Ashley v The Queen [2016] NTCCA 2

PARTIES:	ASHLEY, Darren Anthony 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 9 of 2014 (21218788)
DELIVERED:	24 March 2016
HEARING DATES:	8 and 9 February 2016
JUDGMENT OF:	RILEY CJ, SOUTHWOOD and KELLY JJ
APPEALED FROM:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – Appeal against conviction – jury found accused guilty of murder – fair trial – impartiality – presumption of innocence – whether a juror's note gave rise to an apprehension of bias – whether the jury ought to be discharged during the course of a trial – exclusionary rule not applicable – whether there was a miscarriage of justice due to a failure to discharge the jury – whether apprehended bias could be overcome by direction – a fair minded and informed member of the public might in the circumstances entertain a reasonable apprehension that the jury would not discharge their task impartially – appeal allowed, conviction quashed and a new trial ordered – *Criminal Code* (NT) s 411.

CRIMINAL LAW – EVIDENCE – Notice of contention – section 66 *Evidence (National Uniform Legislation) Act* (NT) – admissibility of hearsay evidence at trial – exceptions to the hearsay rule – where accused gave an undertaking to give evidence during the defence case but ultimately did not give evidence at trial – admissibility of the accused's exculpatory

statements – at the time the question of admissibility arises whether on the balance of probabilities it has been established that the accused is to be called to give evidence - notice of contention dismissed – *Evidence (National Uniform Legislation) Act* (NT) s 66.

Criminal Code (NT) s 359, s 371(1), s 373, s 411, s 411(1)
Evidence (National Uniform Legislation) Act (NT) s 17(2), s 66, s 66(2), s 142

Constantinou v The Queen [2015] VSCA 177; *Webb v The Queen* (1994) 181 CLR 41; *R v Crisologo* (1997) 99 A Crim R 178; *R v Parkes* (2003) 147 A Crim R 450, applied.

Cant v The Queen (2002) 12 NTLR 133; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *R v Czajkowski* (2002) 137 A Crim R 111; *Re Matthews and Ford* [1973] VR 199, approved.

Smith v State of Western Australia (2014) 250 CLR 473, distinguished.

Holt and Merriman v R (1996) 87 A Crim R 82; *R v Boland* [1974] VR 849; *Vaise v Delaval* (1785) 1 T.R. 11; (1785) 99 ER 944, considered.

McDonough Power Equip Inc. v Greenwood (1984) 464 US 548; *R v Box* [1964] 1 QB 430; *R v Syme* (1914) 30 TLR 691; *Smith v Phillips* (1982) 455 US 209, cited.

R v Matthews [1991] 1 VR 534, followed.

R v Ashley [2014] NTSC 26, reversed.

Benjamin T. Huebner, “Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony” (2006) 81 *New York University Law Review* 1469.

REPRESENTATION:

Counsel:

Appellant:	A Elliott
Respondent:	D Morters

Solicitors:

Appellant:	Ramdhas Poli
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ashley v The Queen [2016] NTCCA 2
No. CA 9 of 2014 (21218788)

BETWEEN:

DARREN ANTHONY ASHLEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, SOUTHWOOD and KELLY JJ

REASONS FOR JUDGMENT

(Delivered 24 March 2016)

RILEY CJ:

[1] I agree with Southwood J.

SOUTHWOOD J:

Introduction

[2] This is an appeal against conviction. On 5 June 2014 the appellant was found guilty of the crime of murder following a trial by jury. On 3 July 2014 he was sentenced to life imprisonment with a non-parole period of 22 years. Both the sentence and the non-parole period commenced on 15 May 2012.

[3] The main ground of appeal is that there was a miscarriage of justice as the learned trial Judge allowed the trial to proceed despite receiving, on the

eleventh day of the trial, a note from one of the jurors which gave rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that three of the jurors might not discharge their task impartially.

[4] There was one further ground of appeal. It was based on alleged prosecutorial misconduct which was also said to have rendered the trial unfair to the appellant. Two parts of this ground of appeal were abandoned by the appellant and, in light of the Court's decision on the main ground of appeal, it is unnecessary to consider the remaining part. In any event, the whole of this further ground of appeal was without merit. Counsel are reminded that the Court is best assisted if they exercise discernment and courage. A poor ground of appeal does not make another poor ground of appeal a good ground of appeal, and a poor ground of appeal potentially weakens a good ground of appeal because it has a tendency to distract the Court from the true ground of appeal.

The Juror's note

[5] The Crown case was that on 15 May 2012 the appellant murdered his ex-partner, Mrs Kirsty Ashley, by stabbing her to death at her brother's house because the appellant was angry that she had separated from him. The defence case was that the evidence to be led by the Crown did not exclude the reasonable possibility that someone other than the appellant murdered the deceased.

[6] The trial commenced on 7 May 2014. Two reserve jurors were empanelled. On the same day the trial Judge made her opening remarks, as did both counsel. Her Honour also gave the jury a written outline entitled "Outline for Jury" at the end of her summing up.

[7] During her Honour's opening remarks to the jury she gave the jury instructions about the need to approach the evidence with a purely objective and impartial mind; the need to reach their verdict according to reason and not emotion; the need to consider the whole of the evidence; the need for the jury to keep an open mind which was receptive to changes in any provisional views about the facts as more evidence was led; not to draw any final conclusions until the jury retired to consider its verdict; the burden and standard of proof that the Crown had to meet; the presumption of innocence and the principle that the accused did not have to prove anything.

[8] Of relevance to this appeal, the Outline for Jury stated the following.

> The jury's role is:
>
> (a) To evaluate the evidence and reach conclusions about the relevant facts; and
>
> (b) To decide, at the end of the trial, whether the Crown has proven beyond reasonable doubt that the accused is guilty of the charge on the indictment.
>
> There are a number of instructions and other things that you must bear in mind as you perform your role:

- As you listen to a witness you should approach the witness's evidence with a purely objective, impartial and open mind.

- You should not reach any final conclusions until you have heard all the evidence, the closing addresses of counsel and my summing up. That does not mean that you cannot form provisional views.

Your task is to determine whether the Crown has proven the guilt of the accused person beyond reasonable doubt. When you deliver your verdict you will be asked whether the accused is guilty or not guilty. There are two important things to bear in mind in the process of considering your verdict:

- First, the onus of proof is on the Crown. The accused does not have to prove anything. The accused is entitled to the presumption of innocence. Every person who appears in a criminal court is presumed to be innocent until proven guilty. Accordingly, the accused is presumed innocent unless and until you the jury determine that he is guilty – after you have heard all the evidence.

- Second, the Crown must prove the guilt of the accused beyond reasonable doubt. The words, "beyond reasonable doubt", are ordinary English words. The words mean what they say. If after you have heard all of the evidence, you are left with a reasonable doubt about whether the accused is guilty of the charge on the indictment you must find him not guilty of that charge. On the other hand, if you are satisfied of the guilt of the accused beyond reasonable doubt you must do your duty and find him guilty of the charge.

[9] On 7 May 2014 the Crown called its first witness. Between 7 May 2014 and 20 May 2014, 29 Crown witnesses gave evidence. On 20 May 2014 the electronic record of the appellant's interview by the police was tendered and played in Court. This record constituted the accused's evidence as he ultimately elected not to give evidence at the trial. As at 21 May 2014, nine witnesses remained to be called by the Crown.

[10] On 21 May 2014 a juror sent the trial Judge the following note.

> Dear Judge Blokland
>
> At a suitable time, would it be possible for you to please remind the jurors of our role and instructions, and the onus and burden of proof, as made clear in the 'Outline for Jury'.
>
> Since day two, a most vocal trio of jurors have relentlessly speculated along the lines that *the accused is guilty until there is convincing proof that he is innocent*, including who else did it and why. They seem to misunderstand or don't understand, the content of the 'Outline' (if they have read it). *One of them stridently argues, for instance, that 'obviously' he is guilty; otherwise he would not be arrested and charged*. Some of us try to point to the principle of presumption of innocence until proven guilty based on the evidence presented in the court room only, and that we haven't heard all of the evidence yet. But I think it has to come from you to be taken seriously [emphasis added].
>
> I ask this in confidence. If you are required to mention a juror's note in order to act on it, I withdraw it now. This trio will insist to know who wrote it, as they did with a juror's note last week. I don't want to fuel their already rather immature attitude to those who don't agree with them.

[11] Her Honour raised the juror's note with counsel, and counsel for the defence applied to have the jury discharged as the note gave rise to an apprehension of bias which could not be cured by further directions to the jury.

[12] On 21 May 2014 the trial Judge ruled that she would not discharge the jury as the matters raised in the juror's note could be resolved by giving the jury further directions about their role and the burden of proof. On 22 May 2014 her Honour gave the jury the following directions.

> … [T]his is a reasonably lengthy trial.

> As occurs in trials that are reasonably lengthy, I just want to remind you of a couple of important matters that I indicated at the outset because, bear in mind we are at the stage in the trial where the prosecution has not yet finished its case and the defence has not commenced its case.
>
> Firstly, I want to remind you that the onus of proof is on the Crown. The accused does not have to prove anything. The accused therefore enjoys, as does every person who comes before an Australian court, the presumption of innocence. So far as I mentioned to you, the accused is presumed to be innocent unless and until you as the jury determine that he is guilty after you have heard all of the evidence, although of course I said at the outset it is natural that you will form some provisional views about witnesses and that of course is a natural part of the process and is to be encouraged.
>
> But because of the presumption of innocence that is fundamental, you must not form any concluded view about the guilt of the accused until all of the evidence is in, you have heard counsel's addresses and my summing up. I remind you also that the burden on the Crown is to prove the guilt of the accused beyond reasonable doubt. So ladies and gentlemen I wanted to emphasise those features of our criminal justice system at this stage of the trial.
>
> I also emphasise that you must approach all of the evidence in an impartial way with an open mind that is receptive to change, acknowledging that you may well have views and discussions along the way about particular witnesses and how the evidence is going.

[13] The last Crown witness was called on 29 May 2014. Counsel for the parties addressed the jury on 2 and 3 June 2014 and the trial Judge summed up the case for the jury on 4 and 5 June 2014. During her Honour's summing up she gave the jury the following directions which are of particular relevance to this ground of appeal.

> Of course, as has been explained, and I will talk to you about this in more detail, if you have a reasonable doubt that the accused was the person who killed Kirsty Ashley, then you will find the accused not guilty. If you conclude on all of the evidence, the Crown have not

negatived beyond reasonable doubt any reasonable possibility consistent with Darren Ashley's innocence, then you will find him not guilty. If that is your conclusion, you will need to go no further, looking at the elements of the charge.

… it is likely that the focus of your deliberations will be whether the Crown has proven beyond reasonable doubt that it was Darren Ashley who killed the deceased.

It is important to remember that it is the prosecution who must prove Darren Ashley's guilt beyond reasonable doubt. It is not for Darren Ashley to prove his innocence. This means that you must not find Darren Ashley guilty merely because, for instance, you reject (if you did) the version given by Darren Ashley in his interview with police.

To find Darren Ashley guilty of the crime charged you must be satisfied that the prosecution has proven the charge beyond reasonable doubt. If you reject the version of Darren Ashley in his record of interview that is not the end of your deliberations. You can put that aside and consider whether the Crown has proven guilt or whether you entertain a reasonable doubt.

Now, I do want to remind you, ladies and gentlemen, about something else that is central to our criminal justice system. I mentioned it at the outset of the trial. I reminded you somewhere in the middle of the trial, and which is in any event implicit, I hope in what I have been talking to you about and what counsel reminded you of. It concerns the presumption of innocence and the burden of proof that rests on the Crown.

As I said to you at the outset and during the middle of the trial, as with all persons charged with an offence, Darren Ashley comes into this court with a presumption of innocence in his favour. The law regards the accused as innocent unless and until his guilt has been proven to the satisfaction of you the jury. The burden of proving the charge lies wholly on the Crown. The accused does not have to prove anything. It is not for the accused to prove that if Kirsty Ashley was murdered that he did not murder her. It is the Crown that must prove Kirsty Ashley was murdered and that it was the accused who murdered her.

It is not always easy, particularly when discussing the case that has been put or submitted on behalf of the accused, to avoid using words

> which might be thought to suggest that when the accused has put forward a particular explanation or a version such as in the record of interview or the matters that his counsel has put on his behalf that the accused has to prove some explanation or some version. He does not. It is the Crown that must do all the proving in this Court, so please do not be misled by the inadequacies of expression on my part that might seem to detract from that fundamental and consistent burden that the Crown carries throughout this case.
>
> I have mentioned that nothing short of proof beyond reasonable doubt will do. It is not enough for the Crown to show a mere suspicion of guilt or to show that the accused is probably guilty. You must be satisfied beyond reasonable doubt. Beyond what I have said, the words "beyond reasonable doubt" are considered to be ordinary words with an ordinary meaning and I am not permitted to give you any further direction about the meaning of "beyond reasonable doubt".
>
> You will bear in mind that this is a practical court of law and decisions must be made in a reasonable and sensible way, but if at the end of the case you are left with a reasonable doubt about the accused, you must give the accused the benefit of that doubt and find him not guilty. As I mentioned, if there is a reasonable possibility that the accused is not guilty, the Crown will have failed to prove its case beyond reasonable doubt.

[14] On 3 July 2014 her Honour published her reasons for not discharging the jury.[1] Among other things, she stated:

> The focus here was whether a fair minded person would reasonably apprehend lack of impartiality. It must be remembered that the note is the reported impression or perceptions of one juror in relation to some other jurors. No other juror joined in the note or wrote a similar note. There was no indication of coercion or other misconduct. The juror who wrote the note may be regarded as appropriately sensitive to and would keenly observe the directions concerning the presumption of innocence. The juror can obviously well articulate the directions given on that topic and related issues. Not all members of the public who then become jurors necessarily express themselves in the same way, whether that be in the jury room or not. The note must also be seen in the context of a relatively lengthy trial and what

[1] *R v Ashley* [2014] NTSC 26 at [19] to [27].

> could only be described as a strong Crown case. The note reports internal jury discussions. *It is not appropriate to speculate on the dynamics of those discussions* [emphasis added].
>
> Although the contents of the note were enough to raise concerns, in my opinion it was the type of matter ordinarily dealt with by direction. Having given the jury further lengthy directions, shortly after receiving the note, and again during summing up, a fair minded observer could be in no doubt that the jury followed those directions and determined the issues impartially. It must be remembered that directions relative to the matters raised in the note were given both orally and in writing at the commencement of the trial; shortly after the note was received and during the summing up. The jury received at least four sets of directions on the points raised in the note.
>
> It may be noted that no further concerns over the balance of the trial were raised by the juror or any other juror after the direction was given in response to the note.
>
> The collective knowledge of, in this case, 14 people and the diversity of experience that goes with this works as a safeguard against one opinion dominating discussion in the jury room. It is this collectiveness and diversity which underpins the function of the jury in our criminal justice system.[2]

The law about the juror's note

[15] The main ground of appeal is brought under s 411(1) of the Criminal Code (NT). Among other things, s 411(1) of the Criminal Code (NT) provides that, on an appeal against a finding of guilt, the Court of Criminal Appeal shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that there has been a miscarriage of justice.

[2] ibid at [24] to [27].

[16] The appellant says that there has been a miscarriage of justice in this case because the trial was unfair. As the trial Judge incorrectly exercised her Honour's discretion and refused to discharge the jury, the trial was conducted before a jury about which there was a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that one and possibly three jurors might not discharge their task impartially as they had prejudged the appellant's guilt. One touchstone of a fair trial is an impartial trier of fact – a jury capable and willing to decide the case solely on the evidence before it.[3]

[17] In response to the risk of juror misconduct, the courts and the legislature have adopted a variety of procedural protections to be used during the course of a trial to counter misconduct and ensure a fair trial. For example, the parties may challenge potential jurors, reserve jurors may be empanelled, judges direct jurors about their roles before the Crown opens its case, under s 359 and s 373 of the Criminal Code (NT) the Supreme Court may discharge the juror or the jury if the Court is of the opinion that a juror is not indifferent as between the Crown and the accused person, and under s 371(1) of the Criminal Code (NT) the Court may discharge the jury where there is a high degree of need.

[18] It is now well established that the courts have power to discharge a jury where there is a reasonable apprehension of bias. A trial judge's failure to

[3] Benjamin T. Huebner, "Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony" (2006) 81 *New York University Law Review* 1469 at 1469 (quoting *McDonough Power Equip Inc. v Greenwood* (1984) 464 US 548 at 554 in turn quoting *Smith v Phillips* (1982) 455 US 209 at 2117).

discharge a jury in those circumstances may amount to a miscarriage of justice which requires the verdict of the jury to be set aside. The Courts have held that a jury may be discharged where there is a high degree of need to do so and that a reasonable apprehension of bias is one of the circumstances that constitute a high degree of need.[4]

[19] In *Webb v The Queen*[5] the High Court considered a case involving the following circumstances. A man and a woman were charged with the murder of a man with whom they had been drinking. On the morning of the day that the trial judge commenced his summing up, one of the jurors gave a bunch of flowers to a person at the court house with the request that it be given to the deceased's mother. The trial judge considered that he had power to discharge the jury but declined to do so. The High Court ruled that the test to be applied for determining whether an irregular incident involving a juror warrants the discharge of the juror or in some cases, the jury, is whether the incident is such that notwithstanding any proposed or actual warning of the judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror or the jury has not discharged or will not discharge their task impartially.[6] It was determined that no such apprehension arose in that case.

[4] R v Matthews [1991] 1 VR 534 at [9] per Callaway JA.
[5] (1994) 181 CLR 41.
[6] ibid at p 47.

[20] In *R v Boland*[7] the Full Court of the Supreme Court of Victoria considered a case involving the following circumstances. On 19 November 1973, in the eighth week of the trial, a female juror reported to the Court that she had received a telephone call at her home from a man who claimed to be speaking on behalf of the police who told her that she must find the applicant guilty and that if she did she would receive $5000. She immediately expressed to the caller in emphatic terms her disbelief of his statement that he was speaking for the police, and she reported the incident to the trial judge as soon as the trial was resumed. The trial judge rejected an application by the defence to discharge the jury. His Honour took the view that having regard to the length of the trial he could by giving the jury a suitable warning ensure that no prejudice to the accused would arise out of the incident. The defence applied for leave to appeal against conviction on grounds which included the failure of the trial judge to discharge the jury. The Full Court ruled that the ground of appeal failed. In so doing the Full Court stated the following.

> *Much depends in every case on the nature and degree of the alleged prejudice, the body of evidence already heard and yet to be heard, how far the prejudicial matter may be submerged and pushed into the background by the totality of the evidence, and whether in all the circumstances a clear warning to the jury will be sufficient to avoid or dispel any prejudice and enable a fair trial to be held*. Great weight must always be given to the views on such matters of the trial judge, for he is acquainted at first hand with the conduct and atmosphere of the trial and he has had during its progress the opportunity of assessing the jury – advantages which are necessarily denied to an appellate court [emphasis added].

[7] [1974] VR 849.

> The power of the trial judge to discharge a jury when some incident occurs during a trial which may adversely affect its fairness depends for its exercise upon the principle stated in *Winsor v R* (1866) LR 1 QB 390. The principle is really one of necessity. There must be evident "a high degree of need for such discharge", that high degree being "such as in the wider sense of the word might be denoted by necessity": [authorities omitted].
>
> In the present case the learned trial Judge was of the opinion that he should not discharge the jury. We can see nothing in the circumstances of this case and nothing in the statement of his reasons which would warrant us in concluding that his Honour had wrongly exercised his discretion or that his refusal to discharge the jury was wrong in law. In particular we are of the opinion that his Honour was not in error in taking into account the length of the trial.[8]

[21] In *Holt and Merriman v R*[9] the Court of Appeal of Victoria considered an appeal against conviction where one of the grounds of appeal was that the trial judge had failed to discharge the jury in circumstances where it was alleged several jurors were unable or unwilling to obey the trial judge's instruction to avoid discussing the case with strangers, family or friends. The facts were as follows. On the fourth day of the trial, a police witness was approached by two jurors outside the court room while he was standing waiting for the lights to change. One of the jurors said to the witness, "How's your nerves?" The witness asked the juror if he was a juror and then said, "I can't talk to you mate." The juror said, "I am only asking you how your nerves are." The witness said, "I have been there before" and walked away. The trial judge directed himself about partiality in terms of *Webb v The Queen* and refused to discharge the jury. The Court of Appeal held that

[8] ibid at p 866 – 867.
[9] (1996) 87 A Crim R 82.

the trial judge's determination that the incident did not demonstrate an inability to comply with directions was not shown to be wrong. During the appeal an issue arose as to whether the decision of the High Court in *Webb v The Queen* had cast doubt on the correctness of the statement of the Full Court of the Supreme Court of Victoria in *R v Boland* that there must be "a high degree of need" for a discharge of the jury. Callaway JA stated:

> It was suggested in the course of argument on this ground that *Webb's* case may cast doubt on the correctness of the statement by the Full Court in *Boland* [1974] VR 849 at 866 that there must be "a high degree of need" before a jury is discharged on account of an incident that may adversely affect the fairness of the trial. As their Honours explained on the same page that means that discharge must be necessary in the wider sense of the word. *Webb's* case stands for the proposition that it is necessary to discharge a juror or a jury as a whole, if a fair-minded observer might entertain a reasonable apprehension concerning his or its impartiality. To my mind there is no inconsistency between the two cases, nor is it surprising that such an apprehension should be regarded as satisfying the test of necessity in the sense explained by the Full Court, for ex hypothesi justice would no longer be seen to be done.[10]

[22] In *R v Matthews*[11] the Court of Appeal of Victoria considered an appeal in which one of the grounds of appeal was that the trial judge erred in not discharging the jury upon it becoming apparent that one juror, a single mother, may have affected other jurors by her concern for the welfare of her children. The trial judge discharged the juror but not the jury. The Court of Appeal held that this ground was not made out but allowed the appeal on another ground. Callaway JA with whom the other judges agreed stated:

[10] ibid at p 86.
[11] [1999] 1 VR 534.

> Mr Tehan submitted that the whole jury should have been discharged in the circumstances that I have described. The judge had several times expressed his own fear that the position was irretrievably compromised and there was clearly a strong factual basis for that apprehension. The danger was made greater by the fact that the juror had already made up her mind and had done so when it was focused on other issues and there was an extraneous reason for her to hasten to a conclusion. Assuming that her decision was that the applicant was guilty, she may already have influenced one or more of the other jurors by a view not properly arrived at and that influence may not have been dispelled by her discharge. Counsel submitted that the judge had erred, whether one had applied the traditional test of a high degree of need or adapted the test applicable to reasonable apprehension of bias. … *In my opinion the test is still whether there is a high degree of need, but a reasonable apprehension of bias is one of the circumstances that constitute a high degree of need* [emphasis added].
>
> That test was not satisfied in this case. In the first place, the learned and very experienced trial judge was entitled to revise his provisional opinion upon further reflection and in the light the jury's answer to his question. He did not in any sense abdicate his function but, having formed a favourable opinion of the jury's reliability and common sense, paid heed to what they said. Secondly, the course of discharging the relevant juror and the proceeding with the trial was undertaken at the joint request of both parties. They, too, were in a better position than we are to assess the danger the juror posed to the integrity of the trial.[12]

[23] In *Cant v The Queen*[13] the Court of Criminal Appeal of the Northern Territory heard an appeal in which the first ground of appeal concerned the failure of the trial judge to question a juror about whether, in the circumstances, that juror remained indifferent as between the prosecution and the accused, and the subsequent failure of the trial judge to discharge that juror. The circumstances were as follows. Towards the end of the

[12] ibid at [9] and [10].
[13] (2002) 12 NTLR 133.

prosecution case, a note was handed to the trial judge from one of the jurors which read as follows.

> I believe I should inform you of certain discussions amongst jurors concerning Craig Cant's criminal history. Last week a juror commented that he is facing two other charges in addition to the current charge before the court. A heated exchange followed where several jurors stressed that it is no concern to us and our decision should be based upon facts presented as evidence. While I am unable to comment upon the extent to which those discussions may have influenced other jurors if at all, I believe the matter should be brought to your attention.[14]

The trial judge rejected the application to discharge the juror on the basis that either the whole jury should be discharged or the matter dealt with by directions. His Honour determined that it was not necessary to discharge the whole of the jury because the matter could be dealt with by direction.

[24] The Court of Appeal allowed Mr Cant's appeal and stated:

> The difficulty that faced his Honour was that, notwithstanding the direction given at the beginning of the trial, it was alleged by a juror that another juror had ignored this direction and raised with other jurors the fact that the appellant was facing other charges. Obviously if a witness had sought to give evidence about such a matter there would be a real risk that the trial would have miscarried: cf *R v McKean* [1961] NSWR 249. However, in this case, the matter of the other charges came from one of the jurors, so not only had other jurors become possessed of inadmissible and highly prejudicial information, but because it came from one of the jurors, it gave rise to a question about that juror's impartiality as a juror. The inference of apprehension of bias on the part of the unknown juror was strong given that the trial judge had already directed the jury in the terms mentioned above at the beginning of the trial, a direction which apparently one juror had decided to ignore. Moreover according to the note, this gave rise to a heated discussion which implies that the

[14] ibid at [84].

> unknown juror and perhaps others as well, were not prepared to act according to their oaths or affirmations as jurors.
>
> It is fundamental that jurors, like judges, must be impartial and appear to be so. The test to be applied to jurors is whether the incident is such that, notwithstanding any warning or direction given by the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair minded member of the public that the juror or jury has not discharged or will not discharge his, her or their task impartially: *Webb v The Queen* (1994) 181 CLR 41.
>
> We consider that his Honour erred in not making enquiries so as to ascertain the true facts, and whether or not, once those facts had been ascertained, the juror in question, and possibly some other jurors or perhaps even the whole jury, should have been discharged: see s 373 of the Code. Senior counsel for the Commonwealth Crown, Mr Hanson QC submitted that the proposed course of identifying the individual juror concerned was inappropriate and referred us to the decision of the Court of Criminal Appeal in *R v Orgles* [1994] 1 WLR 108 at 112 – 113 where the Court expressed the view that such a course is inappropriate where the problem is internal to the jury, and that in those circumstances the whole jury should be questioned in open court. We do not think that there is any hard and fast rule about how this should have been done in the circumstances of this case. Be that as it may, as their Lordships recognized at p 112 – p 113, in circumstances like this, it is the duty of the trial judge to enquire into and deal with the situation so as to ensure a fair trial, and no enquiry of any kind was made.
>
> We are left, not knowing what in fact were the circumstances, but with an allegation, made by a juror, which raised serious doubts about the impartiality of at least one other juror, in circumstances where there are also serious doubts about whether any direction given by the learned trial judge would have been acted upon.[15]

[25] In *R v Czajkowski*[16] the Court of Criminal Appeal of New South Wales heard an appeal against conviction in which the grounds of appeal were: (1) the trial judge erred in failing to discharge the jury after the note from a juror

[15] ibid at [9], [10], [11] and [12].
[16] (2002) 137 A Crim R 111.

was received; and (2) the trial miscarried by reason of a reasonable apprehension of bias on the part of some members of the jury. The facts were as follows. On 28 November 2001, after the evidence had finished, after about three weeks of hearing and after the addresses for the prosecution and the defence, but before the trial judge's summing-up to the jury, a note was sent to the judge by the foreperson. That note read:

> Dear Judge
>
> Some of the jurors are slightly bias (sic) against drugs and have already made there (sic) minds up on day one.[17]

In the absence of the jury an application was made by counsel for each accused for the discharge of the jury. The trial judge declined the application and relied on directions to the jury to put aside any prejudice and decide the case on the evidence.

[26] The Court of Criminal Appeal of New South Wales allowed the appeal, quashed the appellants' convictions and ordered a new trial. In his reasons for decision, Sheller JA, with whom the other judges agreed, stated the following.

> ....
>
> This Court has held that the test is whether "the parties or the public might entertain a reasonable apprehension that the jury might not bring an impartial mind to the resolution of the issues involved in the proceeding": *R v Maxwell* (unreported, Court of Criminal Appeal,

[17] ibid at [5].

NSW, 23 December 1998) at 27 - 28 “a test of possibility upon possibility”. The test will be at its most strict for a criminal trial.

If a juror indicates that he or she is biased, the juror should be discharged: *R v Piccin* [2001] NSWCCA 35; *R v Stretton* (at 255). Similarly, if a judge indicates that he is biased in some way (for example, he has a generalised view that drug dealers are not to be believed: *R v Van Sinh Hoang* (2002) 128 A Crim R 422) such expressions of opinion conflict with the requirement of neutrality and impartiality and cause a reasonable apprehension of bias. In *R v Bright* (2000) A Crim R 466 at [28], Kirby J said:

> A person should not sit as a juror if, in all the circumstances, the parties, or a fair-minded and informed member of the public, might entertain a reasonable apprehension that he or she might not bring an impartial or unprejudiced mind to the resolution of the questions involved in the trial: *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293.

….

In my opinion, the trouble in this case is that the note indicated that by the time addresses concluded and before the summing-up some jurors or a juror had made up their minds or his mind on day 1. That statement was made in the context of some of the jurors or a juror being “slightly bias [sic] against drugs”. In my opinion, the appellants or a fair minded and informed member of the public might entertain a reasonable apprehension that the jury would not discharge its task impartially.

In fact, despite the careful argument advanced on behalf of the Crown, both in writing and orally, I find it hard to reach any other conclusion. To my mind, this is a clear case where such a fair minded and informed member of the public would entertain a reasonable apprehension that the jury could not discharge its task impartially, that a juror or jurors were biased and had prejudged the case on day 1.[18]

[18] ibid at [19], [20], [35] and [36].

The exclusionary rule

[27] The respondent submitted that *Smith v State of Western Australia*[19] established the approach that is to be adopted in determining how a trial judge is to deal with irregularities in the jury process in cases such as the present. In my opinion, that submission cannot be sustained. *Smith v State of Western Australia* is a case concerning post-verdict jury evidence. It is not a case that was concerned with a failure by the trial judge to discharge the jury during the course of a trial.

[28] This appeal is not concerned with the *exclusionary rule* which provides that once a trial has been determined by an acquittal or conviction under the verdict of a jury, and the jury discharged, evidence of a juror as to the deliberations of the jury is not admissible to impugn the verdict.[20] This appeal is not concerned with post-verdict jury testimony. The attitude of the three jurors came to light during the course of the trial and the defence made an application to discharge the jury before any verdict was delivered. The question in this appeal is whether in those circumstances the trial miscarried and therefore the verdict should be set aside.

[29] In *Re Matthews and Ford*[21] the Full Court of the Supreme Court of Victoria stated that "the circumstance that one of the jurors has during the course of the trial expressed a strong opinion concerning one of the parties or one or more of the witnesses may justify a judge in discharging the jury and

[19] (2014) 250 CLR 473.
[20] *Smith v Western Australia* (2014) 250 CLR 473 at [1].
[21] [1973] VR 199.

ordering a new trial (...). The question whether a trial should be discontinued or a new trial ordered is, however, a radically different matter from whether a verdict once given should be set aside."[22]

[30] The birth of the exclusionary rule seems to occur with the decision of Lord Mansfield in 1785 in *Vaise v Delaval*.[23] In that case his Lordship rejected an affidavit of a juror which was sought to be tendered after the jury had delivered its verdict. The affidavit deposed that the jury, having been divided "tossed up" and the plaintiff won. Lord Mansfield's entire opinion stated:

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanour: but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window or by some such other means.[24]

[31] While support for the maintenance of the exclusionary rule now lies in the preservation of the secrecy of a jury's deliberations to ensure those deliberations are free and frank so that its verdict is a true one and to ensure the finality of that verdict,[25] the rule which stems from the decision of Lord Mansfield is that evidence of a juror shall not be received to impeach his or her own verdict. The rule is grounded on the doctrine that "a witness shall not be heard to allege his own turpitude"; *nemo turpitudiem suam alligans audietur*. The reason for this is that a juror who committed misconduct *or*

[22] ibid at p 205.
[23] (1785) 1 T.R. 11; (1785) 99 ER 944.
[24] ibid.
[25] *Smith v Western Australia* (2014) 250 CLR 473 at [31].

witnessed misconduct but failed to bring it to the court's attention prior to the verdict could not be a credible witness.

[32] The information contained in the juror's note in this case does not run foul of the doctrine that a witness shall not be allowed to allege his or her own turpitude. The evidence came to light before the jury delivered its verdict. The juror acted in accordance with paragraph 12(c)(ii) of the written Outline for Jury which instructed the jurors that if they became aware of some improper conduct on the part of a fellow juror to bring it to the trial Judge's attention by passing a written note to the Judge through the jury guard.

Consideration of the juror's note

[33] The juror's note was carefully written. It refers to the Outline for Jury which contained a written instruction to the members of the jury that if they became aware of improper conduct on the part of a fellow juror they should report it to the trial Judge. Although the note describes the attitude of the three jurors as a "rather immature attitude to those who don't agree with them", the note is balanced and rational.

[34] Of significance, the note states that *since day two* of the trial: (1) a most vocal trio of jurors has relentlessly speculated that the accused (the appellant) is guilty until there is convincing proof that he is innocent, and (2) one of them stridently argues that obviously the accused (the appellant) is guilty, otherwise he would not have been arrested and charged. If the contents of the note are accepted as true, the note establishes that for a

period over 13 days (commencing on the second day of the trial, and including adjournments and weekends) the three jurors were at all times approaching the case on the premise that the appellant was guilty until there was convincing proof of his innocence. In other words, they had been proceeding on the assumption that the accused was guilty until proven innocent. Further, according to the note, one of the three jurors was stridently arguing that the accused was obviously guilty or he would not have been charged. That is, the juror had a strident view that only guilty people were arrested by the police and charged. The three jurors had adopted this position, and had held it for 13 days, despite being given detailed oral instructions by the trial judge about the burden of proof and the presumption of innocence and a written outline to the same effect which they had with them in the jury room; despite there being no evidence by the end of the second day of the trial which of itself, or in conjunction with the other evidence heard by the end of day two, implicated the accused in the murder of the deceased; and despite some of the members of the jury reminding them of the presumption of innocence and the requirement to act only on the evidence which had been presented to them in court.

[35] By the end of day two the Crown had called three witnesses. They were Constable First Class Jasen Machacek, Senior Constable Timothy Paul Healey and Mrs Heather Steadman, the mother of the deceased. None of these witnesses gave evidence which of itself, or in conjunction with the

evidence of the other two witnesses, implicated the appellant in the murder of Kirsty Ashley.

[36] While it is correct that a juror may come to a determination or form a definitive view as the case goes along,[26] by day two of the trial the jury had not heard any evidence which, of itself, implicated the accused in the murder of the deceased. In the circumstances, the inference of an apprehension of bias on the part of the three unknown jurors was strong given that they had not only been given oral directions in the terms set out in par [7] but a written outline in the terms set out in par [8]. Further, as the three had relentlessly and stridently held those views for 13 days, the further directions by the trial judge which were in the same terms as the original directions and were addressed generally to the jury and not to three jurors specifically could not overcome the reasonable apprehension of bias or prejudgment.

[37] I find that in this case, notwithstanding the further directions given by the trial Judge, a fair-minded and informed member of the public might entertain a reasonable apprehension that the three jurors would not discharge their task impartially and it was necessary to discharge the jury. The trial Judge erred in not discharging the jury and as a result the trial miscarried.

[38] Accordingly, the appeal should be allowed, the appellant's conviction quashed and a new trial ordered.

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[26] *Re Matthews and Ford* [1973] VR 199 at 205; *R v Syme* (1914) 30 TLR 691; *R v Box* [1964] 1 QB 430 at 434.

Notice of Contention

[39] During the course of the trial the appellant led evidence of exculpatory statements he made prior to the trial from three Crown witnesses - Jaryn Ashley, Jacinta Ashley and David Wallace. The evidence was hearsay evidence which was led in accordance with a ruling made by the trial Judge under s 66 of the *Evidence (National Uniform Legislation) Act* (NT).

[40] For the evidence to be admissible under s 66(2) of the *Evidence (National Uniform Legislation) Act* (NT), it was necessary for the appellant to establish that he was to be called to give evidence at the trial. To this end, counsel for the appellant gave an undertaking that the appellant was to be called to give evidence during the defence case. However, as matters transpired, the appellant did not give evidence at the trial.

[41] The respondent objected to the evidence of the appellant's exculpatory statements being led at the trial. The objection was overruled and the respondent has filed a notice of contention in this appeal. The notice pleads that the trial Judge erroneously found the hearsay evidence about the exculpatory statements of the appellant was admissible. The respondent contends that her Honour erred by accepting the undertaking given by counsel that the appellant would be called to give evidence satisfied the requirements of s 66(2) of the *Evidence (National Uniform Legislation) Act* (NT). The respondent submitted that, on the basis of the undertaking alone, the trial Judge could not have been satisfied that the appellant was a person who was to be called to give evidence because, regardless of any

undertaking by counsel, an accused person always has the right to elect not to give evidence and that is what the appellant ultimately did in this case. This meant that inadmissible hearsay evidence of exculpatory statements made by the appellant was led during the Crown case.

[42] The Respondent says that *R v Parkes*[27] was wrongly decided and submits that this Court should consider the interpretation of s 66 of the *Evidence (National Uniform Legislation) Act* (NT) afresh. The respondent says the Crown is at a significant disadvantage if highly prejudicial hearsay evidence is allowed to remain before the jury for an extended period of time before it is ultimately ruled inadmissible and the jury told to disregard the evidence.

[43] In circumstances such as this, it is important to remember what the High Court stated in *Farah Constructions Pty Ltd v Say- Dee Pty Ltd*[28] namely:

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate courts in another jurisdiction on the interpretation of … uniform national legislation unless they are convinced that the interpretation is plainly wrong.

[44] Section 66 of the *Evidence (National Uniform Legislation) Act* (NT) states:

> (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
>
> (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

[27] (2003) 147 A Crim R 450.
[28] (2007) 230 CLR 89 at 151 - 152.

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned; and

(b) the age and health of the person; and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note for subsection (2A)

Subsection (2A) is inserted as a response to the decision of the High Court of Australia in Graham v The Queen (1998) 195 CLR 606.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note for section 66

Clause 4 of Part 2 of the Dictionary is about the availability of persons.

[45] There are three conditions for the application of s 66 of the *Evidence (National Uniform Legislation) Act* (NT): (1) the person who made the representation is available to give evidence about an asserted fact; (2) the person who made the representation has been or is to be called to give evidence; and (3) at the time the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

[46] Under s 17(2) of the *Evidence (National Uniform Legislation) Act* (NT) an accused in criminal proceedings "is not competent to give evidence for the prosecution". However, there is nothing which precludes an accused from giving evidence as part of his or her case. Thus, while an accused person is not competent and therefore not available to give evidence as a witness for the prosecution,[29] an accused is competent and available to give evidence as a witness for the defence.

[47] The words "is to be called" are ordinary words that mean what they state. The party seeking to tender the hearsay evidence of a representation must satisfy the court on the balance of probabilities[30] that the person who made the previous representation is in fact to be called to give evidence at the trial.

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[29] *R v Parkes* (2003) 147 A Crim R 450 at [47] and [48].
[30] *Evidence (National Uniform Legislation) Act* (NT) s 142.

[48] In *Crisologo*[31] Simpson J stated:

> Statements made by an accused person at a relevant (that is, early) time are, in my view, a precise counterpart of complaint made by an alleged victim in sexual assault (and other) cases. The *Evidence Act* draws no distinction between the admissibility of out of court statements made by a complainant, and statements of a similar kind made by a person accused of crime. The principles applicable to the admission of evidence of complaint apply equally to *the admission of evidence of relevant out of court statements by an accused person at a time when the events the subject of the statement are fresh in his/her memory and when he/she has been or is to be called to give evidence*. Such evidence is, like evidence of complaint, now admitted as evidence of the truth of what was said: *Hall; D* (1997) 94 A Crim R 931.
>
> This does not, however, mean that all out of court statements made by an accused person with respect to the events the subject of the charges will necessarily be admitted into evidence. I have said that the statements are not excluded by the hearsay rule. There remain two additional sections to be considered, conferring discretion upon the court as to the admission of evidence, or the use that may be made of particular evidence. Section 135 confers discretion to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might (a) be unfairly prejudicial to a party; (b) be misleading or confusing; or (c) cause or result in undue waste of time. Section 136 confers discretion on the court to limit the use to be made of evidence if there is danger that a particular use might (a) be unfairly prejudicial to a party; or (b) be misleading or confusing.[32]

[49] In *Constantinou v The Queen*[33] the Court of Appeal of Victoria stated,

> "There are at least two conditions for the application of s 66: (a) that the person who made the representation has been or is to be called to give evidence and (b) that, at the time the representation was made, the

[31] (1997) 99 A Crim R 151.
[32] ibid at 189.
[33] [2015] VSCA 177.

occurrence of the fact asserted in the representation was fresh in the memory of the person who made the representation."[34]

[50] I accept the submission of counsel for the respondent that taken literally the statements of Ipp JA in *R v Parkes*[35] at [49] to [50] are not correct to the extent that they seem to overlook the requirement in s 66(2) that the person who made the representation has been or is to be called to give evidence. However, nothing turns on this apparent error in this appeal.

[51] In the same case of *R v Parkes*, Hulme J correctly interpreted the requirements of s 66(2) when he stated "to render the evidence of Mr Jenkinson the subject of this ground admissible, *at the time the question arose* it had to be established that the appellant, who was the author of the representation, had given evidence or would be called" [emphasis added].[36]

[52] Having reviewed the authorities referred to by counsel, it seems to me that the construction of s 66 arrived at by the Victorian Court of Appeal in *Constantinou v The Queen*, by Hulme J in *R v Parkes*, and by Simpson J in *Crisologo* is correct.

[53] It will be for the trial judge to determine *at the time the question arises* whether, on the balance of probabilities, it has been established that an

[34] ibid at [183].
[35] (2003) 147 A Crim R 450 at [49] – [51].
[36] ibid at [135].

accused is to be called.[37] In some cases, the circumstances may be that an undertaking by counsel for the accused that the accused is to give evidence is sufficient to satisfy that standard of proof. In other cases, the circumstances may be that more is required if the hearsay evidence of the representation is to be admitted into evidence.

[54] If an accused person ultimately does not give evidence, the remedy will either be a direction to the jury to disregard the hearsay evidence or to discharge the jury if the prejudice to the Crown case cannot be cured by an appropriate direction. The direction the trial Judge gave the jury to disregard the hearsay evidence about the representations of the accused after he elected not to give evidence was an appropriate direction and obviously the jury followed the direction. There was no error in the manner in which her Honour dealt with the hearsay evidence about the accused's representations to the three witnesses in the trial below. It was open to her Honour to accept the undertaking of counsel for the defence.

[55] Furthermore, it is always open to a trial judge to direct the jury immediately following the application of s 66 of the *Evidence (National Uniform Legislation) Act* (NT) in the following terms.

> The evidence of those representations (go to the representations) is admissible at this stage of the trial. However, under s 66 of the *Evidence (National Uniform Legislation) Act* (NT), the evidence of those representations will become inadmissible, and you will be

[37] s 142 of the *Evidence (National Uniform Legislation)* (NT) provides (except as otherwise provided by the Act) the Court is to find that the facts necessary for deciding a question whether evidence should be admitted or not admitted have been proved if it is satisfied that they have been proved on the balance of probabilities.

> instructed to disregard that evidence if the accused does not give evidence.
>
> The accused does not have to give evidence and no adverse inference can be drawn against the accused if he or she does not give evidence; but if the accused does not give evidence you will be directed to disregard the evidence of those representations.

[56] Conversely, if the trial judge is not satisfied on the balance of probabilities that the accused will be called to give evidence and he or she does give evidence, there will be little or no prejudice to the accused since it will be open to the defence to call the evidence in the defence case.

[57] In the circumstances, the notice of contention should be dismissed.

Conclusion

[58] The appeal should be allowed, the verdict of guilty quashed and a new trial ordered.

KELLY J:

Ground 2(b):

[59] I agree with the decision of Southwood J and the reasons for that decision.

[60] As the appeal has been allowed on ground 1, it is not strictly necessary to deal with this ground. However, the appellant persisted with ground 2(b), having withdrawn two others, and for the sake of completeness I will deal with it.

[61] This ground of appeal relates to the prosecutor's submissions to the jury concerning what the prosecutor said was a lie told to police by the appellant

during the interview with police. The appellant was asked, “Do you know if there is a samurai sword at Iain’s place, 48 Lovegrove?” He answered, “Couldn’t tell you.”

[62] The prosecutor submitted to the jury that the accused’s claim [in his record of interview with the police] never to have seen a samurai sword at Iain Steadman’s house was inconsistent with Iain Steadman’s evidence. (Iain Steadman gave evidence that the sword that was found beside the body of the victim came from his house and that the appellant had seen it and handled it.) The prosecutor submitted to the jury that it was pretty obvious to all concerned that what the police officer was asking the appellant about was whether he knew there was a big long sword at Iain Steadman’s house.

[63] The appellant has a number of complaints about the prosecutor’s conduct in making this submission. First, counsel for the appellant says that the submission to the jury misrepresented what the accused had said in the police interview: he did not say he had never seen a samurai sword at Iain Steadman’s house.

[64] In my view, the complaint of unfairness by reason of a misrepresentation cannot be substantiated. The answer was to the effect that the accused did not know whether there was a samurai sword at Iain Steadman’s house. That does not seem to me to be very different from a statement that he had not seen one there, and in my view it was open to the prosecutor to invite the jury to conclude that this was the effect or substance of the accused’s

answer. In any case, counsel for the appellant was free to point out to the jury what the accused actually said and did so.

[65] The second aspect of this complaint is that the sword found by the body of the deceased was not a samurai sword; it was an "elvish" sword. Counsel for the appellant submitted that it was therefore inaccurate to say that the accused's statement to the effect that he did not know if there was a samurai sword in the house was a lie. The prosecutor invited the jury to interpret the police question as asking the accused whether he knew there was a big long sword at Iain Steadman's house. That was a submission that the jury was free to accept or reject. It was open to the defence to remind the jury of the actual question and answer, and to submit that the answer was not a lie: Iain Steadman's evidence was to the effect that he had shown the accused the elvish sword – not a samurai sword – and there was no evidence that there was ever a samurai sword at the house. The defence took full opportunity to make that submission and the trial judge reminded the jury of the defence submission during the summing up.

[66] Finally, the appellant complains that it was not fair for the prosecution to invite the jury to draw an adverse inference about the credit of the accused on the basis that this was a lie because the prosecutor did not mention it in the Crown opening and the defence was therefore not on notice of how it would be used. Counsel for the appellant submitted that the appellant was prejudiced as a result of this because a portion of the interview with police immediately preceding the relevant question and answer had been edited out

by consent. The appellant submitted that this portion of the interview would have cast a different light on the answer because it showed that the accused had a history of involvement with martial arts and weapons associated with those arts and so, it was submitted, could be expected to know the difference between a samurai sword and an elvish sword. (At one point in submissions counsel contended that the excised portion of the transcript showed that the appellant was an "expert" in weapons of this nature.) Had the jury heard that portion of the interview, it was submitted, they would have been less likely to conclude that the appellant's answer to the question set out above was a lie.

[67] I do not agree that this conduct by the prosecutor was unfair. First, the prosecutor is only obliged to give notice of an intention to rely on a lie as an "Edwards" lie – i.e. one which the prosecution says shows a consciousness of guilt. The Crown is not obliged to give notice of every lie relied on as going to credit.

[68] Second, it cannot be said that the defence was not on notice that the Crown was asserting that the appellant's answer to this question by police was untrue. The Crown initially gave notice that it would be relying on the answer as a lie told out of consciousness of guilt. After argument, the prosecutor indicated that he would not rely on it for that purpose. However, he did not go so far as to state that he accepted that the answer was not a lie at all. The defence was clearly on notice that the Crown was asserting that

the answer was untrue and should have anticipated that a submission to that effect would be made to the jury.

[69] Finally, I do not accept that the excised portion of the transcript would have shown that the accused was an "expert" who could be expected to know the difference between a samurai sword and an elvish sword. In that portion of the interview, the appellant was asked whether he owned any weapons. He answered, "It depends what you mean by weapons, if it's nun chuckers …"

[70] He was asked, "Any other martial art type weapons?" He answered, "No, just nun chuckers I think. … I don't really get into it now. It's something I did when I was younger."

[71] He was asked, "Were you taught to use any other weapons?" He answered, "No. Nun chuckers were all I did."

[72] Later he was asked, "You know anyone that would have a samurai sword?" He answered, "I've probably got one actually. Pretty sure Kirsty bought me one years ago. It's in the trailer now."

[73] He was asked when he had last seen that sword and he answered, "Aw ages ago, probably maybe … a year and a half."

[74] When he was asked if it had special markings or anything, he said, "Um I don't know really. It was bought for me as a present. I never really looked at it after that. It was just an ornament."

[75] This does not establish any factual basis for the submission made by the appellant that the excised portion of the transcript demonstrated that the appellant had some sort of expertise in martial arts weapons: quite the reverse, the appellant seems in that conversation to be disclaiming any such expertise or familiarity.

[76] In oral submissions counsel for the appellant made a slightly different point. He said that in that part of the interview, the appellant's attention was being directed towards samurai swords in particular, as distinct from any other kind of sword, and that this context would have made the following answer – that he did not know whether there was a samurai sword at Iain Steadman's house – seem less like a lie. Accordingly, it was submitted, it was unfair of the prosecutor to rely on this answer as a lie having agreed, at the request of the defence, to edit out that part of the interview. I do not agree. It may be that the excised portion of the interview would have lent some strength to the defendant's submission that the answer was not a lie, but it falls well short of providing a context that demonstrates that the answer was true, and I see nothing improper in the prosecutor making the submission that the answer was a lie which reflected badly on the appellant's credit.

[77] In any case, had I been of the view that there has been something unfair about these submissions by the prosecutor, I would nevertheless have dismissed the appeal on this ground by applying the proviso. Any prejudice to the appellant was minimal, there was an overwhelmingly strong Crown

case and these submissions by the Crown did not cause any substantial miscarriage of justice.
