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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 17/2019
[2020] NZSC 113

BETWEEN	BROOKE CHRISTIE ROLLESTON Appellant
AND	THE QUEEN Respondent

SC 18/2019

BETWEEN	BRANDON JAMES ROCHE Appellant
AND	THE QUEEN Respondent

Hearings: 20 June and 13 November 2019

Court: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ

Counsel: (20 June 2019)	E Huda and T D A Harre for Appellant in SC 17/2019 A J Bailey for Appellant in SC 18/2019 M J Lillico and K L Kensington for Respondent
Counsel: (13 November 2019)	E Huda for Appellant in SC 17/2019 A J Bailey for Appellant in SC 18/2019 M J Lillico and M H Cooke for Respondent
Judgments:	26 June and 19 November 2019
Reasons:	19 October 2020

JUDGMENT OF THE COURT

A **Order made directing an inquiry to be undertaken by an independent practitioner of the jury foreperson in the appellants' trial on terms to be settled following receipt of a memorandum of counsel.**

B **The application to cross-examine the foreperson is dismissed.**

C **The appeals are dismissed.**

D **Existing suppression orders in respect of the minutes issued in relation to this matter remain in place but are varied to continue until further order of this Court.**

REASONS

WINKELMANN CJ, O'REGAN, ELLEN FRANCE AND WILLIAMS JJ
(Given by Williams J)

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Introduction

[1] Following a trial by jury in 2017, the appellants Brooke Rolleston and Brandon Roche were convicted of the rape and sexual violation by unlawful sexual connection of the complainant.[1] They appealed their convictions claiming miscarriage due to bias on the part of a juror. The Court of Appeal refused the appellants' application for an order directing independent counsel to interview all jurors[2] and, in a separate judgment, dismissed the appeals.[3] This Court granted the appellants leave to bring a second appeal[4] and appointed counsel to undertake an independent inquiry of the juror the subject of the bias allegation.[5] Once we received counsel's report we proceeded to hear the substantive appeal. We dismissed the appeal with reasons to follow.[6] Here

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1 They were sentenced to terms of imprisonment of 11 years and two months, and 10 years and nine months respectively: *R v Rolleston* [2017] NZDC 17046 (Judge Garland) [Sentencing notes] at [46].

2 *Rolleston v R* [2018] NZCA 356, [2018] NZAR 1560 (Asher, Brewer and Thomas JJ) [Preliminary CA judgment].

3 *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79 (Miller, Dobson and Mander JJ) [Substantive CA judgment]. The appellants also appealed their sentence and those appeals were allowed. Mr Rolleston's sentence was reduced by 15 months and Mr Roche's sentence was reduced by 14 months: at [44] and [46].

4 *Rolleston v R* [2019] NZSC 32 [Leave judgment].

5 *Rolleston v R* [2019] NZSC 61 [Inquiry judgment].

6 *Rolleston v R* [2019] NZSC 129 [Results judgment].

are our reasons for differing from the Court of Appeal in relation to directing an inquiry and for agreeing with that Court on the substantive appeal.

Facts as found by the trial Judge in light of the verdicts

[2] The complainant was 15 at the time of the offending. Mr Rolleston was 19 and Mr Roche was 18. The complainant and her 17-year-old brother held a gathering with friends at their home. Details were posted on social media by a friend. The complainant's parents were out of town and unaware of the event.

[3] As more people arrived, the gathering got out of hand and the complainant became extremely drunk. Mr Rolleston offered to pay her boyfriend (who was around the same age as the complainant) $20 if he (Mr Rolleston) and the boyfriend could have sex with her. The boyfriend declined firmly. He encouraged the complainant to leave the party with him when his mother came to pick him up at midnight. The complainant refused to go. At that point her boyfriend described her as "so wasted she didn't know what was going on". The appellants became aggressive towards the boyfriend. They wanted him out of the way. He was intimidated and left. After the boyfriend left, the complainant went to her own bedroom where two of her friends were already in bed, one of them asleep.

[4] The appellants came and fetched her. They lifted her out of bed and, as she was too drunk to walk unaided, they helped her down the hall. They took her to an adjoining bedroom and there, they raped and sexually violated her.

[5] The appellants admitted having sex with the complainant but said it was consensual throughout. They also argued at trial that even if the complainant had not in fact consented they genuinely believed on reasonable grounds that she had.

[6] By their verdicts, the jury demonstrated that they rejected the appellants' version of events. The trial Judge sentenced them on the basis that the complainant was too intoxicated to give true consent, and that the appellants knew this, as would any reasonable person in the circumstances.[7]

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7 Sentencing notes, above n 1, at [14].

Allegation of juror bias

[7] In the Court of Appeal, the appellants argued their trial miscarried due to juror bias. They applied for a direction that the Court undertake an inquiry into the matter by instructing independent counsel to interview all jurors. Quite properly, neither counsel nor the appellants made any attempt to contact the jurors directly.

[8] Three affidavits filed in support of the application set out the following background.

[9] The first affidavit was from Dante Rolleston, the younger brother of one of the appellants, Brooke Rolleston. Dante Rolleston attended all but the first day or two of the trial. He said that during the trial, the foreperson of the jury (whom we call S, as the Court of Appeal did) had stared at him "intensely for minutes at a time". Dante Rolleston thought he must have known S from somewhere but could not be sure. After the trial, he checked his high school yearbook and found S.

[10] It transpired that the Rolleston brothers had attended the same high school as S. Dante Rolleston and S were in the same year. Brooke Rolleston was a year ahead. Dante said he had bullied S at school because S was "weird". Dante said S was prone to staring at him for no apparent reason and this often led to Dante aggressively confronting S about it.

[11] The second affidavit was from a teacher at the high school. The teacher confirmed that Dante Rolleston was indeed a bully at school but made no comment about the nature of Dante's relationship with S, if any.

[12] The third affidavit was from Brooke Rolleston. His evidence related to the trial. He said that he was too scared during the empanelling process to pay attention to the jurors who were selected, and that he left all of that to his lawyers to handle. He said he did not realise who S was until some days into the trial.

The Court of Appeal decisions

The inquiry

[13] In a preliminary determination, the Court of Appeal declined to direct that the jurors be interviewed by independent counsel.[8] The Court found that the connection between S and the appellants was too tenuous to give rise to a reasonable possibility of juror bias, and therefore of an unfair trial.[9] The essence of the Court's reasoning may be found in the following passage from the judgment:

> [29] At its highest, the application turns on the possibility that S recognised Mr Dante Rolleston, remembered being verbally bullied by him at school at least three years earlier, harboured a grudge as a result and visited the sins of Mr Dante Rolleston on both Mr Brooke Rolleston and Mr Roche. Further, that S told the rest of the jury about being bullied and that influenced their attitude towards both appellants and therefore their deliberations.

[14] The Court considered such scenario was inherently implausible. Brooke Rolleston apparently did not recognise S during the empanelling or when S was elected foreperson, and since S never raised the issue with the trial Judge, the Court inferred S did not recognise Brooke Rolleston either.[10] This meant that the appellants would have to establish that S was sufficiently distracted from the trial to pick out Dante Rolleston from a packed public gallery, remembering who he was and what he did at school three years earlier. He had then to associate Dante Rolleston with his brother Brooke. Having got that far, he then had to use his position as foreperson to influence other jurors without any of them raising any concerns. And S would also have to have chosen to ignore the trial Judge's instruction that he base his verdict only on the evidence, excluding any prior knowledge of, and any feelings of prejudice or sympathy towards, the appellants.[11]

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8 Preliminary CA judgment, above n 2.

9 At [34].

10 At [30]. The Court did raise the possibility that S may have disregarded the trial Judge's instructions in this respect, but it must have set that possibility to one side, given the result.

11 At [31].

The substantive appeal

[15] A differently constituted Court then dealt with the substantive appeal.[12] In the absence of an independent inquiry, the appellants argued that the evidence still demonstrated apparent bias even if actual bias could no longer be established.

[16] The Court rejected this argument, relying essentially on the logic of the preliminary determination. It found that a fair-minded lay observer with a reasonable knowledge of "the workings of the judicial system, the nature of the issues in the case, and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias" would not consider there was a reasonable possibility of juror bias in this case.[13] The Court reasoned that even if S recognised Dante Rolleston when seated in the public gallery and remembered his bullying, the next required step – that he made the connection between the Rolleston brothers and decided to punish both appellants for Dante's behaviour – was too speculative.[14]

The issues

[17] This appeal raised two issues of principle. First, when is it appropriate to inquire into allegations levelled against the jury in a conviction appeal and what should be the scope of such inquiry? And second, are there any circumstances in which the inquiry should include cross-examination of jurors or other witnesses before the court?

[18] The appeal proceeded in two stages, as it had in the Court of Appeal. As a preliminary step, this Court directed the parties to address the question of whether independent counsel should be employed to undertake an inquiry of the foreperson or other jurors.[15] Having heard from the parties, we directed that an inquiry be undertaken of the foreperson.[16] When the inquiry was completed, we then assessed whether the evidence adduced by the appellants and obtained in the inquiry met the test for miscarriage of justice.

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12 Substantive CA judgment, above n 3.

13 At [18] and [20], relying on the decision of this Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

14 At [19]–[20].

15 Leave judgment, above n 4, at [1].

16 Inquiry judgment, above n 5.

The power to order an inquiry

[19] Section 335 of the Criminal Procedure Act 2011 provides for the "[s]pecial powers of appeal courts" in conviction, sentence or contempt appeals. Where the court considers it "necessary or expedient in the interests of justice", s 335(2) relevantly provides that the court may:[17]

> (b) order the examination of ["any witnesses who would have been compellable witnesses at the trial"[18]] to be conducted before any … person appointed by the court for the purpose, and allow the admission of any formal statements before the court:
>
> …
>
> (f) appoint any person with special expert knowledge to act as assessor to the court if the court thinks that special knowledge is required for the proper determination of the case.

[20] The courts in the past relied on s 389(e) of the Crimes Act 1961, the predecessor of s 335(2)(f) of the Criminal Procedure Act, to direct jury inquiries, although the cases have also alluded to the power to order an "examination" under s 389(b) of the Crimes Act (the equivalent of s 335(2)(b) of the Criminal Procedure Act).[19] But whether inquiries of the kind envisaged in this case fit neatly within the terms of s 335(2)(b) or (f) does not particularly matter. Even if s 335(2) did not apply, the court will always have inherent power to address irregularities in its processes by such means as may be necessary in the interests of justice.

Section 76 of the Evidence Act 2006

[21] Section 76 of the Evidence Act addresses the admissibility of evidence about jurors and jury deliberations. In practical terms, it will therefore set the scope of most inquiries that a court considers the interests of justice may require. It would obviously

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17 The compellability of jurors is governed by ss 71 and 72 of the Evidence Act 2006. Section 71(1)(b) provides that a person who is eligible to give evidence is compellable to give that evidence. Section 71(1) is subject to ss 72–75. Section 72(2) provides jurors are eligible to give evidence at trial with the permission of the judge. Such juror is also compellable on appeal (see Evidence Act, s 4 definition of "proceeding" and s 5(3)).

18 Criminal Procedure Act 2011, s 335(2)(a).

19 See *R v Ropotini* (2004) 21 CRNZ 340 (CA) at [6] and [18]. The Court at [18] referred to the power to appoint an "independent assessor" under s 389(d) of the Crimes Act 1961. We assume the Court intended to refer to s 389(e). See also *R v Sangraksa* CA503/96, 3 July 1997, which refers both to an assessor and an examiner: at 1–2 and 4.

not be in the interests of justice to order an inquiry that could only produce inadmissible evidence. The section provides as follows:

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

Intrinsic evidence and the exclusionary rule: s 76(1)

[22] A distinctive feature of our system of trial by jury is that the jury must hold its deliberations in secret and must not give reasons for its verdict. Trial courts go to great lengths to ensure this veil of secrecy is not breached. A court official is appointed to provide for the needs of each jury once empanelled. Even though juries are no longer routinely sequestered, one of the important functions of that official is to ensure the jury is secure from outside influences that may distract them from complying with the duty to determine the defendant's guilt according to law. Trial judges are careful to warn juries that they must not discuss the trial with anyone other than their fellow jurors and that they must not make inquiries of their own about the case.

[23] Section 76(1) adds a further and important safeguard.[20] It enacts what in the common law is known as the "secrecy rule", the "rule of exclusion" or the "exclusionary rule".[21] Evidence of internal deliberations of the jury (intrinsic evidence) is not admissible in any proceedings except where exceptional circumstances provide a compelling reason to admit it.[22] In deciding whether the circumstances are sufficiently exceptional, the court must undertake the balancing exercise described in subs (4).

[24] The justification for the exclusionary rule has changed over the course of history,[23] but in the context of the Anglo-common law, the authorities have generally referred to the following justifications:[24]

(a) Secrecy promotes candour in the process of collective decision-making and the prospect of later publication of jury conversations would have a chilling effect on such candour.

(b) Secrecy protects the finality of the jury's verdict by ensuring that post-verdict appeals do not descend into blow by blow post-mortems of the collective deliberation process.

(c) Relatedly, secrecy protects public confidence in the collective decision-making of juries by preventing inevitable disagreements within the jury room from becoming the subject of ongoing wider community debate and controversy.

(d) Secrecy protects jurors by ensuring that they are not drawn into subsequent appeals and that they are not exposed to criticism or worse

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20 See *R v Pan* 2001 SCC 42, [2001] 2 SCR 344 at [47]–[48].

21 See for example in New Zealand, *R v Papadopoulos* [1979] 1 NZLR 621 (CA) at 627; in Australia, *Smith v State of Western Australia* [2014] HCA 3, (2014) 250 CLR 473; in the United Kingdom, *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118 at [13] per Lord Steyn and [115] per Lord Hope; and in Canada, *Pan*, above n 20, at [38].

22 Evidence Act, s 76(3).

23 The original reason was to protect jurors from self-incrimination: see *Mirza*, above n 21, at [95] per Lord Hope; and *Pan*, above n 20, at [49]. Both *Mirza* and *Pan* refer to *Vaise v Delaval* (1785) 1 TR 11, 99 ER 944 (KB).

24 In New Zealand, see *Papadopoulos*, above n 21, at 626 and *Tuia v R* [1994] 3 NZLR 533 (CA) at 555; in Australia, *Smith*, above n 21, at [30]–[31]; in the United Kingdom, *Mirza*, above n 21, at [47] per Lord Slynn; and in Canada, *Pan*, above n 20, at [50]–[52].

by members of the community who may not agree with the views jurors express about the case in deliberations.

[25] These factors are not just about protecting the interests of jurors and the finality of their verdicts. They go also to the quality of justice received by defendants when tried by a jury of their peers. In this sense, they are also relevant to fair trial rights.

[26] Courts in the United Kingdom, Canada, Australia and in New Zealand (prior to 2006) have long limited strict protection of jury secrecy only to matters intrinsic to the deliberation process.[25] Section 76(1) affirms that approach. As we discuss below, s 76(2) describes in broad terms the kinds of evidence that are seen as extrinsic to the deliberation process, and therefore beyond the reach of the exclusionary rule. In practice, the line between intrinsic and extrinsic evidence has sometimes proved difficult to draw and the courts have occasionally been uncomfortable with its effect in individual cases.[26] In any event, even in relation to extrinsic matters, the protection of jurors and the jury system will still be relevant, at least to some extent, in deciding whether an inquiry is justified.[27]

[27] The conceptual and practical difficulties of demarcation are mitigated to some extent in New Zealand by the test in s 76(3) and (4).[28] As we have said, subs (3) provides that the exclusionary rule may be relaxed in exceptional circumstances where there is a "sufficiently compelling reason" to admit the evidence. When making its assessment, subs (4) requires the court to weigh two public interests: the requirements of justice and the need to protect jury confidentiality.

Extrinsic evidence: s 76(2)

[28] Evidence relating to jurors is not subject to the exclusionary rule if it does not relate to internal jury deliberations; that is, if it is evidence extrinsic to the deliberation process. Section 76(2) describes this category of extrinsic evidence in broad terms. It

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25 *Mirza*, above n 21, at [102] per Lord Hope; *Pan*, above n 20, at [59]–[60]; *Smith*, above n 21, at [27]; and *Papadopoulos*, above n 21, at 627.

26 See for example *Pan*, above n 20, at [60]; and *Smith*, above n 21, at [27]–[29]. See also the dissenting speech of Lord Steyn in *Mirza*, above n 21, at [23]; and *Tuia*, above n 24.

27 See below at [43].

28 These subsections use similar language to that adopted by Tipping J in *Tuia*, above n 24, at 556.

identifies, "without limitation", three categories of extrinsic evidence: juror competence or capacity, conduct and knowledge. Juror competence or capacity refers to the mental or physical ability of the juror to perform their role.[29] This would include evidence of issues such as lack of fluency in the trial language,[30] or of a mental or physical disability preventing the juror from comprehending the trial.[31]

[29] Extrinsic evidence of disqualifying juror conduct or knowledge will be admissible. Potentially disqualifying conduct will include, for example, jurors undertaking their own investigation into trial issues.[32] Potentially disqualifying knowledge will include knowledge of inadmissible prejudicial evidence received from a source outside of trial.[33] It will also include evidence of any prior knowledge the juror may have about the defendant, a witness or the case itself. Not all prior knowledge of that kind will necessarily be significant. Judges routinely direct jurors to put out of their minds any prior knowledge they may have about the trial. In any event, the cases are clear that the scale of New Zealand communities is such that jurors will occasionally have some kind of connection with, or knowledge of, parties or witnesses at a level that is not problematic.[34] Rather, the evidence must relate to knowledge or connection believed to be of a disqualifying kind.[35] Obviously, there will be some overlap between these categories and, as noted, they are not an exhaustive list of the possible categories of admissible extrinsic evidence. The issue will not be

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29 See Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at [133]. See also *Lal v The King Emperor* [1933] All ER Rep 723 (PC). This covers similar ground to the lack of capability standard in s 22(2)(a) of the Juries Act 1981, which is a ground on which a trial judge may discharge a juror or jury before or during a trial under s 22(1).

30 *Lal*, above n 29.

31 For a disqualifying mental disability, see for example *James v R* [2011] NZCA 219, [2012] 1 NZLR 353 at [21]–[27].

32 See *R v Bates* [1985] 1 NZLR 326 (CA) (where multiple jurors researched the availability of the drug ephedrine); *R v Gillespie* CA227/88, 7 February 1989 (where two jurors visited the scene); *R v Taka* [1992] 2 NZLR 129 (CA) (where jurors tested the rate of cooling of their car engines); and *JM v R* [2016] NZCA 383 (where a juror had allegedly conducted internet searches).

33 See *Tuia*, above n 24 (where the appellant's medical records had been taken into the jury room by mistake); *R v Norton-Bennett* [1990] 1 NZLR 559 (CA) (where a juror obtained information from her son and a book said to be related to the case); and *R v Baybasin* [2013] EWCA Crim 2357, [2014] 1 WLR 2112 (where a juror allegedly read a book about drug dealing that referred to the defendant's family during the trial).

34 *R v McCallum* (1988) 3 CRNZ 376 (CA) at 379, cited in *R v Te Pou* [1992] 1 NZLR 522 (CA) at 526–527.

35 This category is also reflected in s 22(2)(d) and (e) of the Juries Act allowing the trial judge to discharge a juror or jury if a juror is "personally concerned" with the facts of the case, or "closely connected" to a party, witness or proposed witness.

which of the s 76(2) categories the evidence fits into, but whether justice requires that an inquiry into that evidence be undertaken.

[30] The focus in this appeal is on extrinsic evidence; that is, evidence about whether S's prior knowledge or experience of Brooke and Dante Rolleston (if any) prevented him, or appeared to prevent him, from bringing an open mind to jury deliberations. As we shall see, the Crown initially argued, and the Court of Appeal may perhaps be taken to have accepted,[36] that an inquiry into S's possible partiality would inevitably lead to eliciting evidence of jury deliberations in breach of the exclusionary rule. That is because, it was suggested, if the evidence pointed to bias on the part of S, resolution of the appeal would necessarily require a further inquiry into the effect of that, if any, on jury deliberations.

[31] We certainly agree with the Court of Appeal that any inquiry into the way in which one juror's attitude towards the defendant might have affected the whole jury would be an inquiry into intrinsic jury deliberations. It would require the court or its examiner or assessor to ask what S said to the other jurors. Such inquiry would therefore need to clear the higher threshold in s 76(3). But there remains the question whether, as the appellants argue, actual or apparent bias on the part of a single juror could be sufficient to establish miscarriage without the need for inquiry into intrinsic evidence of its effect on the wider jury. We turn now to this matter.

Application for an inquiry

Submissions

[32] The appellants supported the making of a s 335 direction and the Crown opposed. The appellants argued that on the facts as deposed in the Court of Appeal, S's membership of the jury gave rise to a sufficient appearance of bias to warrant such inquiry, and further that the New Zealand Bill of Rights Act 1990 right to a fair trial before an independent and impartial court justified it.[37] Further, the appellants argued

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[36] Preliminary CA judgment, above n 2, at [29] ("the application turns on the possibility … that S told the rest of the jury about being bullied and that influenced their attitude towards both appellants and therefore their deliberations").

[37] New Zealand Bill of Rights Act 1990, s 25(a).

the necessary inquiry could be carefully circumscribed so as to avoid eliciting intrinsic material.

[33] For the Crown, it was argued that the interests of justice did not justify an inquiry in this case. First, as the Court of Appeal found, the connection between S and the appellants was too remote. While there might have been an issue if it was alleged that Brooke Rolleston himself had bullied S, the interests of justice could not be served by investigating the bullying of S by someone else, even one closely related to Brooke Rolleston. Further, the appellants made no allegation at all of a connection between S and Mr Roche. Second, any inquiry would inevitably lead to eliciting information about the jury's actual deliberations. That is, this Court would inevitably be required to consider whether S told the jury about being bullied by Dante Rolleston, and if so, whether the jury took that in to account. There was, the Crown submitted, no compelling reason as required by s 76(3) to breach jury room confidentiality.

The interests of justice

[34] As we have said, before directing an inquiry, the overarching criterion for the court is the interests of justice.[38] What justice requires will depend very much on the allegations made, the underlying factual context of the trial and charges, and the issues arising. But it is also important to bear in mind the wider context of safeguards that may be deployed by the court before, during or after trial to ensure that the defendant is tried fairly before an independent and impartial jury. These provide useful and relevant navigational markers when applying a standard that is necessarily imprecise.

Other fair trial safeguards

[35] The starting point is the New Zealand Bill of Rights Act. Section 25(a) guarantees all defendants (including those who choose trial by jury) a fair and public hearing before an independent and impartial court. All of the procedures and safeguards discussed here must be seen as expressions of that fundamental guarantee.

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[38] See also *Tuia*, above n 24, at 557; and *JM v R*, above n 32, at [24].

[36] The Juries Act 1981 contains several relevant safeguards. Section 25 of that Act applies to the jury selection stage of the trial. It entitles any party to challenge a juror who is "not indifferent between the parties".[39] Prior to commencement of the jury selection process, trial judges invariably direct the jury panel that if they have any connection with the trial, the defendant or any witness to be called, and they are selected, they must advise the court of that connection. At that point, the prosecutor will often read out in open court a list of proposed prosecution witnesses for the benefit of the jury panel.

[37] Once empanelled, jurors must swear an oath or make an affirmation that they will give their verdict according to the evidence and, the implication is, *only* the evidence.[40]

[38] Following commencement of the trial, there is a second layer of safeguards. Section 22 of the Juries Act applies at any stage of the trial prior to verdict.[41] The court, "having regard to the interests of justice",[42] may discharge a juror who it considers is incapable of performing their duty as a juror,[43] is "personally concerned" in the facts of the case,[44] or "closely connected" with a party, witness or proposed witness.[45]

[39] There are also offences designed to firmly discourage particular forms of partiality. By the terms of s 117(b) of the Crimes Act, it is an offence to influence or attempt to influence a juror by "threats or bribes or other corrupt means". And it is an offence for a juror to accept any "bribe or other corrupt consideration" in relation to their duty on the jury or to wilfully attempt to pervert the course of justice.[46]

[40] Finally, there are the standard directions trial judges give to the jury in open court during and at the conclusion of the evidence: that the jurors must approach the trial on the basis that the defendant is entitled to be presumed innocent until proven

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39 Juries Act, s 25(1)(a).
40 As required by r 22 and sch 1 form 2 of the Jury Rules 1990.
41 Juries Act, s 22(2).
42 Section 22(1).
43 Section 22(2)(a).
44 Section 22(2)(d).
45 Section 22(2)(e).
46 Crimes Act, s 117(d). See also s 117(e).

guilty to the criminal standard; that the prosecutor bears the burden of proof; that jurors must not discuss the trial with non-jurors or make their own inquiries about the trial; and that they must set aside any feelings of prejudice or sympathy they may harbour towards the defendant or the complainant and give their verdict based only on the evidence they have heard in the trial.

[41] This matrix of safeguards demonstrates how important it is that jurors bring an open and unbiased mind to their deliberations and that those deliberations are untainted by prejudicial extraneous evidence or other material not admitted in the trial process.

The test

[42] There is no indication in s 76 of the Evidence Act that inquiries into extrinsic evidence will be rare or exceptional where issues such as juror partiality are truly in play.[47] But there are obvious limits. A closer look will be unnecessary where the allegations, even if they are true, could not provide a successful ground of appeal. Extrinsic allegations of a trivial, inconsequential or irrelevant nature will not meet the interests of justice test.[48] Further, the general admissibility rules in the Evidence Act still apply to extrinsic evidence. If the allegations relate to evidence that is otherwise inadmissible, the interests of justice will not be served by further inquiry.

[43] Finally, sight should not be lost of the interests of jurors, who are not volunteers and who must perform a difficult and often onerous public service. Ordinarily they will be entitled to expect to return to their everyday lives at the conclusion of the trial without a lingering fear that they may later be required to give an account of themselves to an appellate court. Obviously this must happen where the interests of justice require it, but for the protection of jurors as well as the integrity of the jury system, the courts ought not to jump too readily to the conclusion that a jury inquiry is required. The interests of justice will not be served by co-opting the court into a jury-focused fishing expedition unsupported by a credible evidential narrative.

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47 See also *JM v R*, above n 32, at [23].
48 At [24].

[44] If, on the other hand, the allegations relate to extrinsic evidence and are sufficiently credible to suggest an inquiry could reasonably establish that there has been a miscarriage of justice, then it will generally be in the interests of justice to direct such inquiry.

Application to this case

[45] The primary allegations of fact on which the appellants relied were that Brooke Rolleston's younger brother Dante Rolleston was a bully at school about three years before the trial and he repeatedly and regularly bullied S, who was in the same year. Dante Rolleston said he bullied S because S was prone to staring at him at school. Brooke Rolleston, a year their senior, attended the same school. Dante Rolleston said S had also stared at him during the hearing. The respondent did not seek to adduce independent evidence to suggest these primary allegations were untrue.

[46] The controversy related instead to the inferences that could properly be drawn from the allegations if they were accepted. The view of the Court of Appeal was that the link between Dante Rolleston's bullying (even if accepted) and the verdicts was too tenuous.[49] The allegations, it was suggested, did not support the necessary inference chain: that it was reasonably possible S recognised Dante Rolleston, remembered being bullied by him, connected him to Brooke Rolleston, communicated these matters to his fellow jurors in deliberations and thereby infected the entire jury with his alleged antipathy towards the appellants.[50]

[47] We preferred a different approach to the question of whether an inquiry should be undertaken. On the evidence of Dante Rolleston and his former teacher, the inference was reasonably available that S remembered Dante Rolleston from school, and in a prejudicial light. Further support for this inference could be found in the allegation that S had repeatedly stared at (and therefore recognised) Dante Rolleston in the courtroom. Without further inquiry, this allegation could not be dismissed as false or incapable of belief, given the alleged background of bullying. Further, is it, as the Court of Appeal suggested,[51] really so unrealistic to suppose that S knew Dante

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49 Preliminary CA judgment, above n 2, at [34].
50 At [31].
51 At [29]–[31] and [34].

and Brooke Rolleston were brothers, and that any antipathy he may have felt towards Dante influenced his attitude towards Brooke? It seemed to us that, without knowing more, a narrative along these lines was perfectly credible. A closer look was required. We therefore concluded that it was necessary in the interests of justice to direct that an inquiry be undertaken. Whether or not further steps might be required following that inquiry could await the result.

[48] Similarly, it was not necessary at that stage for us to resolve the question of whether bias (actual or apparent) on the part of one juror is enough to taint the verdict of the jury, or in the alternative whether evidence was required that S's partiality (if any) infected the whole jury. Once completed, the inquiry would provide a fuller picture and a decision could be made about whether that question arose at all. In any case, the authorities are not entirely in agreement on the question. The test generally applied to judicial partiality, as set out in the decision of this Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, implies that one biased judge is enough to establish bias in relation to an entire appellate bench.[52] In deciding whether to direct an inquiry, the Court of Appeal in this case did not appear to accept that one biased juror would be enough,[53] although the Court subsequently cited the *Saxmere* test in the substantive appeal.[54] More generally, appellate courts have been inconsistent in their application of that standard to juries.[55] The inconsistency may simply reflect the fact that allegations of juror bias are rare and arise in very fact-specific circumstances. In any event, at this point in our consideration of the appeal, it was necessary to decide only whether a closer look was required.

The inquiry

[49] This Court therefore instructed Mr Rapley QC to undertake an independent inquiry to "ascertain the nature and extent of the relationship, if any", between Brooke Rolleston, Dante Rolleston and S. Counsel for the appellants argued that the inquiry

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52 *Saxmere*, above n 13. See also *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.

53 See Preliminary CA judgment, above n 2, at [29].

54 The Court of Appeal applied the *Saxmere* test for apparent rather than actual bias: Substantive CA judgment, above n 3, at [17], citing *Saxmere*, above n 13, at [3].

55 See for example *Cavanagh v R* [2010] NZCA 36; and *Te Pou*, above n 34. For the United Kingdom, see *R v Hood* [1968] 1 WLR 773 (CA); and *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679.

should relate to all jurors, but we considered this unnecessary for the reasons already traversed. In any event, broadening the inquiry could, potentially, have led it to elicit intrinsic evidence in breach of the exclusionary rule. It would have required questions to be asked and answered about the deliberation, and so would have triggered the more stringent test in s 76(3).

[50] Mr Rapley was provided with the necessary background documentation. Counsel for the appellants had initially proposed that a series of mostly closed questions be put to S, but we preferred to rely on senior counsel to conduct the interview as he thought fit in light of the objective of the inquiry and any responses from S. Counsel could be expected to guide S away from discussing jury deliberations and to focus only on information about the relationships under inquiry.

[51] Before Mr Rapley interviewed him, S instructed Mr Cook, an experienced criminal barrister. Mr Cook provided initial advice to S and attended the interview with him. His costs were met by the Court.

[52] The interview took place on 16 August 2019. Mr Rapley advised that S was co-operative throughout. The content of the interview was not transcribed, nor did S give evidence on oath. Instead Mr Rapley took a statement from S, which S subsequently signed. This statement was provided to the Court and the parties. Its terms satisfy us that Mr Rapley raised the necessary issues with S in the interview and tested his responses appropriately. All relevant issues identified by counsel for the appellants were traversed by Mr Rapley and referred to in the statement.

[53] In summary, S stated that the name "Dante Rolleston" did not mean anything to him, and that while he was bullied at school (he recalled the identity of some of those who bullied him), he did not recall Dante Rolleston being one of them. S did not know Brooke Rolleston either.

[54] He then described his experience of the trial. He said he did not recognise either appellant at first but on about the third day he thought one of them looked familiar. He did not know and could not recall why, and so decided he did not know him after all. He thought no more of it and did not consider it was a matter that should

be raised with the trial Judge. He confirmed that he was aware he could be excused from jury service if he knew the defendant or a witness, and that if he did recognise one or other of the appellants he would have told the trial Judge even if he was not sure where from.

[55] Finally, S said that at the conclusion of deliberations and shortly before he announced the jury's verdicts, he had noticed someone in the public gallery who looked familiar, but again he could not pick how he knew that person. He put the matter out of his mind as unimportant. He knew of no connection between that person and the appellants.

The substantive appeal

[56] Following receipt of the statement, we invited further submissions in writing from the parties and convened a further hearing to hear oral argument on the substantive appeal.

[57] The appellants advanced argument essentially on two fronts. First, S's statement, when taken in the context of the evidence adduced by the appellants, still left room for continuing concern about apparent bias. And second, in the alternative, there is at least sufficient lingering doubt about the veracity of S's claim that he did not recall either of the Rolleston brothers to justify granting the appellants an opportunity to cross-examine him. The appellants had made no formal application following the inquiry, but counsel for Brooke Rolleston made an oral application at the hearing.

[58] For its part, the respondent accepted it may be appropriate to allow cross-examination of jurors in some circumstances, but not in this case. Rather, S's statement, given in formal circumstances through an independent inquiry, ends the controversy. There is, the Crown argued, no longer any proper basis (if there ever was one) upon which apparent or actual bias could be established. Nor should cross-examination be allowed to enable the appellants to maintain their search for such basis.

Application to cross-examine S

[59] It is convenient to first address the oral application for leave to cross-examine S before turning to the substantive argument.

[60] There may be occasions where cross-examination of a juror or jurors is justified. As Mr Lillico acknowledged for the Crown, r 40(1)(a) of the Supreme Court Rules 2004 contemplates that witnesses may be called to give evidence in this Court. Further, the terms of ss 72 and 76 of the Evidence Act logically contemplate the possibility that jurors may be required to give evidence in court in some circumstances. But as a general proposition, leave to cross-examine jurors will be rare. It will be granted only where that more invasive form of inquiry is necessary in the interests of justice because the alternatives – an inquiry by independent counsel or by the court itself – are for some reason insufficient. In making its assessment, the court will be mindful of the interests of jurors[56] and that giving leave to cross-examine would afford the appellant an opportunity they would be most unlikely to have obtained at trial.

[61] The interests of justice may necessitate a right of cross-examination where, for example, the credibility of a juror's account is directly in issue and must be resolved in order to address the issues in the appeal. Examples of this may be seen in England and Wales Court of Appeal decisions in *R v Adams*[57] and *R v Baybasin*.[58] In both cases, conflicts between the evidence of different jurors about important aspects of their deliberations required the Court to make credibility findings in order to resolve the controversy.

[62] But this is certainly not the kind of case where cross-examination of jurors can be said to be necessary in the interests of justice. Here, there is no real conflict between the witnesses on the essential questions before the Court and there is nothing in S's statement or Mr Rapley's report to suggest that the statement may be unreliable. Cross-examination would not, therefore, be in the interests of justice. The application to cross-examine S was therefore declined.[59]

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56 See above at [43].
57 *R v Adams* [2007] EWCA Crim 1, [2007] 1 Cr App R 34 at [176].
58 *Baybasin*, above n 33.
59 Results judgment, above n 6.

Does the evidence establish actual or apparent bias?

[63] We agree with the respondent that on the evidence of the appellants and S, there is no basis upon which to infer apparent or actual bias on the part of S. There is, in the final analysis, no inherent conflict between S's statement and Dante Rolleston's affidavit: Dante Rolleston says he bullied S, but S says he does not remember either Dante Rolleston or his bullying. Whatever Dante Rolleston did to S (if anything), it was not memorable by comparison to the treatment S received at the hands of others he remembered vividly.

[64] The appellants suggested that we should not rely on S's statement and prefer the evidence of the Rolleston brothers. Three particular reasons were advanced: first, Dante Rolleston's evidence was not challenged by the Crown; second, it is very likely S was advised by his counsel against making any statement that might constitute evidence of an offence;[60] and third, Dante Rolleston's evidence suggests S stared at him in the courtroom more often and for longer periods than the single brief occasion, it may be inferred, S identified in his statement.

[65] We are unable to accept those propositions. First, as we have said, the evidence of S and Dante Rolleston is not in conflict, so the Crown had no reason to challenge Dante Rolleston's evidence.

[66] Second, to draw a negative inference from the fact that S obtained the assistance of counsel would be unjustified. S, like the appellants, is a young man. Mr Rapley advised that S initially retained counsel at the insistence of his parents who were naturally anxious about the implications of their son being visited by Queen's Counsel appointed by this Court pursuant to a procedure they did not understand. In any event, counsel would not be expected to have advised S to lie. Even assuming S was somehow in jeopardy, the advice would have been to maintain his silence. It would be ironic to infer S lied from the fact that he sought the same access to legal advice that is guaranteed to the appellants as their fundamental right.[61] There is no basis upon which to infer that S sought legal advice to avoid

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60 Counsel for Brooke Rolleston referred to contempt of court, and s 117(b) and (e) of the Crimes Act, which relate to corrupting jurors.

61 New Zealand Bill of Rights Act, ss 23(1)(b) and 24(c).

self-incrimination. On the contrary, following consultation with counsel, S co-operated in the inquiry and did not at any stage express a wish to exercise his right to silence. The obvious inference is he had nothing to hide.

[67] Third, in relation to the frequency and length of the staring episodes in court, the statements of S and Dante Rolleston are not necessarily in conflict. What Dante Rolleston perceived as active staring at him may not have been a conscious action on the part of S at all. He may simply have been staring in Dante Rolleston's general direction. Indeed, if Dante Rolleston's evidence is true, S seems to have been an habitual starer. As with S's very different recollections of Dante Rolleston's behaviour towards him at school, the two statements about eye contact are most sensibly construed as different perspectives on the same facts. Dante Rolleston has simply overvalued his impact on and interactions with S.

[68] Further, now that S's perspective is on the record, there is certainly no proper basis on which to apprehend that a fair-minded lay observer appraised of the factual background might reasonably perceive a realistic possibility that S was not impartial.[62] He was clear that he did not associate the person he initially thought was familiar (presumably Dante) with Brooke Rolleston. A critical link in the chain was therefore missing. This meant there was no point in addressing further the question of whether the appellants were required to demonstrate that S's partiality had affected the attitude of the wider jury.[63] Resolution of that important issue should await a case in which it matters and where, unlike this case, relevant arguments are fully canvassed.

[69] Finally, as we have noted, unless a defendant's right to a fair trial before an impartial tribunal was genuinely at risk, jurors should not be exposed to the stress of a forensic inquiry into their actions and motives. As the evidence produced by the inquiry in this case did not suggest anything untoward had occurred in relation to the discharge by S of his duties as a juror, there was no good reason to impose further on him or his colleagues.

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62 *Saxmere*, above n 13, at [3] per Blanchard J.

63 See the discussion above at [48].

Suppression

[70] To protect the interests of the foreperson, it was necessary to extend suppression orders made in relation to the minutes issued by this Court throughout this proceeding.

Result

[71] For the foregoing reasons, we made the following orders in this proceeding:

(a) Order made directing an inquiry to be undertaken by an independent practitioner of the jury foreperson in the appellants' trial on terms to be settled following receipt of a memorandum from counsel.

(b) The application to cross-examine the foreperson is dismissed.

(c) The appeals are dismissed.

(d) Existing suppression orders in respect of the minutes issued in relation to this matter remain in place but are varied to continue until further order of this Court.

GLAZEBROOK J

[72] I write separately to explain my reasons for ordering an inquiry in a bit more detail. Other than as set out below, I agree with the reasons given by Williams J and in particular the reasons for dismissing the appeal.

[73] I agree that an inquiry should not be ordered with regard to matters extrinsic to jury deliberations unless there is a credible narrative that, if confirmed, would be capable of making out a miscarriage of justice.[64]

[74] I agree that the authorities to date are not clear on whether bias (actual or apparent) on the part of one juror would lead to a finding of miscarriage on appeal.[65]

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64 See the reasons given by Williams J above at [42] and [44].
65 Above at [48] and n 55.

Indeed, most of the (relatively scant) authorities would suggest that, contrary to the position with regard to judicial bias,[66] a miscarriage would only arise if there was unfairness which would occur if the bias of one juror had tainted the whole jury.[67] For example, in *Cavanagh v R*, the Court of Appeal said that a reasonable and fair-minded observer would not think that the entire jury would be tainted by one juror's alleged bias in that case.[68] The Court in *Cavanagh* supported the suggestion of the House of Lords in *R v Abdroikov* that to find otherwise would "virtually ignore the other eleven jurors who reached the same decision as the juror in question".[69]

[75] If the test for a miscarriage is that the bias of one juror has to have tainted the whole jury, then there would not have been a credible narrative of a possible miscarriage and therefore no grounds for an inquiry in this case. I agree with the Court of Appeal, for the reasons given, that the scenario set out above at [13] was inherently implausible.[70] But there is a more fundamental problem. If it had been necessary to show that the bias of one juror had tainted the whole jury, then it would be necessary to inquire into jury deliberations. This would have engaged the "exceptional circumstances" test in s 76(3) of the Evidence Act 2006. That test would not have been met in this case: an inherently implausible narrative could not possibly have met the more stringent test.

[76] By contrast, if the actual or apparent bias of one juror would lead to a finding of miscarriage of justice, then I agree that there was a plausible narrative that there may have been actual or apparent bias on S's part.[71] If that had been confirmed after inquiry, this would have meant there had been a miscarriage of justice.

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66 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

67 See for example *R v McCallum* (1988) 3 CRNZ 376 (CA) at 380; *R v Bliss* (1987) 84 Cr App R 1 (Crim App) at 6–7; and *R v Khan* [2008] EWCA Crim 531, [2008] 3 All ER 502 at [10].

68 *Cavanagh v R* [2010] NZCA 36 at [53]. In *Cavanagh*, however, the connection between the juror and the defendant was tenuous and the Court concluded there was no evidence to raise a reasonable apprehension or suspicion that the juror at issue acted other than impartially: at [52] and [54].

69 At [53], citing *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679 at [39] per Lord Rodger.

70 *Rolleston v R* [2018] NZCA 356, [2018] NZAR 1560 (Asher, Brewer and Thomas JJ) at [29]–[34]; and *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79 (Miller, Dobson and Mander JJ) at [19]–[21].

71 See the reasons given by Williams J above at [47].

[77] I consider the better view to be that bias (whether actual or apparent) of one juror does mean a miscarriage of justice.[72] This means that the position is the same for juries as for panels of judges.[73] That this is the case is reinforced by s 25(a) of the New Zealand Bill of Rights Act 1990 and ss 22 and 25 of the Juries Act 1981, as well as the other measures set out by Williams J to ensure all jurors act impartially.[74]

[78] On the material before the Court at the time of the hearing into whether an inquiry should be ordered, there was a credible narrative suggesting possible bias on the part of S. I therefore agreed an inquiry should be ordered. I note that the inquiry was carefully constrained so as not to cover jury deliberations.[75]

[79] I comment that, had the "plausible narrative" been confirmed even in part after the inquiry (which it was not), then there would have been no need for any further inquiry. The only issue would have been whether the narrative in fact meant there was actual or apparent bias on the part of S. If so, then there would have been a miscarriage of justice.

[80] As it happened, the results of the inquiry showed no apparent or actual bias on the part of S for the reasons given by Williams J.[76] This means the appeals had to be dismissed.[77] I also agree with the dismissal of the application to cross-examine the foreperson and the variation of the suppression orders.

Solicitors:
Patient & Williams, Christchurch for Appellant in SC 17/2019
Crown Law Office, Wellington for Respondent

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72 As we did not hear argument on this point, my conclusion on this point is not definitive.
73 Under *Saxmere*, above n 66, apparent bias of one judge on a panel suffices.
74 See the reasons given by Williams J above at [35]–[41].
75 Above at [49]–[50].
76 Above at [63]–[69].
77 Above at [71].