NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 120/2011
[2012] NZSC 58

MICHAEL ANDREW KEITH HASTIE

v

THE QUEEN

Hearing: 7 June 2012

Court: Elias CJ, Tipping, McGrath, William Young and Chambers JJ

Counsel: S W Hughes QC for Appellant
C L Mander for the Crown

Judgment: 23 July 2012

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS
(Given by Chambers J)

Majority verdicts

[1] After a retirement of a little over ten hours, the jury sent the following note to Judge Roberts, the trial judge:[1]

[1] Spelling corrected. We do not know when the jury gave the note to the crier.

> We are unanimous on two counts but are unable to come to a consensus decision on the other six counts and are stalemate at 9 to 3. We are unsure where to proceed from here. We have made progress to get to this point from last night. Can we have some direction please?

[2] As it happened, the Judge was seeing counsel in chambers at the time he received the note. He told counsel the contents of the note. Mrs Hughes QC, counsel for the accused, Michael Hastie, submitted to the Judge that he should take verdicts on the two counts on which the foreperson had indicated the jury was unanimous and should discharge the jury from delivering verdicts on the other six counts. The Judge, while obviously having some sympathy with that submission, did not accept it. Instead, he decided to explain to the jury what was required for majority verdicts. In accordance with normal trial practice, the Judge had briefly alluded to the possibility of majority verdicts in certain circumstances in his summing-up. But he had not at that stage given any details about the triggering circumstances. Nor had he indicated how big "a majority" was required. He now filled in the details as follows:

> Mr Foreman, ladies and gentlemen, I have your communication and I have discussed it with counsel prior to bringing you back into Court.
>
> You have told me that you are unanimous on two counts, and essentially that you are unable to come to a consensus on the other charges and you have nominated for me the divisions you have at the moment. I gather the bottom comments are a plea – we've made progress to get this far can we have some direction please. But what you've left unsaid is, you want out.
>
> It's not unreasonable and I'm grateful to you all for applying yourself so diligently to this task. Regrettably there's a process we have to work through.
>
> Now I indicated to you when I commenced speaking to you that there had been a change in the law which now authorised Judges to seek, if it was possible, majority decisions. While I alerted you to that prospect I haven't yet directed you, and while in anticipation you have probably spelt out your division for me, I need to go through the process with you.
>
> I gather that you realise that by this stage we're getting near the end of it, but we've reached a point where I must tell you now it is possible for you to deliver a verdict that 11 of you agree to. In other words, if only one of your number is in disagreement then you may proceed to verdict. If you don't have 11 people agreeing you won't be in a position to render a verdict, and if you get to that stage no doubt I'll be alerted.
>
> I must, however, tell you before you render verdicts on a majority basis, that is 11 to 1, as a group you must be agreed that it is not probable you can reach a unanimous verdict, that is, 12 of you. The requirement is so important that

> your foreperson will be asked in Court to confirm that as a group it is unlikely you will achieve a unanimous verdict.
>
> Now with the knowledge that I am telling you I will accept verdicts of 11 to 1, I will ask you to retire. Now I qualify this by telling you that I will not keep you for any great period. I expect, however, in the time that I allow, that you will address that one outstanding issue for me. I will call you back into Court at a time in the not too distant future so that if you are truly locked, with no possibility of rendering the majority verdict, I will discharge you.
>
> Thank you ladies and gentlemen.

[3] The jury then retired. Within 30 minutes they returned to deliver their verdicts. They unanimously found Mr Hastie not guilty on two counts and delivered majority guilty verdicts on the other six counts.

[4] Mr Hastie appealed against his conviction and sentence. The ground of appeal against conviction was the Judge's failure to give a *Papadopoulos* direction,[2] or alternatively, the Judge's failure to discharge the jury on those counts on which, at 2 pm, they had indicated they were "stalemated". Mr Hastie also appealed against his sentence. The Court of Appeal dismissed the appeal.[3] This Court subsequently gave leave to appeal on the issue of whether the direction set out at [2] above was appropriate and, if not, whether that gave rise to a substantial miscarriage of justice.[4]

[5] We intend exploring this issue at two levels. First, was what the Judge did in this case appropriate? Next, what should judges generally do when faced with an indication that jurors are having difficulty in reaching a unanimous result?

Was what the Judge did in this case appropriate?

[6] The Court of Appeal concluded that what the Judge did in this case was appropriate:

> [29] In our view it was entirely within the Judge's discretion to give a direction on majority verdicts without at the same time giving a

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2 The current form of the so-called *Papadopoulos* direction is to be found in *R v Accused (CA87/88)* [1988] 2 NZLR 46 (CA) at 59. The direction in its original form is set out in *R v Papadopoulos* [1979] 1 NZLR 621 (CA) at 623 and 626.

3 *Hastie v R* [2011] NZCA 498.

4 *Hastie v R* [2012] NZSC 2.

> *Papadopoulos* direction. Indeed, that would in our view be the preferable course. A *Papadopoulos* direction is a powerful direction and judges tend to use it sparingly. It would be usual for a majority verdict direction to be given and then for the jury to be given further time to deliberate, before considering whether or not to give a *Papadopoulos* direction.

[7] We agree. We think the Judge did the right thing. He provided the jury with information about majority verdicts but did not put any pressure on the jury to reach one. In accordance with standard practice, the Judge had mentioned the possibility of non-unanimous verdicts in his summing-up, but had not fleshed out the details. He had said:

> You may be aware that over recent times the issue of unanimous verdicts has been changed slightly. I am asking you, though, for the moment notwithstanding the change in the law on that aspect, to strive initially for a unanimous verdict. That is a verdict on which each and every one of you agree on all counts. ... Whatever the verdict might be it must be, for the moment, the unanimous verdict of you all. We will address the other issue later on if that is necessary.

[8] It is distinctly possible that some jurors had remembered that part of the summing-up and that the note to the Judge was at least in part prompted by the information the Judge had given them that, at least in some circumstances (which they would not have known), a non-unanimous verdict was possible. For all they knew, a 9–3 verdict might have sufficed. In these circumstances, it was incumbent on the Judge to inform the jury that the position had now been reached where a majority verdict was possible – but only a verdict of 11 to 1.

[9] Mrs Hughes accepted the Judge was entitled to give a majority verdict direction: after all, s 29C of the Juries Act 1981 implicitly invites such a direction when a jury has indicated difficulty in reaching unanimity and the statutory time limit has passed. But she submitted that the Judge should have given a *Papadopoulos* direction as well. She did not ask the Judge to give one at the trial. She apparently discussed the possibility of a *Papadopoulos* direction with the prosecutor, but that was in the absence of the Judge and neither sought the direction.

[10] In fact, what she asked the Judge to do was quite contrary to a *Papadopoulos* direction. The thrust of a *Papadopoulos* direction is the need for perseverance[5] and the need for each juror to demonstrate a willingness, having listened carefully to the views of other jurors, to change his or her view. It is precisely because of the subtle pressure inherent in the direction that some judges prefer never to give one.[6] Mrs Hughes did not want the jury "to persevere": on the contrary, she wanted the Judge to discharge them, having given verdicts on those charges on which they were unanimous. The Judge was clearly sympathetic to that view, as he told the jury that, if they could not reach a majority verdict, he would discharge them. It seems he was intending to do what Mrs Hughes had sought, but only after he had given them information as to what a majority verdict entailed.

[11] Mrs Hughes explained that she was not necessarily stipulating for a full *Papadopoulos* direction. But what was essential, she submitted, was that the Judge give this paragraph from the standard direction:[7]

> But of course no one should be false to his or her oath. No one should give in merely for the sake of agreement or to avoid inconvenience. If in the end you honestly cannot agree, after trying to look at the case calmly and objectively and weighing carefully the opinions of others, you must say so. If regrettably that is the final position, you will be discharged and in all probability there will have to be a new trial before another jury.

[12] Nothing Judge Roberts said, however, was remotely suggesting that a juror "should be false to his or her oath" or that any juror "should give in merely for the sake of agreement or to avoid inconvenience". His direction was entirely informational and did not exhort the jury to try to reach a majority verdict. The quoted paragraph of the *Papadopoulos* direction is needed as a counter-balance to what precedes it in the usual perseverance direction, namely the exhortation to each juror to "do your best to accept [the] responsibility [to give a verdict] and not pass it over to another jury", the need "to listen carefully to one another", and in particular this instruction:

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5 Indeed, the Australians sometimes call their equivalent direction the "perseverance direction": see *Ingham v R* [2011] NSWCCA 88 at [40] citing the New South Wales Bench Book's "suggested perseverance direction".

6 Appellate courts in New Zealand have never insisted judges give *Papadopoulos* directions.

7 *R v Accused*, above n 2, at 59.

> Remember that a view honestly held can equally honestly be changed. So, within the oath, there is scope for discussion, argument and give and take. That is often the way in which in the end unanimous agreement is reached.

[13] The Judge here said nothing of that kind. He put no pressure on the jury. In those circumstances, the Judge was under no obligation to remind jurors to be true to their oaths.

What should judges generally do when faced with an indication that jurors are having difficulty in reaching a unanimous result?

[14] How a trial judge reacts to an indication that a jury is having difficulty in reaching unanimity is a question to which no standard response can be made. The trial judge must assess the matter carefully. He or she will need to take into account the number of the accused persons, the number of charges, the complexity of the issues and the length of time for which the jury has been deliberating. The judge may also have an impression of how the jury is functioning. The trial judge is uniquely placed to weigh all those considerations when deciding how to react to an indication of difficulty in achieving unanimity or indeed deadlock.

[15] Without limiting that discretion, we observe that, generally speaking, we think it desirable to keep an informational direction about the mechanics and requirements of majority verdicts separate from any *Papadopoulos* direction or its equivalent. It would be rare, we think, for a judge to give a *Papadopoulos* direction prior to giving a majority verdict direction. Probably the only occasion when that might be appropriate is when the indication of deadlock arises before the jury has been deliberating for four hours, at which point a jury cannot be discharged.[8]

[16] If the jury, having been given a majority verdict direction, comes back and indicates even a majority verdict is not possible, then the judge could consider a *Papadopoulos* direction. The occasions on which *Papadopoulos* directions will be needed are likely to have been reduced by the fact that the majority verdict direction will have "solved" 11:1 splits in the jury. But the rationale behind the *Papadopoulos* direction holds good even where the majority verdict direction has not led to a

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[8] Juries Act 1981, s 22. An example of a *Papadopoulos* direction being given in these circumstances is *Q (CA63/2010) v R* [2010] NZCA 487, [2011] 1 NZLR 328 at [69]–[84].

verdict. It may still be appropriate for juries to be given the "*Papadopoulos*" message, namely that changing one's mind is not necessarily being untrue to the juror's oath.

[17] The general approach we have advocated is consistent with what the Court of Appeal has previously held.[9] The suggested practice also conforms with long-established practice in England.[10]

[18] We emphasise, however, that these are general observations. We do not wish to be prescriptive because of the importance of trial judge discretion in this area.

Result

[19] We dismiss the appeal.

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9 *Woodcock v R* [2010] NZCA 489 at [30]–[36] (leave to appeal dismissed: [2011] NZSC 8); *Wharton v R* [2011] NZCA 476 at [14].

10 See *R v Watson* [1988] 1 All ER 897 (CA) at 903. Majority verdicts have been possible in England since 1967.