce any parallel case. In the result, something was said to or by this witness which was not in the hearing or presence of the jury or of the accused. The Court is clearly of opinion that, in these circumstances, the appeal must be allowed and the conviction quashed.[11]

23 It cannot be doubted that, in deciding to meet privately with TB, the judge in the present case was also motivated by consideration for a youthful witness. But as was the case in *Dunne*, 'something was said to or by this witness which was not in the hearing or presence of the jury or of the accused'.

24 On 29 June 2021 — the day prior to TB giving evidence at the special hearing — the judge conducted a 'ground rules hearing' in the presence of the parties. The hearing was conducted pursuant to pt 8.2A of the *Criminal Procedure Act 2009* ('CPA'), which provides for the appointment of intermediaries for, and the conduct of ground rules hearings with respect to, complainants (and other witnesses) in sexual offence cases who are under the age of 18 years. Section 389B provides that in a 'ground rules

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9 [1924] 1 KB 256, 259 (Lord Hewart CJ, Lush J agreeing at 259, Sankey J agreeing at 260).
10 (1929) 21 Cr App R 176 ('*Dunne*').
11 *Dunne* (1929) 21 Cr App R 176, 178.

hearing' the court 'considers the communication, support or other needs of witnesses', and 'decides how the proceeding is to be conducted to fairly and effectively meet those needs'.

25 During the ground rules hearing, the intermediary informed the judge that TB — with whom both counsel had met — 'would be one of the most anxious young men that I've come across in my time of doing this work', and indicated that if it was possible for the judge 'to have a brief chat with him' before he gave evidence 'that would be ideal'. The judge then said that what he had done in the past with 'particularly anxious people' was to 'go and show them a picture of my big fat ginger cat which breaks the ice'. After further discussion, there was the following exchange:

> HIS HONOUR: All right, well I'll come down and introduce myself. You think that would be advantageous?
>
> [INTERMEDIARY]: I think it would be excellent. Yes, Your Honour.
>
> HIS HONOUR: All right. Do you know whether he dislikes cats?
>
> [INTERMEDIARY]: He's not a big animal person, is my understanding.
>
> HIS HONOUR: He's not a big animal personal [sic], all right.
>
> [INTERMEDIARY]: But you could talk to him about volleyball.
>
> HIS HONOUR: The photo of the fat ginger cat will stay unrevealed, all right.
>
> [INTERMEDIARY]: He's keen on volleyball.
>
> HIS HONOUR: Volleyball, all right, and what's his favourite – does he have a musical artist?
>
> [INTERMEDIARY]: He said ones which I wasn't familiar with, Your Honour. So, he does - - -
>
> HIS HONOUR: I'm familiar with none of them.
>
> [INTERMEDIARY]: He does say that music calms him, so he may – and he's been asked to bring in his music.
>
> HIS HONOUR: All right.
>
> [INTERMEDIARY]: So he may well be able to let you hear some.
>
> HIS HONOUR: And counsel, I might instruct in chat – I raise any interest in music. But I promise I won't raise musical icons from the 60s. It helps them at their ease, all right, and the whole purpose of that is designed to reduce anxiety so we can have an efficient hearing, all right. All right, thank you very much. Thank you, [Intermediary].
>
> [INTERMEDIARY]: Thank you, Your Honour.
>
> HIS HONOUR: So look, we will aim to start there at 10 o'clock and I'll list this matter for 9.45, but I want to go down and see – introduce myself. So I'd do that as soon as practicable.

26 Neither counsel objected to the judge meeting privately with the complainant. In our view, they should have. In any event, the judge did have a private meeting with the complainant the following day, no part of which was recorded (albeit, in the course of the special hearing, the judge articulated some, but not all, of the conversation he had

with TB).[12] The process by which TB came to give evidence at the special hearing was tainted as a result.

27 Senior counsel for the applicant accepted that 'the judge … was concerned that [TB] needed to have his anxiety ameliorated'. That did not justify a private meeting. Counsel submitted that the judge could have invited the complainant into the courtroom in an informal manner prior to the hearing; he could have come down off the bench; he could have talked to the complainant in the presence of counsel; and he could have removed his robes if he wanted to make the complainant feel more comfortable. But he 'should not have met the complainant in the absence of the parties'.

28 That the administration of justice must not take place behind closed doors is axiomatic. The principle of open justice requires court proceedings to be held in public; or, in cases where exceptions to that general rule are tolerated — such as in cases of alleged sexual offending — to be otherwise open to scrutiny. Self-evidently, open justice promotes the rule of law and militates against the erosion of public confidence in the administration of justice. Open justice promotes the fair conduct of curial proceedings and the impartiality of judges. When justice is administered in private, the fairness of the process, and the impartiality of the judge, are brought into question.

29 As Mason J observed in *Re JRL; Ex parte CJL*:

> A central element in the system of justice administered by our courts is that it should be fair and this means that it must be open, impartial and even-handed. It is for this reason that one of the cardinal principles of the law is that a judge tries the case before him on the evidence and arguments presented before him in open court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides. It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide.[13]

30 Mason J also cited with approval[14] the following observations of McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone*:

> The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous

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12 In the course of oral argument we were informed that it appeared that the intermediary was also present.

13 (1986) 161 CLR 342, 350 (Mason J); [1986] HCA 39 ('*Re JRL*').

14 *Re JRL* (1986) 161 CLR 342, 350–1 (Mason J); [1986] HCA 39. See also *Charisteas v Charisteas* (2021) 273 CLR 289, 297 [13] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ); [2021] HCA 29; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 107 [186] (Gageler J); [2013] HCA 7.

> knowledge and consent of the other party. For if something is done which forms a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.[15]

31 In *City of St Kilda v Evindon Pty Ltd*,[16] proceedings were before the Administrative Appeals Tribunal relating to the refusal of a planning permit. On the eve of the hearing, senior counsel for the party refused the permit had a private telephone conversation with a deputy president of the tribunal. The conversation was not disclosed until after the tribunal gave its decision granting the permit. In quashing the tribunal's decision, the Full Court cited the observations of Mason J and McInerney J set out above and said:

> There are very good reasons for the existence of these precepts of conduct and it is most unwise to depart from them. While litigation produces winners it also produces disappointed losers who are prone to look for reasons for their failure other than a lack of strength and merit in their cases. If a judicial officer has been placed in a situation which arouses a suspicion of unfairness or partiality, human nature is likely to lead the loser to harbour the suspicion and to allow it to grow to a belief that the loss was due to unfairness or partiality of the judicial officer. That tends to destroy the community confidence in the judicial officer. Confidence in those who constitute its courts and tribunals is a basic necessity for a successful civilised democracy.[17]

32 There is no evidence in the present case that TB said anything to the judge that in fact had the capacity to compromise the judge's conduct of the case. But that is not to the point. It is the suspicion of partiality which is aroused by the judge meeting privately with a witness which is important.

33 We note that some of the authorities appear to contemplate that a judge may meet privately with a party, their legal adviser or a witness 'with the previous knowledge and consent of the other party'. There will undoubtedly be circumstances where that is so; a judge attending a function at which counsel for a party is attending, with the knowledge and consent of the other party, provides an example of such circumstances. But we do not consider that the 'previous knowledge and consent' of the applicant in this case is such as to mean that there is no apprehension of partiality raised by the judge meeting privately with the principal witness for the prosecution.

34 Relatedly, in oral argument, when asked by a member of the Court whether 'this point [was] waived because the conduct of the judge was acceded to by both counsel', senior counsel for the applicant submitted that 'the error or the irregularity is of a kind that can't be waived'.

35 While it may be accepted that, in some circumstances in some kinds of cases, a party may, by inaction, waive the right subsequently to object to a matter giving rise to an appearance of impartiality in a judge,[18] in the present case the font of this Court's

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15 *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 127.

16 [1990] VR 771.

17 *City of St Kilda v Evindon Pty Ltd* [1990] VR 771, 776–7 (Kaye, McGarvie and Ormiston JJ).

18 See, eg, *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron), 577 (Dawson J), 579 (Toohey J); [1989] HCA 44. See also Matthew Groves, 'Waiver of the Rule Against Bias' (2009) 35(2) *Monash University Law Review* 315.

jurisdiction is to be found in ss 276(1)(b) and (c) of the CPA, which oblige this Court to allow an appeal against conviction if satisfied that '(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or (c) for any other reason there has been a substantial miscarriage of justice'.

36 Although the general rule is that it is not open to an applicant to rely on an error which could have been cured if exception were taken, as the Full Court observed in *R v Caine*,[19] the court retains power to set aside a conviction on a point which should have been but was not the subject of an exception when the interests of justice demand that course.

37 And as Niall JA observed recently in *Carson (a pseudonym) v The Queen*:[20]

> Whether there has been a substantial miscarriage of justice is not, in this context, to be determined by an assessment of whether the conviction was soundly based on the evidence.[21] It may be noted that, even where the proviso was potentially engaged, it has been held that it would be proper to allow an appeal and order a new trial without applying the proviso 'where there has been a significant denial of procedural fairness at trial'.[22]
>
> Further, as noted in *Baini v The Queen*,[23] a consideration of the text of s 276 of the *Criminal Procedure Act 2009* ('CPA') reveals that a '"substantial miscarriage of justice" encompasses not only cases identified by reference to inaccuracy of result but also cases identified by reference to departure from process'.[24] This is because the separate inclusion of sub-paragraphs (b) and (c) (and in particular the question whether there has been a substantial miscarriage of justice) indicates that those sub-paragraphs 'cannot be confined to cases in which the Court of Appeal is satisfied that it was not open to the jury to convict the appellant'.[25]
>
> Finally, it is important to note that this understanding of s 276 of the CPA 'accommodates fundamental tenets of the criminal justice system in Australia'.[26] In particular, the prescribed mode of trial is trial by jury, and the expression 'substantial miscarriage of justice' encompasses serious departures from trial processes, whether or not the impact of that departure can be determined.[27]

38 We consider that the judge conducting a private meeting with the critical prosecution witness was incompatible with the fundamental tenets of the system of criminal justice in this State, and constituted a serious departure from accepted trial process. It

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19 *R v Caine* (1990) 48 A Crim R 464, 475 (Crockett, McGarvie and Beach JJ).

20 *Carson (a pseudonym) v The Queen* [2019] VSCA 317, [27]–[29]. See also [79]–[81] (T Forrest JA)

21 *Weiss v The Queen* (2005) 224 CLR 300, 317 [45] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ); [2005] HCA 81 ('*Weiss*').

22 *Weiss* (2005) 224 CLR 300, 317 [45] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ); [2005] HCA 81.

23 (2012) 246 CLR 469; [2012] HCA 59 ('*Baini*').

24 *Baini* (2012) 246 CLR 469, 480 [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [2012] HCA 59.

25 *Baini* (2012) 246 CLR 469, 479–80 [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [2012] HCA 59.

26 *Baini* (2012) 246 CLR 469, 481 [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [2012] HCA 59.

27 *Baini* (2012) 246 CLR 469, 481 [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [2012] HCA 59.

occasioned a substantial miscarriage of justice, necessitating the setting aside of the applicant's convictions. As a result, at any new trial TB's evidence must be taken again before a different judge.

Conviction ground 1: Jury irregularity

39 Underpinning the first ground — which the applicant's senior counsel put at the forefront of his oral submissions — is the contention that various members of the jury were permitted 'to deliberate or consider their verdicts' when not in the company of the whole jury, so that the jury was 'separated and incomplete' when some of the jury's deliberations occurred. Counsel submitted that so much constituted a fundamental irregularity, giving rise to a substantial miscarriage of justice.

Principles concerning the separation of jurors

40 Before turning to the particular issues in this case, it is convenient to discuss the common law principles that governed the separation of jurors, and the extent to which those principles have been modified by statute.

41 To ensure the integrity of their verdict, and to ensure that they remain separate from those who might influence their decision, the common law required jurors, once empanelled, to remain together until they had delivered their verdict. In *R v Chaouk* — a case that was decided prior to the enactment of s 51A of the *Juries Act 1967*, the predecessor to the present s 50 of the *Juries Act 2000* ('the Act') — Kaye J described the strictness of the common law rule, and its relaxation up to the point in time that case was decided:

> The ancient common law rule was that jurors, once empanelled, were required to remain together until they had delivered their verdict. This involved keeping the jurors confined in the court, separated from all others, without nourishment and fire for their physical comfort. Porter LJ in *R v Taylor* [1950] NIR 57, at p. 67 examined the early history of the common law rule and its development, from which it is clear that the underlying purpose of the rule was, and remains, to ensure the integrity of the jury's verdict. This was achieved by separating them from those who might choose to tamper with the jurors and from those who might, consciously or otherwise, influence their verdict. The operation of the rule, which necessitated the jury being locked up together within the court until they had reached their verdict, no doubt caused a good deal of inconvenience and hardship.
>
> In the passage of time, and with changed social conditions and facilities, it was possible to relax some of the rigidity of the rule. This was achieved by legislation, of which s 51 of the *Juries Act* 1967, permitting jurors to have fire and other means of heating and refreshment at the Crown's expense, is a relic.
>
> It is now an exceptional case where jurors are kept together from the commencement of the trial until their discharge after verdict. In most criminal trials, having been informed at the outset of the proceedings by the trial Judge of the need for their verdict to be entirely their own uninfluenced by the opinions or advices of outsiders and enjoined not to discuss the case with any person

> except the other jurors while in the juryroom, jurors are permitted to go their own way at adjournments of the hearing until directed to consider their verdict: see *R v Prime* (1973) 57 Cr App R 632, at p. 637.
>
> Nevertheless, the rule remains that there must be no communication, or risk of communication, between outsiders and the jury once they have entered upon their deliberations concerning their verdict. To prevent any such communications, jurors are required to be kept together and separated from other persons. However, some communication by jurors with outsiders is necessary where their deliberations extend beyond the time for a midday meal or overnight. In those circumstances, jurors are subject to the control of keepers sworn to keep them together and separated from outsiders. The function of the keepers is also to ensure that the jurors' communications with others are limited to their personal needs, such as indicating their choice of food and like requirements. It sometimes occurs that, due to sickness or grave family problems, it might become necessary for a juror to be separated temporarily from the other jurors. This is permitted provided that the juror, throughout the period of his separation, is in the company of a keeper. Again, the need for separate sleeping and toilet accommodation and facilities, of course, involves some degree of separation from other members of the jury. Nevertheless, those facilities are provided in a manner which ensures that the jurors are kept apart from outsiders. Disconnection of telephone services to rooms in a hotel occupied by them ensures that the jurors have no communication with other persons. These are but some of the measures taken to procure the observance of the rule.[28]

42 More recently, aspects of the common law rule were canvassed in *Lyons v Queensland*,[29] a case in which the High Court considered whether anti-discrimination legislation had been breached by excluding a deaf person from a jury panel, and failing to provide her with an Auslan (Australian Sign Language) interpreter. The plurality observed:[30]

> The common law has long required that the jury be kept separate.[31] The possibility that, while the jury is kept together, one or more jurors may have communicated with a person other than a fellow juror (or officer of the court) is an irregularity which has been held to vitiate the verdict.[32] The presence of a person other than a juror in the jury room during the course of deliberations is an incurable irregularity regardless of whether the person takes any part in the jury's deliberations.[33] The prohibition on the presence of a thirteenth person in the jury room protects the jury from the suggestion of external influence and promotes the frank exchange of views. It is the latter consideration that informs

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28 *R v Chaouk* [1986] VR 707, 710 ('*Chaouk*'). See also *Brownlee v The Queen* (2001) 207 CLR 278, 323–4 [129]–[130] (Kirby J).

29 (2016) 259 CLR 518; [2016] HCA 38 ('*Lyons*')

30 *Lyons* (2016) 259 CLR 518, 529–30 [33] (French CJ, Bell, Keane and Nettle JJ).

31 Sir Patrick Devlin, *Trial by Jury* (Methuen, 2nd ed, 1966), 41–2; Sir William Searle Holdsworth, *A History of English Law* (Methuen & Co Ltd, 1938), vol 11, 553–4; Sir Willian Blackstone, *Commentaries on the Laws of England*, ed *Edward Christian* (1809), bk 3, 375.

32 *R v Ketteridge* [1915] 1 KB 467, 470 (Lush J for the Court); *R v Neal* [1949] 2 KB 590, 595–6 (Lord Goddard CJ for the Court). See also *R v Crippen* [1911] 1 KB 149, 155 (Darling J for the Court).

33 *Goby v Wetherill* [1915] 2 KB 674; *R v McNeil* [1967] Crim LR 540; *In re Osman* [1995] 1 WLR 1327.

> the exclusionary rule which precludes the admission of evidence of the deliberations of the jury.[34] Each member of the jury is free to speak in the knowledge that no one other than fellow jurors, each of whom is bound by the oath taken at the commencement of the trial and each of whom will be responsible for the ultimate verdict, hears what is said.

43 In Victoria, the common law rule preventing juries from separating after retiring to consider its verdict was modified by statute three decades ago. Hence, the *Juries (Amendment) Act 1993*, inserted s 51A into the *Juries Act 1967* (now repealed). For the first time in this State, a criminal jury was, at the court's discretion — and subject to the jurors providing an appropriate undertaking on oath or by affidavit — permitted to separate between retiring to consider its verdict and the verdict's delivery.[35]

44 The successor to the former s 51A, s 50 of the Act permits the court to allow a jury to separate, or an individual juror to separate from the jury, after retirement — if the court is of the opinion that 'there is good reason to do so' — so long as any separating juror has taken an oath or affirmation in the form prescribed by sch 5. The section provides:

> **50 Court may allow jury to separate after retiring to consider verdict**
>
> (1) Subject to subsection (2) but despite any rule of law or practice to the contrary, the court may—
>
> (a) allow the jury to separate; or
>
> (b) allow an individual juror to separate from the jury if, in the opinion of the court, there is good reason to do so—
>
> after the jury has retired to consider its verdict and before the verdict is given or the jurors are discharged.
>
> (2) A court may allow a jury or juror to separate in accordance with subsection (1) only if each separating juror has taken an oath or made an affirmation in the form of Schedule 5.[36]

45 Further, s 49 of the Act provides that, '[i]f a jurykeeper is required in a trial, the jurykeeper must take an oath or make an affirmation in the form of Schedule 4'.[37]

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34 *Smith v Western Australia* (2014) 250 CLR 473, 481 [30]–[31] (French CJ, Crennan, Kiefel, Gageler and Keane JJ); *R v Pan* [2001] 2 SCR 344, 373 (Arbour J for the Court); *R v Mirza* [2004] 1 AC 1118.

35 Although not identical, s 51A of the repealed Act bore some similarity to the present s 50 of the Act. As enacted, it was in the following terms:

> **51A.** ***Court may allow jury to separate after retiring to consider verdict***
>
> (1) Subject to sub-section (2) but despite anything to the contrary in any rule of law or practice, the court may, in its discretion, allow the jury to separate at any time between it retiring to consider its verdict and the verdict being given or the jurors being discharged.
>
> (2) A court may only allow a jury to separate in accordance with sub-section (1) if each juror has given to the court an undertaking on oath or by affidavit not to discuss with any person, other than another member of the jury, any matter relating (directly or indirectly) to the inquest.

36 The form of oath or affirmation as set out in sch 5 requires each juror to swear or affirm that he or she 'will not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in this trial or the deliberations'.

37 The form of oath or affirmation as set out in sch 4 requires each jurykeeper to swear or affirm that he or she 'will well and truly keep this jury and each of its members committed to your charge and that,

46 This Court discussed the safeguards provided by ss 49 and 50 of the Act in *Youssef (a pseudonym) v The Queen.*[38] In that case, once she had completed her charge to the jury in a trial involving sex and drug offences, the trial judge had jurykeepers sworn in accordance with s 49 of the Act; and, immediately before the jury retired, had a 'separation oath' administered under s 50(2) of the Act. The jury then retired and deliberated for a couple of hours, before leaving the court precincts at around 4:15 pm. The jury returned the next day at around 10:15 am to resume deliberations at 10:30 am. Having had jurykeepers sworn, the judge's expectation was that, once the jury resumed deliberations, they would do so subject to the jurykeepers' supervision, and in conformity with the jurykeepers' oaths or affirmations. Despite that expectation, however, after resuming deliberations on the second day, a number of jurors left the precincts of the court at lunchtime without being accompanied by a jurykeeper. Although the judge considered that to be a 'serious mistake',[39] she did not discharge the jury. Allowing a resulting appeal against conviction, this Court concluded that the fact that the jury were permitted to separate at lunchtime on the second day of deliberations unsupervised by jurykeepers constituted a serious departure from the prescribed processes of a trial, such that there had been a substantial miscarriage of justice.[40] The Court said:

> As *Chaouk* and other cases make clear, it was a cardinal common law principle that in a criminal jury trial jurors not separate during deliberations. It is also clear that the legislature sought to mitigate the strictness of that principle through the introduction of provisions such as s 50 of the Act. In so doing, however, the legislature was astute to ensure that the separation of a criminal jury after retirement was subject to safeguards specifically designed to promote the integrity of the trial process and to minimise the risk of the jury's communication with third parties. Hence, before permitting the separation of a jury after retirement, a trial judge must affirmatively be of the opinion that there is a 'good reason' to permit separation, and must ensure that an appropriate oath (or affirmation) is taken by the jurors involved that they 'will not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in this trial or the deliberations'.[41]

47 The Court also observed:[42]

> We consider that, notwithstanding that they modify the strictness of the common law, provisions such as ss 49 and 50 of the Act are safeguards imposed by the legislature which are designed to protect jury deliberations from contamination. Such provisions also serve a secondary function, preventing the perception that

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except on the order of the court, while they are in your charge, you will not allow any of them to communicate with any other person, or any other person with any of them, whether directly or indirectly, and that you will not, either during the trial or after it has finished, communicate with any juror about any evidence given or issues raised, directly or indirectly, at the trial'.

38 [2019] VSCA 240, [56] (Priest, Beach and Weinberg JJA) ('*Youssef*').

39 *Youssef* [2019] VSCA 240, [26].

40 *Youssef* [2019] VSCA 240, [63] (Priest, Beach and Weinberg JJA). And see *Criminal Procedure Act 2009*, s 276(1)(b) and *Baini* (2012) 246 CLR 469, 479 [26], 481 [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

41 *Youssef* [2019] VSCA 240, [56] (Priest, Beach and Weinberg JJA).

42 *Youssef* [2019] VSCA 240, [62] (Priest, Beach and Weinberg JJA).

> there has been any opportunity for unauthorised communications with the jury. As Hampel J observed in *Chaouk* (albeit with respect to the position at common law), it is of fundamental importance that the basic rules relating to the processes of a criminal trial — particularly in relation to jury deliberations — should be strictly adhered to; and, given that the jury system and its operation are under constant public scrutiny, it is 'essential to ensure not only that no irregularities occur which may adversely affect jury deliberations, but also that no such irregularities appear to take place'.[43]

48 Ultimately, the Court gave the following guidance:

> Before leaving this ground, we would add the following. *As we have mentioned, after the judge was made aware of the 'serious mistake', she seemed to suggest that there may be some circumstances in which it is acceptable for jurors to separate at lunchtime (or at other times) and leave the jury room or court building unaccompanied by a jurykeeper (or keepers), so long as the separation oath had previously been administered*. Self-evidently, it is highly undesirable that there be no uniform practice with respect to the separation of juries and the use of jurykeepers. That being so, we consider it to be desirable that the practice followed in the Trial Division of this Court also be adhered to in the County Court. Although it still sometimes occurs, it is no longer the invariable practice to keep juries sequestered following retirement, so that they commonly return to their homes in the afternoon or early evening after deliberating during the day in their jury room (or other suitable space). *Whilst deliberating, however, they remain subject to the supervision of suitably sworn (or affirmed) jurykeepers, and do not leave the court unaccompanied by keepers*. When first permitted to separate after deliberations commence, the jury take the separation oath (or affirmation) under s 50, and, as a minimum, thereafter are reminded that they are bound by that oath (or affirmation) each time that they separate until being finally discharged. *Strict adherence to that practice will go some way towards avoiding the material irregularity which occurred in this case*.[44]

Events concerning the separation of the jurors in the present case

49 In the present case, the judge finished his charge to the jury in the afternoon of Thursday, 10 March 2022. The judge informed the jury that they would have to surrender their 'electronic devices', which would be returned when they had finished deliberating that day. He also informed the jury that he would have jurykeepers sworn, so that 'if you want to go out and have [a] walk or a break, get some fresh air, someone will be with you'. The judge also told the jury that they would be required 'to take what is called a separation oath'. He told them that the ' oath or affirmation … enables you to separate', otherwise 'you would have to go to a cheap motel somewhere in the city tonight'.

50 Following these instructions, the judge had his associate and tipstaff swear themselves as jurykeepers, and had his associate administer a separation oath or affirmation to the jury under s 50 of the Act. The jury then retired at 2:46 pm and began deliberating. At 4:35 pm, the judge had the jury brought into the courtroom, and asked the jury if they

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43 *Chaouk* [1986] VR 707, 717 (Hampel J).

44 *Youssef* [2019] VSCA 240, [64] (Priest, Beach and Weinberg JJA) (emphasis added).

wanted 'to get a bit of an earlier start' the next morning, 'say 9:30' instead of 10:00 or 10:30 am. The relevant exchange was as follows:

> HIS HONOUR: All right. Look, you've been here since 10, members of the jury. It's been a long day for you. You can continue deliberating for a bit longer if you want to or you can go home now if you want to and come back tomorrow morning. The other issue is what time you'd like to come back tomorrow morning. If you wanted to get a bit of an earlier start on it then that's fine. So just it's a matter for you if you wanted to keep on going for a bit today or call it quits today and come back tomorrow morning. Did you need to discuss that?
>
> FOREPERSON: What time did we need to come in? Is there a specific time or
>
> HIS HONOUR: Tomorrow?
>
> FOREPERSON: Yes.
>
> HIS HONOUR: Look, if you wanted to come in as early as, say, 9.30, you could. Of course you'll have to go via the Mint and do your [Rapid Antigen Test for COVID-19] and all of that, but I understand that's all open from – that's from eight.
>
> FOREPERSON: But is there a specific we should really be in by?
>
> HIS HONOUR: No, I'm offering you the chance to come a bit earlier if you want. If you want to stick to 10 or 10.30, that's fine too.
>
> FOREPERSON: Okay.
>
> HIS HONOUR: Entirely a matter for you. Do you want to pop back in there and see what you want to do: (1) do you want go now or keep deliberating; (2) what time do you want to start tomorrow? We will accommodate whatever suits you.

51 The jury went to the jury room to discuss the matter, and returned to the courtroom at 4:39 pm. There was then the following exchange between the foreperson and the trial judge, during which the judge informed the jury that, if they were in the jury room earlier the next morning, it was 'fine' and 'no problem' for jurors to look at written evidence and exhibits within the jury room even though all of them were not present:

> FOREPERSON: So we'd like to finish now and we'll start at 10.
>
> HIS HONOUR: Yes, 10.
>
> FOREPERSON: *And then we had a question of whether we are able to read the specific material before 10 o'clock.*
>
> HIS HONOUR: If you got here a bit earlier?
>
> FOREPERSON: *Yes, are we able to read transcripts and whatnot?*
>
> HIS HONOUR: *Yes, if you're here earlier and there's written material in the room, as jury members within the room you can look at the evidence. There's no problem with that. Yes, there's no – you don't have to all be present in the room. If you happen to be here a bit earlier and you're in there and there's an exhibit there and you want to have a look at it, that's fine* unless counsel have got a different view.
>
> [DEFENCE COUNSEL]: No, Your Honour.

> [PROSECUTOR]: No.
>
> HIS HONOUR: No, all right. So that's the answer to that. All right, we'll be on hand from 10, members of the jury. Remember the separation oath that you gave not to talk to anyone else about the matters in this trial. Thanks very much and we'll see you – we won't reassemble at 10, we'll await notification from you of a question or verdict. All right, thanks, members of the jury.[45]

52 The jury then left the court at 4:41 pm, neither counsel having demurred from what the judge had told the jury.

53 According to records obtained from the County Court, the next day — Friday, 11 March 2022 — the first juror entered the jury room at 9:01 am, and, by 9:29 am, half the jury were present in the jury room. One juror entered during that period at 9:13 am, and — unaccompanied by a jurykeeper — then exited, only to re-enter at 9:22 am.

54 The jury did not assemble the following day — Monday, 14 March 2022 — since it was a holiday. On Tuesday, 15 March 2022, the records show that the first juror arrived at 8:58 am, and, by 9:39 am, nine jurors were present. A juror who arrived at 9:39 am left at some point and re-entered the jury room at 9:47 am.

The parties' submissions on ground 1

55 Counsel for the applicant submitted that jurors who arrived at court before 10:00 am on Friday, 11 March, and Tuesday, 15 March 2022, were free of any supervision by jurykeepers, and were at liberty to use their telephones and electronic devices until their seizure at 10:00 am.

56 Furthermore, the effect of the judge's instruction above,[46] counsel submitted, was to grant permission to the jury to deliberate even if all of their number were not present in the jury room. As 'jury members within the room' they could 'read transcript' or 'written material' and 'look at the evidence' or 'an exhibit'. There was 'no problem with that… they [did not] have to all be present in the room'. The applicant's counsel contended that the jury were given express permission, for example, to view TB's VARE and special hearing evidence, or the applicant's record of interview. It is unrealistic to expect or infer that they did so as independent islands, quarantined from one another and against the collaborative process that distinguishes a jury's deliberations. In the absence of a direction that precluded them from deliberating until they had all arrived, the jury were at liberty — and been given permission — to do so. And until 10:00 am — when their jurykeepers were back on hand — the jury did so without having first surrendered their phones and electronic devices.

57 Further, the applicant's counsel submitted that, in the case of the two jurors who arrived, then exited the juror room and re-entered, it is irrelevant whether they left the court building. They may not have left the building, but they were exposed to contact with people other than fellow jurors whilst unaccompanied, and while other jurors deliberated. The judge's instructions to the jury, and the events that followed them,

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45 Emphasis added.

46 At [49].

counsel submitted, amounted to a material or fundamental irregularity, giving rise to a substantial miscarriage of justice.

58 Counsel for the respondent submitted that the possibility that one or more jurors might have read material, or viewed evidence, independently of other jurors, was not an irregularity (fundamental or otherwise); but even if it were, it could not have had any impact on the result of the trial. A juror individually acquainting himself or herself within the jury room of relevant material is doing no more or less than he or she would have been entitled to do when all jurors are present.

59 Moreover, two jurors leaving the jury room prior to the agreed time at which the jury would continue to deliberate (and at a time when not all jurors were yet present) cannot be said to be a serious departure from the prescribed processes for trial. The respondent's counsel submitted that the available facts do not support the hypothesis that some kind of contamination may have occurred which could have affected the jury's verdicts. The scheduled recommencement of deliberations — that is, the time at which the jury were to assemble for that purpose — had not yet been reached. Hence, the entire jury — all of whom were subject to the separation oath or affirmation — had not yet assembled. The two jurors had been released home overnight subject to their oaths. Subject to those oaths, the two jurors could properly have wandered the streets in the court precinct rather than arriving at court at the times indicated. Stepping out of the jury room for a few minutes prior to the scheduled recommencement of deliberations for the day could have had no influence on the verdicts.

60 Finally, counsel for the respondent submitted that there was no basis for concluding that any of the jury might have had their telephones or electronic devices with them during deliberations.

61 In our opinion, the applicant has failed to make good the contentions that the jury may have deliberated while incomplete, or that jurors may have separated from the rest of the jury during deliberations, thereby risking outside communication.

Consideration of ground 1

62 The expressions 'deliberate', 'deliberation' and 'deliberating' are not defined in the Act.

63 In a criminal trial, s 46(2) of the Act permits a court to discharge a jury, or take a majority verdict, if the jury has been unable to reach a verdict 'after *deliberating* for a period of time that the court thinks is reasonable, having regard to the nature and complexity of the trial'. What is comprehended by the term 'deliberating', however, is not defined.

64 Further, although s 50 permits the separation of a criminal jury 'after the jury has retired to consider its verdict and before the verdict is given' — and therefore by necessary implication contemplates that the jury having separated will come back together at some point to continue deliberating — the Act does not spell out any conditions pursuant to which the jury will reconvene, or when the jury will be considered to have resumed deliberating.

65 In *Papazoglou v The Queen* — a case in which (among other things) a miscarriage of justice was said to have resulted from the fact that a juror did not participate in deliberations — Priest JA (in dissent) observed that 'a jury is deliberating when involved in the process leading to decision — discussion, debate, consideration of issues, and the like'.[47] He cited a passage from *R v Young*,[48] an unusual case in which jurors in a trial for murder, having retired to consider their verdicts, were accommodated in a hotel overnight. Four members of the jury, whilst at the hotel, conducted a session with a Ouija board, where questions were asked of the deceased, and answers purportedly received, which were highly prejudicial to the appellant. In reaching the conclusion that what occurred at the hotel was not in the course of 'deliberations' — s 8(1) of the *Contempt of Court Act 1981* (UK) made it a contempt to obtain, disclose or solicit 'any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations' — the Court of Appeal (Lord Taylor of Gosforth CJ, Waterhouse and Bell JJ) observed:

> *Oxford English Dictionary* definitions of 'deliberation' include 'consideration with a view to a decision', 'weighing … in the mind', 'careful consideration', 'discussion of…reasons for and against', 'debate'. In our view, the whole object of sending a jury to a hotel is to give them a break, rest or respite from their deliberations. It would be absurd to suggest that when every juror is in a separate bedroom, whatever their thoughts, the jury could collectively be described as being 'in the course of their deliberations' …[49]

66 In our opinion, the jury would not have understood the judge's comments[50] to be an invitation to deliberate; that is, discuss, debate or consider issues with a view to reaching a decision. Rather, we consider that the jury would have understood no more from what the judge said than, in the period leading up to the time that the whole jury had reconvened and were ready to resume deliberations, it was permissible for individual jurors to read transcript (or other written material) or look at exhibits. Self-evidently, although reading transcript or looking at an exhibit may take place in the course of deliberating, those activities of themselves do not constitute deliberations. We consider that nothing in what the judge said might reasonably have been construed as an invitation to deliberate prior to the whole jury once more being present. In those circumstances, the fact that individual jurors may have left, then returned to, the jury room, prior to the time appointed for the resumption of deliberations, is of no moment.

67 As formulated, the first ground cannot be upheld.

68 Before we leave this ground, we would observe that a deal of the difficulty in this case arose from the fact that the Act is silent as to the manner in which juries are to reconvene having been permitted under s 50 to separate. In *Youssef*, this Court made it clear that, whilst a jury is deliberating — having reconvened after previously being permitted to separate pursuant to s 50 — the jury must remain subject to the supervision of suitably sworn (or affirmed) jurykeepers, and must not leave the court unaccompanied by

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47 *Papazoglou v The Queen* (2014) 45 VR 457, 535 [354]; [2014] VSCA 194 ('*Papazoglou*').
48 *Papazoglou* (2014) 45 VR 457, 532–3 [347] (Priest JA) citing *R v Young* [1995] QB 324 ('*Young*').
49 *Young* [1995] QB 324, 331.
50 At [49] above.

keepers.[51] We consider that, in a case in which a trial judge permits a jury to separate under s 50, he or she should fix a time at which deliberations are to resume, and impress upon the jury that:

(a) jurors who arrive in the jury room prior to that time are not to discuss the case in the absence of the whole jury and before the time so fixed; and

(b) from the time deliberations resume, the jury must remain together subject to the supervision of sworn or affirmed jurykeepers, and must not leave the jury room during the course of deliberations unless in the company of jurykeepers.

Conviction ground 4: failure to give a tendency warning

69 The charged offending was alleged to have occurred on either side of a camping trip to New South Wales. TB claimed that he was raped more than once during that trip. That evidence was led by the prosecution to rebut any suggestion that the offending stopped and started again during the offending period, and to place the charged acts in their proper context. The prosecution did not, however, rely on tendency reasoning.

70 Further, the prosecution led evidence that the applicant had occasionally smacked TB. That evidence was led to explain why TB had delayed in reporting his alleged abuse, and to explain his submission to the applicant.

71 The applicant's trial counsel sought a direction under s 27 of *the Jury Directions Act 2015* ('JDA') dealing with the use of 'other misconduct' evidence, but did not seek a direction under s 29, 'that the trial judge warn the jury not to use the evidence as tendency evidence'.

72 In this Court, counsel for the applicant submitted that a substantial miscarriage of justice had arisen as a result of the judge's failure to give a direction under s 29. Trial counsel should have asked for it; and, in any event, the trial judge should have concluded under s 16(1) of the JDA that there were 'substantial and compelling reasons' for giving a warning under s 29 despite the absence of a request from counsel.

73 Prior to the jury viewing TB's evidence, the judge directed the jury that the evidence of what occurred interstate was led for the limited purposes of providing the 'full context', and to explain why the applicant 'felt that he could offend in what might be described as a brazen manner'; and the evidence that the applicant 'used to smack' TB was advanced by TB 'as a reason for submitting to the alleged offending in this case' and 'as a reason why there was no immediate complaint'. The judge told the jury to 'keep the evidence in perspective', and not to 'decide the case on the basis of any feelings of sympathy or prejudice, or because of what you learn about the [applicant]'. Defence counsel took no exception to these directions.

74 Further, in his charge, when dealing with the applicant's alleged conduct on holiday, and TB's allegation that the applicant 'would on occasions hit him', the judge gave the following directions (which again were not the subject of exception):

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[51] See [46] above.

> The prosecution has led evidence that the accused committed sexual offences on the holiday camping trip against the complainant. There are no charges relating to that evidence and the evidence therefore is not directly related to any of the offences charged on the indictment.
>
> The prosecution says this evidence is relevant because it shows that the alleged offending in 2016 continued, when they went on holiday, when the opportunity arose. It did not stop when they went away and then start up again when they got back, which you might find implausible. It places the charged act in the full context of what the prosecution allege was going on in 2016, so you have heard it to understand that the prosecution case is that this offending started, continued on the holiday, continued afterwards and then stopped. So that is the reason that you have heard that.
>
> You also heard evidence from the complainant that the accused would on occasions hit him. …
>
> …
>
> And you must keep the evidence in perspective. It is only part of the prosecution's case. As I told you, you must not decide this case on the basis of any feelings or sympathy or prejudice because of what you learn about the accused.
>
> This direction goes also I think for some of the issues this morning about the accused's way of parenting and how hard he was, as well. ... You do not decide the case on the basis of feelings or sympathy or prejudice because of what you learn about the accused. The evidence has been led for the purposes that I have described, members of the jury, and you must not use the evidence for any other purpose.

75 Sections 27, 29 and 30 are found in div 2 of pt 4 of the JDA. As we have mentioned, the applicant's trial counsel requested a direction under s 27. So far as relevant, it provides:

> (2) In giving a direction referred to in subsection (1), the trial judge must—
>
> (a) identify how the other misconduct evidence is relevant (whether directly or indirectly) to the existence of a fact in issue in the trial and direct the jury not to use the evidence for any other purpose; and
>
> (b) if the evidence forms only part of the prosecution case against the accused, inform the jury of that fact; and
>
> (c) direct the jury that it must not decide the case based on prejudice arising from what the jury has heard about the accused.
>
> (3) In giving a direction referred to in subsection (1), the trial judge need not—
>
> (a) explain further what the jury should consider in deciding whether to use the other misconduct evidence; or
>
> (b) identify impermissible uses of the other misconduct evidence; or
>
> (c) refer to any other matter.

76 It is plain that the directions given by the judge pursuant to the request of trial counsel were in accordance with the requirements of s 27(2). As we have indicated, however, the applicant's counsel in this Court submitted that the judge should also have given a direction under s 29, notwithstanding the absence of any request by trial counsel that he do so.

77 Under s 29(1), prosecution or defence counsel may request under s 12 that the trial judge warn the jury not to use other misconduct evidence as 'tendency evidence'. Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so. Subsection (2) provides that 'it is a good reason for not giving the requested direction if the trial judge considers that there is no substantial risk that the jury might use the evidence as tendency evidence'. As already noted, s 16 provides that even if a particular direction has not been requested, the trial judge must give the jury a direction if the trial judge considers that there are substantial and compelling reasons for doing so.

78 Significantly, s 30(1) provides that, except as provided by that division, 'a trial judge is not required to direct the jury regarding the use of other misconduct evidence'; and s 30(2) provides that any rule of common law to the contrary is abolished. Hence, where evidence of sexual misconduct extraneous to the charged conduct is introduced at trial, the common law obligations imposed by cases such as *R v Grech*[52] that the judge give a 'non-substitution' direction, and warn the jury not to reason from such evidence that the accused is the kind of person likely to have committed the offences charged, have been statutorily abrogated.

79 In our view, the fact that the applicant's trial counsel sought a specific direction under s 27 is a clear indication that she considered the directions given under that section were sufficient to protect her client's interests. We would also infer that, in circumstances where the prosecution had not sought to rely on tendency reasoning, defence counsel made a deliberate forensic choice not to request a direction under s 29, so as to ensure that a lid was kept on Pandora's box. We do not consider that there were substantial and compelling reasons that required the trial judge to give a direction under s 29 in the absence of a request.

80 Ground 4 cannot be upheld.

Conviction ground 2: Unsafe and unsatisfactory verdict

81 In support of ground 2, counsel submitted that the only issues at trial were TB's credibility and reliability. Notwithstanding that the jury must have found TB to be credible and reliable, counsel submitted, on the whole of the record this Court should conclude that the jury should have entertained a reasonable doubt about the applicant's guilt.

82 Broadly, in advancing that submission, the applicant's counsel relied on the following 16 factors:

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52 [1997] 2 VR 609.

(1) *TB's motive to lie.* TB had made allegations of sexual offending against the applicant after the applicant discovered from images and footage on TB's telephone that TB had been smoking cannabis and threatened to send TB back to the Philippines.

(2) *Allied to the above, TB's delay in complaining*. The alleged offending occurred when TB was aged 10, yet he did not complain until three years later, when he was 13, in circumstances in which the complaint closely followed the discovery of his drug use and the associated threat of deportation.

(3) *The evidence of TB's relationship with his stepfather*. TB's best friend noticed nothing in his behaviour suggestive of ongoing abuse; and, importantly, gave evidence that TB wanted to spend time with his stepfather.

(4) *The content of TB's complaint*. Initially, when TB told his mother that 'dad raped me', he said that the offending occurred when she was in the shower or doing dishes, yet none of the charged acts were said to have taken place at those times. TB also joked with his friend about rape via telephone text messages eight weeks earlier. Moreover, when he spoke to police two days after complaining to his mother, he said that the applicant 'whack[ed]' him, and provided his later narrative only after what the judge at the special hearing described as 'extraordinary' and 'vigorous cross-examination' by the informant.

(5) *The vagueness of TB's evidence at the special hearing*. TB was aged 15 when he gave evidence at the special hearing. Counsel for the applicant submitted that his evidence was vague when compared to the detailed VARE. He frequently said that he 'didn't know' or 'couldn't remember'.

(6) *The 'detail' in TB's account, in circumstances in which other evidence demonstrated many details were wrong*. By way of example, when describing his alleged oral rape, TB said the applicant's penis was 'hairy', in circumstances in which other uncontradicted evidence was that the applicant shaved his genitals. Moreover, interrogation of TB's telephone showed that he had accessed pornography on the internet, and had made crude jokes with others about rape.

(7) *The 'red herring' constituted by the lubricant evidence*. Although the prosecutor relied on the police finding lubricant to support TB's account of anal rape, other evidence suggested that TB was aware that his stepfather and mother kept lubricant in a wardrobe in the master bedroom.

(8) *The fact that nobody noticed that the alleged offending was taking place*. Although sexual offending against children is often brazen, the fact remained that the allegedly painful and distressing offending took place under the noses of his mother and siblings — at times when they were very close by — yet they noticed nothing amiss.

(9) *The evidence concerning 'hot yoga'*. TB gave evidence that the offending on charges 1 and 2, and 11 to 13, occurred during the day, when his mother was at 'hot yoga', yet TB's mother gave evidence that she only took hot yoga in the

evening. She also said that if the applicant was at home and not working during the day and TB was there, TB's two siblings would also have been present.

(10) *TB's description of the applicant's genitals*. TB's evidence was that the applicant's penis was 'hairy'; he remembered feeling pubic hair on his lips; and he was left with hair in his mouth after the last incident of oral penetration. TB's mother gave unequivocal evidence, however, that throughout 2016, when the applicant returned from working, he would shave off all of his pubic hair in the shower.

(11) *Whether TB's siblings were at home when the alleged offending occurred*. TB gave evidence that most of the offending occurred when his siblings were not at home, yet other evidence established that — save for a day here and there — when the applicant was at home and not working, TB's brother and sister were also at home.

(12) *The unlikelihood of the uncharged offending having occurred in a public shower block.* If the uncharged offending occurred in the manner alleged by TB, it would have been within metres of other campers in circumstances where the risk of detection was high. Moreover, evidence from TB's mother and siblings suggested that the applicant showered with the children together.

(13) *The brazen and high-risk nature of the alleged offending*. On TB's evidence, the sexual offending in the workshop occurred when his mother and siblings were upstairs. Indeed, the applicant was said to have anally raped TB, and ejaculated into his mouth during forced fellatio, only moments before sitting down to dinner. In those circumstances, detection must have been a virtual certainty.

(14) *The absence of threats or manipulation*. TB did not allege that the applicant — despite his absence from home for weeks at a time — threatened him or took steps to ensure his silence. There was no evidence that the applicant tried to manipulate TB psychologically in a way that is common in cases of sexual abuse (especially involving family members).

(15) *The alleged offending occurred 'out of the blue' then stopped suddenly*. According to the evidence, the alleged offending commenced in 2016 without any precursor, whether by 'grooming' or otherwise. The sexual offending — which was of an extreme kind and invited the risk of detection — then proceeded for six to eight months before suddenly stopping, never to occur again. This was a very unusual feature.

(16) *The applicant was of positive good character and made emphatic denials*. As soon as the allegations were made, the applicant denied them in his wife's presence and accused TB of making up a story. The applicant — a man whose positive good character was attested to at trial by witnesses who had known him for decades — then made emphatic denials to police.

83 Section 276(1)(a) of the CPA provides that the Court of Appeal must allow an appeal against conviction if it is satisfied that 'the verdict of the jury is unreasonable or cannot be supported having regard to the evidence'. In applying s 276(1)(a), we must ask ourselves whether we are satisfied that it was open to the jury upon the whole of the

evidence to be satisfied beyond reasonable doubt that the applicant was guilty.[53] The relevant test was laid down by the majority in *M* as follows:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[54]

84 More recently, in *Pell v The Queen*, the High Court endorsed the approach in *M*, and said:

> The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment — either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence — the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.[55]

85 In light of the matters relied upon by the applicant, the jury might well have entertained a reasonable doubt about the applicant's guilt. But they were not bound to do so. It must be assumed that the jury, having seen and heard TB give evidence, assessed that evidence to be credible and reliable. Examining the whole of the evidence for ourselves, and taking into account, in particular, the various criticisms made of TB's evidence — its claimed inconsistencies, discrepancies and inadequacies — we have been unable to conclude that the jury, acting rationally, was compelled to enjoy a reasonable doubt as to the applicant's guilt on any of the charges.

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53 *M v The Queen* (1994) 181 CLR 487, 493–5 (Mason CJ, Deane, Dawson and Toohey JJ); [1994] HCA 63 ('*M*').

54 (1994) 181 CLR 487, 494–5 (Mason CJ, Deane, Dawson and Toohey JJ); [1994] HCA 63 (citations omitted).

55 *Pell* v *The Queen* (2020) 268 CLR 123, 145 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12 (citations omitted) ('*Pell*'). See also *Dansie v The Queen* (2022) 403 ALR 221, 224–6 [8]–[15] (Gageler, Keane, Gordon, Steward and Gleeson JJ); [2022] HCA 25.

86 That the applicant was a man of positive good character, who made spontaneous and emphatic denials of the allegations made against him, is significant. There is also a deal of force in several of the applicant's contentions concerning the discrepancies and other imperfections in TB's evidence.

87 Indeed, there were a number of aspects which had the potential to diminish confidence in the credibility and reliability of TB's evidence. Importantly — and even bearing in mind the experience of courts that children often delay in complaining — TB did not complain for some years after the alleged offending ceased, in circumstances where his complaint only appears to have been made upon being detected using cannabis, and upon being threatened with the drastic disciplinary action of being sent back to the Philippines (so much, it might be concluded, also providing a powerful motive for lying). Added to that, TB's evidence at the special hearing in some respects was vague and lacking in detail.

88 Moreover, there were significant aspects of TB's evidence that were inconsistent with other evidence. Among those discrepancies were TB's assertions that the applicant's genitals had hair — in circumstances where other evidence suggested he was clean-shaven — and his evidence that some of the offending occurred when his mother was at yoga, and when his siblings were not at home.

89 Quite obviously, however, not every inconsistency, discrepancy or inadequacy in a child complainant's account will necessarily lead to the conclusion that a guilty verdict based on the complainant's evidence must be considered to be unreasonable or unable to be supported having regard to the evidence. The issue must always be whether, on the whole of the evidence — taking proper account of any imperfections in the complainant's (and other) evidence — it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

90 While each of the various points raised by the applicant might be capable of being answered on an individual basis, the task of this Court is, as we have said, to look at the evidence as a whole and to determine whether, in all of the circumstances, it was open to the jury to find the applicant guilty. In our view, all of the features relied upon by the applicant as impinging upon the credibility and reliability of TB's evidence were well within the capacity of the jury to evaluate. The jury conducted its evaluation of the evidence after the benefit of the jurors sharing their subjective assessments of the witnesses, and reached a unanimous decision. We do not — and cannot — 'perform the same function in the same way as the jury, or with the same advantages that the jury brings to the discharge of its function'.[56] And self-evidently, having evaluated TB's evidence, the jury assessed it as being credible and reliable.

91 Although it was an unusual — although not unprecedented — feature of the alleged offending that it started without antecedent grooming (or similar conduct) and then ended suddenly, that is a factor that the jury were capable of evaluating. The jury were also capable of assessing the fact that the alleged conduct was apparently brazen and risked detection, a feature which is not uncommonly found in such cases. So, too, would

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56 *Pell* (2020) 268 CLR 123, 145 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

the jury be capable of properly evaluating other evidence in the case, including that relating to the presence of lubricant in the applicant's wardrobe, and TB's access to pornography and jokes about rape.

92 Having carried out our own review of the evidence, we are not persuaded that the jury must have had a reasonable doubt about the applicant's guilt on any of the charges he faced. As a result, ground 2 must fail.