Muller v The Queen [2016] NTCCA 1

PARTIES:	LANE JOSEPH MULLER
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 14 of 2015 (21436631)
DELIVERED:	28 JANUARY 2016
HEARING DATES:	16-20 NOVEMBER 2015
JUDGMENT OF:	MILDREN AJ
APPEALED FROM:	HILEY J

REPRESENTATION:

Counsel:

Appellant:	L Bennett
Respondent:	S Geary

Solicitors:

Appellant:	LBLLB Louise Bennett Criminal Lawyers
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
Judgement ID Number:	Mil16537
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Muller v The Queen [2016] NTCCA 1
No. CA 14 of 2015 (21436631)

BETWEEN:

LANE JOSEPH MULLER
Applicant

AND:

THE QUEEN
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 28 January 2016)

Mildren AJ:

[1] This is an application for leave to appeal against conviction. The usual practice is that applications for leave are dealt with by a single Judge exercising the powers of the Court of Criminal Appeal[1] and no reasons are required to be given[2]. I have decided to provide short reasons in this case because the grounds relied upon are unusual.

[2] The applicant was found guilty by a jury of the offence of having had sexual intercourse without consent. The trial commenced on 16 November 2015. The evidence, closing addresses and the learned trial judge's summing up

[1] *Criminal Code*, s 429.
[2] *Supreme Court Rules*, r 86.14(4).

concluded on the 19th of November and on the afternoon of that day the jury retired to consider its verdict. However, there was an air-conditioning malfunction such that the jury deferred deliberations until the following day. At some time shortly before the jury had been deliberating for 6 hours on the 20th, which was a Friday, the foreman sent a note to the trial judge to the effect that the jury was unable to come to a unanimous verdict and that the foreman did not believe that the jury would get to a position when it would. The trial Judge did not re-convene the Court, nor were the contents of the foreman's note made aware to counsel immediately. His Honour decided to wait until the statutory 6 hours had passed and then reconvened the Court in the absence of the jury. His Honour then revealed the contents of the foreman's note and advised that, subject to anything counsel might have to say, he proposed to tell the jury that he was able to take a majority of verdict of ten and to give them a Black direction at the same time. His Honour also indicated that he intended to tell the jury that the Court would reconvene at 4:30pm "just so that everybody can decide whether or not they want to sit on tonight or come back tomorrow or Monday." No objection was taken by either counsel to the course which his Honour proposed.

[3] Shortly thereafter, the precise time of which is unclear, but it was after 3:15pm, the Court resumed and his Honour began by confirming that the relevant period of six hours had passed and then he advised the jury that he was able to take a majority verdict of ten or more. His Honour then gave a Black direction, at the beginning of which he advised the jury about his

intention to reconvene at 4.30pm and to then ask the jury whether it would prefer to sit on or to come back Saturday morning on Monday morning. At the end of the direction his Honour said:

> "So I will ask that you continue deliberations for a short while longer in the hope that you can reach a unanimous verdict, but if it becomes plainly impossible after you've considered my further remarks, that you cannot reach a unanimous verdict, then attempt to reach a verdict, a majority verdict of ten or more."

[4] At approximately 4:30pm the Court reconvened and a majority verdict was taken.

[5] Subsequently, in an envelope addressed to the Applicant's solicitors, one of the jurors sent a statutory declaration concerning what occurred in the jury room after his Honour had delivered the Black direction. The statutory declaration was afterwards brought to the attention of the trial Judge. It does not appear that his Honour thought it necessary to order an investigation into the matters referred to by the juror. The envelope and its contents were sealed, "not to be opened without the leave of the Court" and placed on the Court file. Copies of the statutory declaration were made available to counsel by the trial Judge for the purpose, as I understand it, of hearing further submissions. I have read the statutory declaration as one of the grounds of the proposed appeal appears to rely on its contents.

[6] The proposed grounds of appeal are as follows:

(a) The learned trial judge erred as a matter of law in failing to reconvene the Court at the first reasonable opportunity after being

informed by the jury that they were unlikely to reach a unanimous vote (sic):

(b) The learned trial judge erred in giving the jury a majority verdict direction at the same time but before giving a Black direction to the jury, thereby impermissibly undermining the Black direction.

(c) The learned trial Judge impermissibly put pressure on the jury to reach a majority verdict rather than a decision according to their individual oaths as is required by the Black direction;

(d) There was a consequent material irregularity in the trial amounting to a miscarriage of justice in that the jury or certain members of the jury were pressured by other jury members to return a verdict otherwise than in accordance with their individual oaths as jurors.

[7] The power to entertain a majority verdict is contained in s 368 of the *Criminal Code (NT)* which is in the following terms:

> Where upon a trial a period of not less than 6 hours has elapsed since the jury retired and the jurors are not unanimously agreed upon their verdict the court shall:
>
> (a) if the jury consists of 11 or 12 jurors and 10 of those jurors are agreed upon a verdict to be given, take and enter that verdict as the verdict of the jury; or
>
> (b) if the jury consists of 10 jurors and 9 of those jurors are agreed upon a verdict to be given, take and enter that verdict as the verdict of the jury.

[8] This provision was considered by the Court of Criminal Appeal in *CEV v R*[3], *Tipiloura v R*[4] *and in Fittock v R*[5]. There are now provisions enabling majority verdicts in nearly all states, but the provisions are far from

[3] [2005] NTCCA 10 at [16] – [20].
[4] (1992) 2 NTLR 216 at 218
[5] (2001) 11 NTLR 52 at 59.

uniform. In New South Wales, for example, the legislation provides for a procedure requiring the trial Judge to ascertain from the foreman that there is no possibility of a unanimous verdict, the time after which a majority verdict can be taken is longer, and the majority must be at least 11 jurors. In Victoria, the legislation specifically provides for discretion in the trial judge as to whether or not to take a majority verdict at all. In Western Australia, a majority verdict is available after only 3 hours of deliberation. If the offence is an offence against a law of the Commonwealth, majority verdicts are not possible. The various decisions of state and territory courts relating to the procedure to be adopted in relation to when juries ought to be told about the possibility of a majority verdict in relation to non-Commonwealth offences was discussed by the Court of Criminal Appeal (NSW) in *Ingham v R*[6]. There is no decision which I can find which has upheld a ground of appeal that a direction to a jury concerning the possibility of a majority verdict has undermined a Black direction, although there are some cases which have at least arguably admitted that possibility in appropriate circumstances. In the present case much might depend on whether the word "shall" in s 368 of the Code is interpreted to mean "must" or whether it confers a discretionary power[7], and the facts in the present case are distinguishable from the facts in those cases which do not support the applicant's case.

[6] [2011] NSWCCA 88.
[7] In *Tipiloura v R* (1992) 2 NTLR 216 at 219 it was held that the provision was mandatory and there was no discretion to refuse to accept it. Arguably this made it all the more important for the trial judge to exercise caution before instructing the jury on the power to accept a majority verdict.

[9] In the present circumstances, I consider that proposed grounds (b) and (c) are reasonably arguable, notwithstanding that no objection was taken by counsel at the trial, and raise important questions of criminal practice and procedure which have relevance beyond the present case. I note that counsel for the accused at the trial was inexperienced which may explain why no objection was taken.

[10] As to ground (a), I do not consider that, taken as a separate ground, it has a reasonable chance of success, and therefore leave to argue this ground is refused.

[11] As to ground (d), in so far as it asserts actual pressure by the course the trial judge took, relying upon the Statutory Declaration of the juror, in my opinion there is no substance to the ground in that form and leave to rely on that ground in its present form will be refused.

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