IN THE SUPREME COURT OF NEW ZEALAND SC 120/2011

[2012] NZSC Trans 7

MICHAEL ANDREW KEITH HASTIE

v

THE QUEEN

Hearing:	07 June 2012
Court:	Elias CJ Tipping J McGrath J William Young J Chambers J
Appearances:	S W Hughes QC for the Appellant C L Mander for the Crown

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CRIMINAL APPEAL

MS HUGHES QC:

May it please the Court, I appear for the appellant.

ELIAS CJ:

Yes Ms Hughes.

MR MANDER:

May it please the Court, I appear for the Crown.

ELIAS CJ:

Thank you, Mr Mander. Right, Ms Hughes.

MS HUGHES QC:

Thank you, Ma'am. On the 18th of August 2010 a jury advised that it was stalemated, nine to three on six counts, unanimous on two and requested that the Judge provide them with some direction. No direction was provided, other than advice that the Judge would now accept majority verdicts. Shortly after retiring again, majority verdicts were returned.

Context around the final jury question had to be that firstly, that the trial was a single issue trial and, that is, the question of the credibility of the complainants was front and centre. Secondly, the jury had been deliberating for 10 hours, six hours the previous day, then a night and then a further four hours on the 18th. The jury had heralded that they were stalemated in previous communications and if I remind the Court that they had asked two previous, or had two previous communications, the first of which: "What is the definition of reasonable doubt and is an element of doubt acceptable to arrive at a unanimous decision?" And thereafter, immediately before they retired on the first day, jury status: "We have come to a crossroads collectively. We are consistent but not unanimous. We don't expect to change anyone's stance tonight. We have a couple of jurors that would like some quiet time to consider their positions. This may bring us closer to resolution."

Now in short, those three communications, I submit, demonstrate that this was a conscientious jury who was working hard on trying to reach consensus. They had demonstrated their ability to do so by reaching a unanimous verdict on two counts. They had spent 10 hours considering the matter. They had had a break of a night in between and they were requesting assistance.

In what is known as the *Papadopoulos* decision, his Honour President Cooke had said and this is at paragraph 20 of my submissions, "In the result we consider that words on the following lines or to the like effect will ordinarily be appropriate in New Zealand when the jury report difficulty in agreeing and are in substance asking for and entitled to guidance from the Judge." It's my submission that the question asked on the 18th entitled this jury to some guidance from the Judge as to how they should address the impasse at which they found themselves.

CHAMBERS J:

If it was so obvious, why didn't you ask the Judge immediately to give such a direction?

MS HUGHES QC:

Because it was so obvious, Sir. As the memorandum from both myself and Crown counsel makes clear, we both assumed that that's exactly what he would do.

CHAMBERS J:

But when he didn't do that?

MS HUGHES QC:

When he didn't do that, Sir, we were both stood in Court as the jury retired again, discussing just that issue and had resolved to return to his Honour to ask him to recall the jury when the Court taker told us that in fact the jury had reached a verdict and it was too late.

TIPPING J:

You said that was about half an hour later?

MS HUGHES QC:

No, Sir, it didn't take as long as that. I'm unclear about the timing. What happened was this, that we were advised that the jury had the third question, we met his Honour in chambers, as in, in his chambers, not in Court for chambers, there was a discussion, I made the application that the verdicts on the two unanimous counts should be taken and that the jury should be discharged on the other matters. That obviously took some time, with the Crown disagreeing and his Honour ruling against me. We then proceeded to Court where his Honour provided the direction. Ms Clarke and I were packing up our books, immediately began talking about why there hadn't been a *Papadopoulos* direction, resolved that we would ask the Court taker if we could be permitted to speak to his Honour further. At that time, another Court taker came through the back door and said a verdict had been achieved.

TIPPING J:

So you mean it's a matter of five or 10 minutes?

MS HUGHES QC:

It is more like – that is my memory of it but –

TIPPING J:

At most?

MS HUGHES QC:

Yes, that is my memory of it, Sir because we certainly had not left the Court. We were stood in Court talking as we packed up our books, both of us expressing concern that there had been no *Papadopoulos* direction and that's confirmed by the memorandum that's before the Court.

CHAMBERS J:

What do you say —

McGRATH J:

That memorandum seems to indicate that you were in the course of discussing whether the Judge should be asked to recall the jury?

MS HUGHES QC:

We both were in Court, Sir. His Honour had issued his direction. He had retired. The jury had retired. The two of us were talking about why hadn't there been a *Papadopoulos* direction, what should we do about it? We had just reached the point where we'd agreed that we should ask him to recall the jury to deliver such and we were advised that the –

McGRATH J:

You're suggesting now that there was agreement on that, where that's not really what the memorandum at page 63 says?

MS HUGHES QC:

Oh well, perhaps it doesn't say that but that certainly was where we were at.

WILLIAM YOUNG J:

The majority verdict direction was given at 2.06 pm. Presumably there will be a Crown record as to when the verdict was delivered, although I know it takes some time to get everyone into Court.

MS HUGHES QC:

There have been issues with the timings and the records on this in any event, Sir because your Honour will see from the indictment that it records that there are two unanimous counts and that the majority verdicts are split in some way and part of the memorandum was to confirm that the unanimous verdicts were the two not guilties. There were no unanimous verdicts for guilty.

WILLIAM YOUNG J:

Yes, I was just really interested what time the verdict was given?

MS HUGHES QC:

I accept that it records that the jury's question was received at I think 2.02, his Honour provided a direction at 2.06, that seems far too short a time for me, in as much, as I say, we were in his chambers. So he had to receive the question, we had to be retrieved from wherever we were, then we had to sit down and discuss the question, then we went into Court for him to provide the direction, then the jury go back down the stairs again. We have further discussions in Court; neither Ms Clarke nor myself left Court. We were in that Court discussing the issue when we were advised that in fact the jury had reached a decision.

CHAMBERS J:

Be that as it may, what do you say about the overseas authorities that Mr Mander has put forward which seem to indicate that the preferred course is to give the informational majority verdict direction first and then later, if required, a *Papadopoulos* or the perseverance direction, as the Australians call it?

MS HUGHES QC:

I can see no logical reason why, if a jury has reached a point after 10 hours where it has been unable to agree and it's making it clear, the split and the request for advice, why a *Papadopoulos* direction wouldn't be given at the same time as a majority direction. How does giving a majority verdict direction to a jury that says we're stuck 9/3 assist them over the line?

CHAMBERS J:

So it's crucial to your argument, is it, that we know what the division was?

MS HUGHES QC:

It is a further factor that you are aware of in this instance. I don't think it's crucial. I mean, I think if you had any jury reporting we've been at it for 10 hours, we cannot agree, that at that point logically a Judge would provide a direction as to a majority verdict but should at the same time provide direction as to how the impasse might be breached and that is surely a *Papadopoulos* direction. The giving simply of a majority direction cannot and does not resolve how you might resolve a difficulty that has arisen in the jury room whether you're currently sitting 11/1, 10/2, 5/7, whatever.

ELIAS CJ:

Does that mean — and I would like you to tell me what you think the substance of the — it's a shame to use, I think, this label *Papadopoulos*. I would like to know what you say the Judge should have conveyed to the jury, which may be in the *Papadopoulos* direction, but it may be a matter that needs to be covered in any event. So I'd like you to do that but I'd also like you to indicate whether it's your view that some direction about how to reach a majority verdict should always be given.

MS HUGHES QC:

I certainly agree with the latter, Ma'am because I cannot see the utility of simply saying listen, 11/1 and I'll accept a verdict, in brief.

WILLIAM YOUNG J:

Well, it may be. I mean, if the split is 11/1 then that solves the problem.

MS HUGHES QC:

It may do, if that is the split but even then juries have always, until very recently, conscientiously worked to try and achieve a consensus. That's always the desired outcome if at all achievable. Why wouldn't –

CHAMBERS J:

It seems here though that what the Judge was attempting to do was meet your point. You had asked that the jury be discharged on the points they weren't agreed on and it seems as though the Judge was rather going your way. He fulfilled his requirements under law to tell them about the majority verdict but he also said to them, I'm not going to hold you long and, effectively, if having that information doesn't help, I'll be discharging you as a jury. So he was effectively going your way on this. Most defence counsel don't actually like *Papadopoulos* type directions –

ELIAS CJ:

Well, can I have perhaps an answer to my question because I think that is really what it is directed at? What do you say should have been conveyed to the jury?

MS HUGHES QC:

I say that it would be difficult to go beyond the three principles enunciated back in the days of what's informally called the *Papadopoulos* direction, Ma'am, to remind jurors that they have sworn a solemn oath and that they are to be true to that oath, irrespective of the discomfort it might cause them, or whatever else. I think that is the most critical aspect of a *Papadopoulos* direction in any regard. Do not forsake your oath for the sake of convenience, or to end the process that's been undergone.

Secondly, to explain that in the event that they do not agree then the matter will, almost inevitably, go to another jury. Thirdly, that an opinion held sincerely can just as sincerely be changed. I don't have any difficulty with those three factors because they encourage discussion and debate and remind people that this is a much bigger issue than today's inconvenience.

CHAMBERS J:

Well, with all due respect though, those three factors have always been put in the reverse order in the traditional direction.

MS HUGHES QC:

I'm simply providing them in the order — in an order. I'm not saying that that's the order that you would necessarily provide them in but they are the three factors which I would expect to be covered.

ELIAS CJ:

Well, and indeed, I do think it is quite unhelpful to keep attaching this label to it because a *Papadopoulos* direction was given in order to encourage juries to come up with a verdict but once you have the majority verdict option perhaps it is these other elements that you put first and second that do need to be included in the direction as to a majority verdict. I'm just asking whether that's –

MS HUGHES QC:

Yes, and I certainly would submit Ma'am, that the most important of those factors has to be holding true to your oath. That has to be the thing that we most expect of a

juror. That how ever uncomfortable it is, how ever fed up you are, how ever you're sick of sitting in that little room going round and round in circles, if this is what you believe then you must stand by that and you should not surrender your belief for convenience or any other reason. And this jury had made clear throughout an extended period of time that they were having difficulty reaching any kind of unanimity.

TIPPING J:

They seemed to have bridged the gap to some extent but I think one can infer that the gap was wider than 9/3 the night before?

MS HUGHES QC:

That may have been the case, Sir. Or indeed, that they —

TIPPING J:

Because they said they had managed to make some progress, didn't they?

MS HUGHES QC:

Mmm and indeed, it could be that they were unagreed on all counts at the point that they left —

TIPPING J:

Well, who knows —

MS HUGHES QC:

— the night before, we don't know –

TIPPING J:

— but I think your proposition that this was a jury that were having genuine difficulties is a valid one.

MS HUGHES QC:

Yes, Sir and, of course, there was no way we had of knowing the two unanimous verdicts they had, whether they were guilty or not guilty, so —

TIPPING J:

But you don't know whether the majority is one way or the other, for guilt or innocence —

MS HUGHES QC:

No, no, I mean, it seems an —

TIPPING J:

— or not guilty —

MS HUGHES QC:

— unlikely scenario that more people would leave the nine team to join the three team but it is a possibility. I mean, I think again, the relative shortness of time makes that unlikely.

TIPPING J:

Well, I was quite startled by that. I didn't appreciate that the verdict came back so soon after the majority direction.

MS HUGHES QC:

Yes, it did. I mean, and that was the surprising factor because this jury had made clear throughout, as you can see through its series of statements and questions, that it was struggling to reach verdicts.

TIPPING J:

It's struggling on various points, so it seems but —

MS HUGHES QC:

It certainly seems that it — by the second day, it had obviously achieved unanimity on the drugs counts but remained split on the various sex counts. What advice was given by his Honour that allowed that bridge to be crossed between when they delivered their last question saying we're split 9/3 to returning an 11/1 verdict? What was there that could have assisted them, two people, to change their minds?

TIPPING J:

I think your essential submission, as I'm hearing it, is that the failure to say, in conjunction with the majority direction, you must be true to your oath and the

consequences of ultimate impasse has led to a substantial miscarriage of justice that cannot be resolved by the proviso.

MS HUGHES QC:

Correct, Sir.

TIPPING J:

Is that the — it's those two omissions, if you like?

MS HUGHES QC:

Yes, that is the essence of it because effectively what the Court of Appeal has said is, given that two jurors changed their minds in quick order after that final direction, it must be assumed that they were not in fact implacably opposed to a conviction and were just simply prevaricating to some extent. That is one school of thought. The opposite school of thought is that in fact they were implacably opposed but by being sent back again they simply surrendered their opposition for the sake of convenience.

Now, his Honour Justice Chambers has said quite properly that his Honour Judge Roberts had indicated that he wouldn't keep them for long. What did that mean? He had already kept them in this room for more than 10 hours and had sent them home for a night's sleep in the middle but didn't tell them what that meant and if in fact at that point in time they were implacably opposed, what difference did his direction make to that?

McGRATH J:

Wasn't he apparently endeavouring to make it plain that he wasn't putting them under any pressure through suggesting they would be indefinitely there following that direction?

MS HUGHES QC:

But what does "you won't be there for much longer" mean?

McGRATH J:

Well, it's just —

MS HUGHES QC:

I mean, is it another hour, is it another couple of hours?

McGRATH J:

He didn't want to get specific but it does seem to me that he clearly was indicating to them that if in fact you're set at 9/3 you can come back, you can get that back to me, or something, no doubt I'll be told, or something of that kind. You can get that back to me and that they would then be released.

MS HUGHES QC:

But with respect, Sir, this jury had already indicated we are stuck at 9/3. We cannot find a way through this.

WILLIAM YOUNG J:

But I think it's a common experience of trial Judges that juries often say that and then perhaps, with just the effluction of time or perhaps with the jolt of a *Papadopoulos* direction, they could achieve unanimity and now it's slightly different with the majority verdict provision.

MS HUGHES QC:

Certainly with guidance, I mean, it's not an uncommon scenario for juries to present saying, you know, we can't agree and that is when they are entitled to receive guidance from the Judge as to how that impasse might be overcome.

McGRATH J:

Is it perhaps possible that the Judge was of the view that the jury was one that had demonstrated that they were facing up to their responsibilities, both in relation to their perseverance and in fact the fact that they had moved somewhat on the morning of the second day, and that it would be inappropriate for him, in those circumstances, to give a *Papadopoulos* direction because that might be, in some way, pressuring a jury that he was satisfied was fully conscious of its responsibilities under its oath?

MS HUGHES QC:

Well, with respect, Sir, the jury asked for help. It got none. So the jury said, we have done our best. We have been at this for hours. We have done our best and the best we can do is two unanimous, six split, 9/3.

McGRATH J:

To which, it seems to me, the Judge was responding: "well, if you're set at that and you come back at 9/3 and after further consideration over a short time — I'm not leaving you with this indefinitely — I will be discharging you".

MS HUGHES QC:

But why wouldn't the Judge offer them the advice that they sought? All he did was send them back, telling them that if they reached an 11/1 verdict, he would accept that verdict.

WILLIAM YOUNG J:

So you say the advice should have been *Papadopoulos* type advice even —

MS HUGHES QC:

Yes.

WILLIAM YOUNG J:

— if the P word isn't used?

MS HUGHES QC:

Yes, I'm trying to think of another word for it so I don't get growled at.

WILLIAM YOUNG J:

Perseverance I suppose —

McGRATH J:

Perseverance seems to be —

ELIAS CJ:

Well, you're unpacking it in saying that they should have been reminded to be true to their oath and they should have had the explanation that the outcome, if they were at impasse, would be that the matter would go to another jury?

MS HUGHES QC:

Yes, that's it in summary.

TIPPING J:

From your point of view, those are the key points. From the Crown's point of view, a reminder about give and take and honesty of change of mind and so on. You wouldn't necessarily give the two that we've identified —

MS HUGHES QC:
Without the third.

TIPPING J:
— without the third?

MS HUGHES QC:
I accept that, Sir. That I would accept. All three would be in the boat together. I don't disagree with that but, in this instance, all these people were told, who had clearly made a conscientious effort to try and sort out their differences, was, if you come back 11/1, you will be discharged, otherwise I'll leave you for a period of time, undefined, and then I'll deal with the matter.

TIPPING J:
Is another way of putting your case and I don't necessarily think I'm on one side of this or the other at the moment but I'm just —

MS HUGHES QC:
You should really be on my side, Sir because it's the side of right.

TIPPING J:
I'm sure that's your view. Is another way of putting your client's case, that there's too great a risk here that two of them just gave in for the sake of —

MS HUGHES QC:
Well otherwise, what else happened? I mean, there are two opposing schools of thought if you like. One is that in fact that —

ELIAS CJ:
We can't speculate though really, can we?

MS HUGHES QC:

Well, excep,t Ma'am, I mean, to an extent that's precisely what has happened because the Court of Appeal has said two of them can't have been opposed. Two of them — there must have been —

ELIAS CJ:

I'm not saying that I think that course was not speculative. I'm not sure that I would go there myself but —

MS HUGHES QC:

No, but I think, with respect, that is speculative, on the other –

TIPPING J:

It's a question of risk. Whether there is a sufficient risk that two gave in for — we'll never know and there's no —

MS HUGHES QC:

You will never know but what you do know is that this jury did conscientiously approach its task over 10 hours with a night in between, did reach unanimity on two counts, did on more than one occasion express the fact that they were struggling and did finally seek advice and got none. So what more could they have done?

WILLIAM YOUNG J:

The argument you advance has to be premised on the basis that the jury communications indicated there was a heightened level of risk of minority juror capitulation, I guess. Because you're not going to say that every time the jury — every few hours the Judge has to come back and give the jury a rev up as to being true to their oath and whatever. But the truth is that there are lots of cases where juries return verdicts that, while not meeting the requirements of inconsistency, do raise at least a suspicion, suggest a heightened risk, that there was a heightened risk of say, compromise. Yet, on the whole we, rightly or wrongly, proceed on the basis that they've been told what to do, that they're to deal with the matter impartially and dispassionately, and only go along with a verdict of guilty if they're sure the defendant is guilty. Why does the communication that we're having difficulty agreeing or we're at a stalemate suggest that someone wasn't going to be true to their oath? Particularly in the context where they know that sooner rather than later, if they hold out, they can go home.

MS HUGHES QC:

It is because they are using an expression such as stalemated, but more importantly, it's because it is prefaced by an extended period of time spent considering the matter. And it really was a single issue trial: did they believe the complainants or not? I mean, that's really what it boiled down to. There can't have been tradeoffs because we know before they've come in with the third communication, they've already got two unanimous verdicts and that clearly didn't change, so it's the 9/3 on the other six counts where there was a movement.

My answer to your question has to be that if it is a reasonable inference that in fact two people jumped ship for the sake of convenience or pressure or to end it, then that cannot be a safe verdict and how can it be said, other than that is a reasonable inference to be drawn from the facts known in this case?

McGRATH J:

You're also saying it's important —

TIPPING J:

Frankly, I wouldn't put it as an inference. I would simply say in accordance with the ordinary jurisprudence that there's a sufficient risk as to render this verdict one that can't be upheld. Now, I'm not saying that's my view but that surely is the submission, not a reasonable inference.

MS HUGHES QC:

But I think — but beyond that, the general statement, as your Honour makes, is the fact, in this case, it is a reasonable inference to be drawn —

TIPPING J:

Oh well, if you can carry it that far, yes but you don't have to carry —

WILLIAM YOUNG J:

It has to be unacceptable risk. I mean, there's always a risk in any jury trial that in behind the one word or two word verdict there's going to be something unsatisfactory which has gone on and we just accept —

MS HUGHES QC:

Oh, I mean, there's always a suspicion as to how verdicts are achieved. I agree with you entirely and we've all had that experience of being mystified as to how they've got to wherever they've got but in this instance we know that after 10 hours they said, we are stuck 9/3, we want help, the Judge provided a direction and very shortly thereafter they returned with a change of the lie of the land where a majority verdict is now possible.

McGRATH J:

Ms Hughes, I am interested in the other aspect of your argument. The jury were not told that if they were discharged, in all probability there would have to be a new trial.

MS HUGHES QC:

Yes.

McGRATH J:

Would you just like to elaborate on why that operated unfairly in your submissions, against the appellant's?

MS HUGHES QC:

Because if jurors reach the point where they think that this means he gets a free pass, then that may influence a juror as well. I mean, the decisions I've referred to make clear that we shouldn't make assumptions about what jurors, in fact, understand the consequence is of a discharge and to be clear, why not say it? Why not say, if, in fact, I'm obliged to discharge you then this matter will almost certainly have to go to another jury?

TIPPING J:

But the people who think he's innocent, or not satisfied he's guilty, would be very happy with that.

MS HUGHES QC:

That may be but, of course, we didn't know which way it was swinging –

TIPPING J:

But we now know and we can take that into account, can we not?

MS HUGHES QC:

Yes but it –

TIPPING J:

For that purpose?

MS HUGHES QC:

Mhm.

CHAMBERS J:

But the whole point of that part of the P direction was not to provide reassurance that it would go to another jury. It comes in the context of telling a jury about their responsibility to decide something and not to hand it over to somebody else. That's the context of it.

ELIAS CJ:

Well, that may have been the context in which a number of Judges used it but if one reads what the President said in *Papadopoulos*, he was concerned about the point that jurors would not appreciate that there would be another trial.

MS HUGHES QC:

And that's paragraph –

ELIAS CJ:

And that pressure.

MS HUGHES QC:

And paragraph 26 of my submissions records his Honour's words in that regard: "We think that it will normally be advisable for a trial Judge to tell a jury, after they report difficulty in agreeing, that if he decides to discharge them a new trial will ordinarily follow. Otherwise they or some of them may be unsure or under the illusion that the proceedings against the accused will end in a stalemate." So —

McGRATH J:

That's after rejecting alternative formulations that were a little stronger, wasn't it? He reaches that — I mean, I'm not suggesting but there's a further context of this —

MS HUGHES QC:

Oh, there's further context around it. I mean, I think it's incredibly easy for us to make assumptions about what people understand about legal processes and it can be the best outcome if there is absolute clarity about if this happens, then that will be the probable consequence, so we're not leaving them trying to work it out for themselves.

ELIAS CJ:

I'm more interested, rather than in the particular case for the moment, on the more general point of principle and I'm trying to think whether I'm right that the *Papadopoulos* direction was the only occasion, before majority verdicts came in, where a Judge would redirect on the jury's function and how it was to operate and that was the background in which the issues that needed to be covered were addressed. Now that was a development of the Judges, the *Papadopoulos* direction. We now have the legislature saying you can't tell them straight away. It's a matter of discretion for the Judge whether you instruct them that they can bring back a majority verdict but it is another instance of a case where the Judge then is required, having given all the original directions, to redirect on the jury's function and tell them that they can bring in a majority verdict. I just wonder whether that's the way this should be looked at. Whether there's a general principle that where a Judge is telling the jury how to operate, as opposed to answering some questions of law and so on that the jury may come up with, you always do need to remind them about the fundamentals of their duty?

MS HUGHES QC:

Yes. It –

WILLIAM YOUNG J:

Is there any jury research on this? Has anyone – I mean, is there any indication in the published jury research that juries do forget their function? I know that there'll certainly be, I mean, jurors obviously will feel under a lot of pressure at times to agree.

MS HUGHES QC:

I'm not aware of any such research, Sir but I am certainly aware of many cases where having received a direction as to how the jury or jurors being reminded effectively of their duties, they then go on and achieve a verdict.

WILLIAM YOUNG J:

I've got a feeling that the Warren Young research indicated that jurors would be more helped in general by an engagement with their question rather than with a pattern direction.

MS HUGHES QC:

Mmm but in this instance, of course, the jury asked for the Judge to engage with them and his engagement extended as far as, I'll take a majority verdict and send you away for a while.

TIPPING J:

The point made by the Chief Justice is perhaps reinforced by the fact that not many summings up, in my experience, would give directions akin to *Papadopoulos* in the ordinary summing up.

MS HUGHES QC:

No, I agree with that.

TIPPING J:

So they haven't really been directed in the context which the directions, to which we're now discussing, will arise and are a known inability to make progress.

MS HUGHES QC:

I mean, for myself, I struggle to understand why you wouldn't give, effectively, a *Papadopoulos* direction with a majority direction because you're only going to give a majority direction, say for a jury coming back and volunteering itself look, you know, we are split 11/1 and that that's not going to change and a Judge may well choose to take that verdict in that circumstance. But otherwise why wouldn't you because you have a jury that has been unable to achieve a verdict. If it has been retired for the appropriate period of time and has clearly been conscientiously applying itself to the task at hand, why wouldn't you remind them of that duty? Because at that point people have become tired, concessions could be potentially made that shouldn't be made, people forget about their oaths, what can possibly be a bad thing about reminding them why they're there?

TIPPING J:

Well, I think if I'd been faced with this I would have given a tailored *Papadopoulos* with the majority direction. The question is whether the failure of the Judge to do that has led to a miscarriage of justice but, I mean, others may disagree with what I've just said but that, asking myself what I think, that's what I think I would have done. And that's apparently what you and Ms Clarke were expecting and —

MS HUGHES QC:

Yes, Sir and, of course, the issue for me is the speed at which the majority verdict was then returned. How can it be safe? I mean, we do not know what happened, so we do not know what changed, what the compromise, you know, we just don't know. What we do know is that for 10 hours, with the night in between, this is where they'd got to and then –

TIPPING J:

Yes, well you're, understandably, just repeating yourself on this.

MS HUGHES QC:

I do apologise.

McGRATH J:

Ms Hughes, to answer your question I suppose, what concerns me is that the Judge may have decided that to give a *Papadopoulos* direction would put the jury under further pressure which he didn't think they should be put under. I mean, it does seem to me that he was trying to wrap matters up but just simply thought that he better give a direction on majority process to rule that out as it were. And he expected them to come back very quickly, although not with the verdict they actually did reach.

MS HUGHES QC:

If in fact his Honour thought that that was so, then why didn't he simply discharge on the counts that they were split 9/3 and take the verdicts on the other two? What was the utility at that point in simply telling them, go away and if you return a majority verdict, I'll take that?

McGRATH J:

What he says, and as indicated in a record, is that he thought that there had to be a process whereby he said something about, in other words, directed them on, the

majority verdict. But I'm coming back to your question, that what I wouldn't want to come out of this case is something that curtailed the discretion of Judges as to whether or not to give a *Papadopoulos* in situations of which they felt the jury had been fully aware of their responsibilities and he could see that to some extent there had been movement reflecting that.

MS HUGHES QC:

The difficulty with that, Sir, is it doesn't appear that his Honour turned his mind to the *Papadopoulos* direction because he certainly didn't discuss it with counsel. Whether he —

WILLIAM YOUNG J:

Well, did you discuss it with him?

MS HUGHES QC:

Beg your pardon?

WILLIAM YOUNG J:

You didn't discuss it with him?

MS HUGHES QC:

No, no, I accept that, I accept that the focus of the discussion in chambers was my application for discharge —

WILLIAM YOUNG J:

Discharged or not, take verdicts, discharge on the balance.

MS HUGHES QC:

Correct. That's right, Sir. Return to Court, he delivers the direction, Ms Clarke and I have the discussion we've spoken of, we are advised that there's a verdict already. So that's what happened. So he didn't turn his mind to that and —

McGRATH J:

Well, it may be, I mean, we're now getting into quite a lot of supposition. I mean, it may well be that in this sort of case — I'm not speaking of the particular case — but in this sort of case, responsible counsel could decide that the last thing he or she wanted was a *Papadopoulos* direction and would not mention it. I mean, it might be

a strategic decision taken, for example, in those circumstances and the Judge might have it in mind but think no, they've had enough. They've shown me sufficiently how conscientious they are in this matter to their oaths. It's not appropriate for me to give them a *Papadopoulos* direction. And that nothing is in the record on any of these matters and that it would be rather unwise for us to try and give rules as to how these situations should be followed.

MS HUGHES QC:

The Judge had a discretion as to whether a *Papadopoulos* was given or not but in this instance they had sought his assistance and, as the President made clear in the decision called *Papadopoulos*, that they are entitled to guidance when they seek assistance and they didn't receive any. The factors that should have weighed with his Honour were the time that they had already been in consideration and the consistent theme that had come through their various communications that they were stuck. Now, how did his direction assist them in becoming unstuck? So –

TIPPING J:

If we assume that there was no capacity for majority verdicts at this time, I could quite understand a Judge saying no, they've done their best. I'll discharge them. In fact, I think I probably would have done that myself but once you go to the step of asking them to resume their deliberations in accordance with now the majority rules, my anxiety is if you do that without the *Papadopoulos* or something equivalent, tailored to that new situation, then you may be running risks that are greater than they've been perceived to be putting them under pressure.

MS HUGHES QC:

I agree with that because you're only giving them one out effectively. You're saying that the way out of this is a majority verdict.

TIPPING J:

Well, particularly if you don't tell them what the consequences of ultimate impasse are.

MS HUGHES QC:

Correct. And particularly if you don't remind them that if you've been at this for an extended period of time, and that's sincerely your view, then you must hold to that view.

TIPPING J:

You see, if there had been no majority outcome available and the Judge had given a *Papadopoulos* and then they'd managed to reach unanimity, I very much doubt whether that could have been impugned. Many Judges wouldn't have done it though but what we're faced with is the reality that that wasn't the case; that the jury were sent back out to try and do something.

MS HUGHES QC:

Yes.

TIPPING J:

And that the real issue is whether they were given enough instruction in that context, in the light of the fact that they really hadn't been given any instruction previously for this sort of situation.

MS HUGHES QC:

I agree, Sir.

TIPPING J:

That's what is worrying me and I just shadow it for the Crown's benefit mainly.

MS HUGHES QC:

Yes and that is the issue I have, in that they asked for help and the only help they were given is that if you return 11/1 then I'll take the verdict and in such a short period of time they returned verdicts of just that, having spent hours —

CHAMBERS J:

But that isn't all he said.

MS HUGHES QC:

He also said that —

CHAMBERS J:

He also said and if you don't, I'll discharge you.

MS HUGHES QC:

Sometime, but he didn't say when. And these people had already been at it for hours. I mean, what does that mean? I mean, I can certainly remember how they were stomping out, looking exceedingly cheesed off. I mean, they had made clear where they were at and they weren't doing that prematurely or capriciously. They had conscientiously applied themselves to the task at hand, as is demonstrated by the unanimity on the other two counts.

ELIAS CJ:

Ms Hughes, I think we're probably starting to go round in circles —

MS HUGHES QC:

Yes, I suspect we might be.

ELIAS CJ:

— is there anything more you want to tell us?

MS HUGHES QC:

At the end of the day, Ma'am, there can be no dispute that the jury did return a very prompt majority verdict after his Honour's direction. That is, there are two competing explanations for that: either two of them were in fact simply prevaricating, or it means that two of them felt compelled to change their point of view because of the pressure they felt they were under. If there are two competing explanations for their conduct, then Mr Hastie is entitled to the benefit of the one that benefits him. There's just simply no other way of knowing — I mean, if in fact there were two prevaricators, nine firmly in the guilty camp and one firmly in the not guilty camp, why wouldn't the foreman have said that? I mean, what the foreman says is that we are split 9/3 and yet within minutes of having asked for advice, being told about the majority verdict and, of course, told that he will eventually discharge them, they return verdicts of 11/1.

TIPPING J:

Could I just be reminded exactly what he said at that context?

MS HUGHES QC:

Certainly, Sir. That's pages 60 and 61, is his direction.

TIPPING J:

You said something about not long, I seem to remember, not too distant future?

MS HUGHES QC:

And in the final paragraph, "Now I qualify this by telling you I will not keep you for any great period."

TIPPING J:

Thank you.

MS HUGHES QC:

But what does that mean, in the context of the time they'd already spent and what does that mean in the context when they've already told him that they can't reach agreement?

WILLIAM YOUNG J:

At page 60, I think he makes clear what his interpretation was and that is: "what you've left unsaid is, you want out".

MS HUGHES QC:

Mmm, these people were fed up.

WILLIAM YOUNG J:

And he's responding to what he takes to be the nub of their concern and he's saying okay, well you can have out but I have to tell you before you do so that 11/1 is okay.

MS HUGHES QC:

Mmm. If you've got a group of people, Sir, who are indicating they want out and you say to them here's the road marking over here, 11/1 and you're out, what do you think that might do?

CHAMBERS J:

Well, I would have thought the answer was he's saying look, it's not unreasonable you want out but regrettably there's a process we have to work through. So he's telling them there's something by law I'm required to tell you about, which he was right about. But then he says, after telling you what the law is, I'll ask you to retire but I won't keep you for any great period. I'll call you back in the not too distant future, so

that if you're truly locked — so isn't he merely explaining to them, we're working through a process that the law requires of me but I understand you want out, that's not unreasonable, if you can't reach a majority verdict then I will discharge you?

MS HUGHES QC:

The only bolt hole he offered them was an 11/1 verdict, other than the vagaries that I won't keep you for much longer and then I will discharge you. Why wouldn't he, given that they had been unable to reach an agreement and they had sought advice, why wouldn't he have given them a *Papadopoulos* —

CHAMBERS J:

Because he wasn't expecting them to persevere as a *Papadopoulos* direction is all about, the need to go back, to listen to each other again, et cetera. I suspect he probably thought they were going to come back and say no, we can't get a majority verdict and he was then going to discharge them but...

MS HUGHES QC:

But he didn't tell them how that impasse might be overcome and that's what they sought from him. They sought from him advice as to how they might narrow that gap and he didn't give any.

McGRATH J:

What he said to them was that if after this further short period you are truly locked, with no possibility of rendering a majority verdict, he would discharge them.

MS HUGHES QC:

Mhm.

McGRATH J:

That was his final words to the jury, was it?

MS HUGHES QC:

Yes.

CHAMBERS J:

I think you keep missing my point. He wasn't asking —

MS HUGHES QC:

I do apologise —

CHAMBERS J:

— them to persevere. In other words, he wasn't asking them to do what a *Papadopoulos* direction was. He saw himself as fulfilling the requirement of section 29C, so that they were aware of a possibility about which he had not told them in the past. If they wanted that option that was fine but if they didn't, he would then discharge them.

MS HUGHES QC:

That may have been what he intended. That is not what the jury had sought from him and, given the indication that they had provided to him, it's my submission that he had to give them a *Papadopoulos* if he was not going to accept the verdicts on the unanimous counts and discharge on the balance.

WILLIAM YOUNG J:

Can I just ask you one question? I note that in the Court of Appeal judgment, the timings are noted. The jury retire at 2.07 pm and return at 2.35 pm —

MS HUGHES QC:

Mhm.

WILLIAM YOUNG J:

— are you in doubt as to whether those times are right?

MS HUGHES QC:

I am. I mean, it is, as I have said to your Honour, the message was received, counsel were gathered, there was a discussion in his Honour's chambers, out to Court, deliver the direction, jury back downstairs again, Ms Clarke and I are talking in Court, we get told that there's a decision. I can't answer — if someone has actually recorded the times, I can't disagree with that —

WILLIAM YOUNG J:

Well, the 2.06 pm will presumably have come off the FTR system and presumably there will be a Crown book, or possibly an FTR record of the taking of the verdict.

MS HUGHES QC:

I presume that that is so. I can only repeat what in fact happened. I wasn't taking any particular note of the time.

WILLIAM YOUNG J:

There wouldn't have been any great delay about the jury coming back into Court once they had announced the verdict because you and Ms Clarke were around and the defendant was presumably in the cells. It would have taken five or 10 minutes?

MS HUGHES QC:

It would have taken five or 10 minutes to get up the stairs. I mean, the usual performance of telling the Court Crier and communicating to the Judge, then getting up the stairs and everybody getting in there. Is there anything further?

TIPPING J:

I have read somewhere and I just want — in case this becomes relevant in my mind, that the Judge said something pretty unspecific about majority verdicts in his summing up, or am I thinking — am I completely misleading myself?

MS HUGHES QC:

No, you are not misleading yourself. This Judge's habit is to refer to that factor in his —

ELIAS CJ:

Sorry, what factor?

MS HUGHES QC:

Beg your pardon?

ELIAS CJ:

What —

CHAMBERS J:

The vague possibility of a majority verdict —

MS HUGHES QC:

That you will — what he generally says is —

ELIAS CJ:

Oh, right.

MS HUGHES QC:

— words to the effect, that you may now be aware that there is a possibility in law for —

ELIAS CJ:

Oh yes, sorry, yes.

MS HUGHES QC:

– majority verdicts but I will talk about that later if that needs to be addressed.

WILLIAM YOUNG J:

We don't have the summing up?

MS HUGHES QC:

No.

TIPPING J:

So you say this is this Judge's practice but I defer from that that it's not all Judges' practise?

MS HUGHES QC:

Well, other Judges I've –

CHAMBERS J:

It is in the bench book.

MS HUGHES QC:

— appeared before don't —

TIPPING J:

It's in the bench book, is it —

MS HUGHES QC:

— do it — is it in the bench book? I beg your pardon but certainly he does —

TIPPING J:

You've got to sort of foreshadow the possibility —

MS HUGHES QC:

— say words to that effect —

TIPPING J:

— in those sort of slightly —

ELIAS CJ:

Well, it's to exclude it, isn't it? To say you may have read that but you —

MS HUGHES QC:

Mmm but you're nevertheless expected to be unanimous and I'm not going —

ELIAS CJ:

Yes and I'll tell you if —

TIPPING J:

If we reach that point, yes —

McGRATH J:

A passage Justice Tipping, is at paragraph 6 of Mr Mander's submissions.

WILLIAM YOUNG J:

So it may be of course that that's also a contextual indication. It provides a context to the jury's question okay, we've got this far, can we get the majority?

TIPPING J:

That's what I thought. I agree with my brother. That was what was going through my mind. That they were — some of them would have had this memory of what the Judge said and it was seeking, you know, being told formally about it.

MS HUGHES QC:

Mhm. Again though, they ask for advice.

TIPPING J:

Well, I know, yes. I'm not saying it's a weighty point. I just wanted to have it clarified as a fact.

MS HUGHES QC:

No, no and if my memory serves me correctly, it simply, you know, you will have heard about the possibility of majority verdicts and moving straight along, it doesn't — I can't even remember if he indicated that it would be 11/1 in that early stage. Beg your pardon?

CHAMBERS J:

He didn't.

MS HUGHES QC:

Yes. Is there anything further?

ELIAS CJ:

No, thank you. Yes, Mr Mander.

MR MANDER:

Yes, may it please the Court. The first submission that I would seek to make is that there can be no issue that the Judge, as a matter of law, was entitled to direct the jury at this point, at the point that he did, that a majority verdict was available to the jury. All the statutory preconditions had be met and I don't understand it to be in contest that the Judge was unable to direct in the way that he did.

The trial had lasted a little over a week, some six days and at the time that the Judge directed on the majority verdict process they had been in retirement nine to 10 hours. In my submission, there's nothing exceptional about that situation and it is clear that Parliament has considered that where those preconditions are satisfied a majority verdict can properly be returned. The preconditions, having been satisfied, the primacy that is required to be given to a unanimous verdict is therefore maintained.

So in my submission, as a matter of law, the Judge did nothing wrong in this case. The approach that he took is being challenged on the basis that he failed to do what apparently was expected by trial counsel which was to deliver the so-called

Papadopoulos direction which, as has already been eluded to, is sometimes referred to in other jurisdictions as a perseverance direction. In my submission –

ELIAS CJ:

I continue to think that that's really an unhelpful way of putting it because I would have thought that we were being asked whether, in this context, a Judge should remind the jurors to be true to their oath and explain that if they don't agree what will happen. In other words, don't we have to look to the substance of what the Court in *Papadopoulos* thought should be? In that case, the direction given to a jury that was being asked to persevere but in this case, equally, may apply to a jury that is being asked to give a majority verdict?

MR MANDER:

In my submission, the concept that a Judge would take it upon him or herself to direct a jury because of a perceived need to provide some sort of assurance or warranty that the jury's deliberative process is still on track is novel.

ELIAS CJ:

Well, why do we have those directions at the outset in any event? Why is that required in our case law?

MR MANDER:

Well, we don't — trial Judges do not give the type of detailed directions which are contained in the *Papadopoulos* type direction —

ELIAS CJ:

No, no, I understand that, yes but they do remind jurors, at least — maybe they don't anymore but that each of them has to be of the view and that it's important for them to observe their oath.

MR MANDER:

Each of them has to be sure, each of them has to be satisfied beyond reasonable doubt and they must be unanimous as to the proof of the ingredients of the charge but —

ELIAS CJ:

Yes. Now that we have a requirement that a Judge explains how they can go about their task in terms of a majority verdict, why would the reasoning that was adopted in *Papadopoulos*, in respect of the perseverance direction, not have equal force? That's the issue of principle that I'm principally concerned with here.

MR MANDER:

Well, in my submission, if one looks at the rationale, the root reasons as to why the *Walhein*, the *Watson*, the Australian *Black* direction have all evolved, it's as a result of no concern necessarily that a juror is wandering from their oath, or that juries, or a jury as a group is somehow drifting off course. It is clear, in my submission, from the jurisprudence that these types of directions have their genesis and a concern that a jury should make every effort to return a positive verdict and it is a means —

WILLIAM YOUNG J:

But it shifted though, didn't it? Initially it was a lot of pressure on jurors to do their job and not, as it were, pass the baton to someone else and get on with it and then it shifted and all the jurisdictions were interested, including New Zealand, where the *Papadopoulos* direction emerges but it is in the context of where the juries are being told they have to do something they don't want to do, that is they've got to stick at it and give and take and consider whether their honestly held opinion can be honestly changed but balance that with, you must be true to your oath one way and then this, what's the consequences of disagreement? Probably a retrial which is, in the *Papadopoulos* situation, put the other way from how it had previously been put.

MR MANDER:

Indeed and with the —

CHAMBERS J:

I mean, if it wasn't for the perseverance part of it, if you weren't expecting them to persevere, the moment you found they had a disagreement, if you were so concerned about not keeping to your oath, you would just discharge them. It's needed, isn't it, because you've told them, I want you to persevere and I want you to remember about give and take? That's why it's then needed.

MR MANDER:

Indeed. The direction, as I've submitted, certainly comes from a perceived need to get a jury to stick at it.

McGRATH J:

So the third cardinal principle is really a consequence of the first and to ensure that the first doesn't operate unfairly?

CHAMBERS J:

Mhm.

MR MANDER:

Indeed because the concern is, is that by giving such a direction, you are placing improper pressure on a jury. The direction, the perseverance direction, is the imposter here. It is the intervention into the jury's process and carries with it the potential to render the jury's process which is a matter for it, of course. It is the conduit by which undue pressure or illegitimate pressure may be placed upon an individual juror.

ELIAS CJ:

Well, I understand that but I'm asking you, I suppose, to think a little bit more fluidly instead of thinking in terms of these categories and is not a statutory opportunity to bring in a majority verdict itself a further intervention in the jury process that consistently with what prompted the *Papadopoulos* safeguards, also calls for some safe handling and just as if a jury comes and asks again about the burden of proof for example, we're very careful always to instruct in the same way if a jury is being told how it can go about its task? Because that's the intervention which is required by the statute here, is it not safe practice to remind them that that does not require them to, oh well, you know, let's flip a coin here, or something like that? What's wrong with dealing with it as safely as our recent forefathers thought we should deal with an intervention to require them to persevere? It's a different form of perseverance that's being asked of them.

MR MANDER:

In my submission, leaving to one side the potential benefit there might be in providing a direction to a jury that's been out a long time to remind them of their oaths, to remind them of what might have been said in the summing up. Leaving to one side

what potential benefit there might be in doing that, in my submission, there is no connection between giving a majority verdict, giving majority verdicts directions and giving the type of direction which your Honour is suggesting.

ELIAS CJ:

Well, that's what I'm questioning but —

MR MANDER:

In my submission, a majority verdict, once those statutory conditions are met, it is a means by which a jury can deliver a verdict, certainly not a unanimous verdict but a majority verdict which is just as good as a unanimous verdict. And where I struggle with the proposition that your Honour is putting is that I struggle to see why just because — if a Judge has come to the view that a reasonable time has elapsed, that a jury can come to the decision that it is not probable that they can reach a unanimous verdict, then he or should, as a matter of law, instruct the jury that a majority verdict is available.

Now, in my submission, that situation is quite isolated from a concern that a Judge may have about the way in which the jury is deliberating.

CHAMBERS J:

I suppose —

TIPPING J:

Isn't it an ex hypothesi — before you consider majority verdicts, there must necessarily be a measure of disagreement, hence you are in a situation where Parliament has in effect said well, if there's this agreement, you've got to — or you can give them the opportunity of resolving it by majority verdict, so you're almost, by definition, in the sort of country in which the directions that we've been discussing, traditionally are given. And what I'm having difficulty in, I would have thought there was every advantage and very little disadvantage in having a very simple tailored direction to go with the majority one and I think this is basically what —

ELIAS CJ:

That's what I'm putting too.

CHAMBERS J:

I suppose an answer to that though might be that just as when in the summing up, a Judge gives a factual direction about the need for unanimity and says nothing about the need for a jury, each juror, to be true to his or her oath. So all that's happening at this point is that the earlier information about how to deliver a verdict is being altered and of itself, it might be said, doesn't give rise to any need to remind about the need to adhere to oaths.

ELIAS CJ:

Well, that's the question: whether the gap and the return to give an instruction about how they may proceed requires you to cover the bases. That's the issue really it seems.

MR MANDER:

It is. I mean, the lesser evil may be not to introduce some type of perseverance direction in order that that one juror, ultimately that one juror, is able to remain true to their oaths, or in their own self they've been true to their oaths and yet we achieve a verdict acceptable in law.

The other aspect to it which goes back to what should be in a majority verdicts direction is whether or not a majority verdicts direction should still include a exhortation to the jury to continue to endeavour to be unanimous and I —

TIPPING J:

Well, that would be rather self-defeating, wouldn't it? I mean, surely they're entitled to some sort of clarity as to what – I mean, I know you're just floating that as a possibility, Mr Mander but that's going to start making things really quite complicated, isn't it? Because you won't give it unless you think they're probably not going to be unanimous. I mean, if you say well, never mind that, let's keep going chaps.

WILLIAM YOUNG J:

You've got to basically be satisfied, isn't it that they have to be —

TIPPING J:

Yes, the foreman has got to say that we probably —

WILLIAM YOUNG J:

Yes.

MR MANDER:

Well, I raise it because in the case of *Woodcock v R* [2010] NZCA 489 which is at tab 17 of the Crown's bundle at paragraph 25, which sets out the approach taken by Justice Wylie at trial to the majority verdicts direction that he gave to the jury, on the opposite page, paragraph 25, it's a long paragraph but in the second page, the third paragraph down of the quote, the Judge told the jury: "You should keep trying to achieve unanimity until you are agreed that it is not likely to happen."

TIPPING J:

Well, that's sort of preliminary, that's prior to, isn't it? That's a step before giving the formal majority direction?

MR MANDER:

Well, this was a majority verdicts direction.

TIPPING J:

Was it?

MR MANDER:

Yes.

TIPPING J:

But he would have had to have been satisfied before giving it that it was not probable, there were – I can't quite see how this works?

MR MANDER:

Well, there is a linkage obviously with directing a jury. You've also got to reach the conclusion, indeed your foreperson will be asked that there is no probability that you can reach a unanimous verdict. So it is tied in with that requirement under the statute. But just going back to the previous point about whether there should be introduced into majority verdict directions some type of tailored *Papadopoulos* direction, one also has to remember that the jury is also going to be receiving directions at the same time about how it will also have to consider whether or not it can be unanimous. So there is the potential for the direction to become somewhat

complicated if it does include some element of the *Papadopoulos* direction, in my submission.

TIPPING J:

When does the foreman say that we probably can't be unanimous? Is that before the majority verdict or as part of the taking of the majority verdict?

MR MANDER:

It's part of the taking of the verdict but clearly a Judge would need to have had it communicated to them —

WILLIAM YOUNG J:

You would want to know the foreman is going to stick to the script.

MR MANDER:

Yes, indeed.

TIPPING J:

Exactly. So you've really got to satisfy yourself before you give it, haven't you? It's just a sort of pro forma requirement that — I mean, I'm not trying to downplay it's importance but before giving a majority direction, you need to be pretty confident that the foreman is going to be able to stand up and say that.

MR MANDER:

Well, in my submission, there would be three stages to it. Firstly, you would get to the point where you felt it was appropriate to give the direction which presumably would be on the basis that you have some indication that the jury is struggling or the jury is having trouble making progress. You would then need to go into Court and give the directions, that is, the time has come where I can accept a verdict of 11/1. However, before you can reach that point, or before I could accept such a verdict, you would have to be sure that there is no likelihood or it is not probable that you can reach a unanimous verdict. That is so important. Such is the importance of you having reached that point, your foreperson will be asked before they deliver the verdict that that indeed is the position that you as a jury has reached.

So that is something that they would be told. It's not — in my submission, it doesn't necessarily follow that the jury would have already reached that point or that the

Judge would be aware that they had reached that point before giving the direction itself.

TIPPING J:

No.

ELIAS CJ:

But the key direction is the one when he sends them away and says, “I’ll be getting you back shortly to find out whether you are in a position to give a majority verdict”. That’s the one we're talking about here. What is so complicated about saying to them, “I'm empowered to take a majority verdict. You will have to confirm that it's not likely that you will reach agreement and I simply remind you though that you must not, you must stay true to your oath. If you are not able to agree I will be just discharging you and there will be another trial”? What’s wrong, what’s so complicated about that?

MR MANDER:

Well, in my submission, it would vary from situation to situation and I don't — and my submission is —

ELIAS CJ:

Well, it may well. I accept that, although isn't the decision whether to take the majority verdict what will vary? I'm not sure that I do agree that it would vary from situation to situation whether you would be reminding them of the basics of what their function is.

MR MANDER:

Well, in my submission, the present case may be an example of that. They have been deliberating for nine to ten hours.

ELIAS CJ:

Yes.

MR MANDER:

They appear to have been a responsible jury. They appear to have stuck to their task. There is no indication that they have, that they had wandered into an illegitimate process or that undue pressure is being placed on one juror in particular or a number of jurors as is sometimes the case in some cases. So would this be a

case where there is any indication that they need to be reminded of their responsibility to be true to their oath? They would appear to have been very true to their oaths. All that has happened is that, as a matter of law, a majority verdict is available and ought not the jury be entitled to know that? Otherwise isn't there a risk that the Judge is reading the tea leaves as to, well, will they get a majority verdict given they have been out for nine to 10, and I happen to know just by chance that it's 9/3?

ELIAS CJ:

But isn't — aren't you inviting more reading of tea leaves if you say it varies from case to case. Isn't the safe way to go simply to touch off those two bases because it is really a perseverance direction? It's asking them to come back with an indication that they are unable to agree and that they have reached a majority verdict.

MR MANDER:

Well, Ma'am, with great respect, I have difficulty in drawing the connection between informing a jury as a legal direction, as a matter of law Parliament provides that this is the situation and you are entitled to know that, and the other situation where a jury, there is a concern that a jury has gone off track —

ELIAS CJ:

Try harder.

MR MANDER:

Try harder.

CHAMBERS J:

I suppose if — it is possible that Judges could just give the criteria under section 29C in their summing up, perhaps in written form as well at the time of the summing up. Had that been the case here it may well be that this jury would not have needed to come back at all to the Judge because what may have been that they may have thought is 9/3 enough for a majority verdict. Had the Judge given it at the time of the summing up they would have known that it had to be 11/1, but in that event they wouldn't have got, if it had all been done in the summing up they would never have got any lecture about the need to remain true to their oaths.

MR MANDER:

The great danger, and the Australian jurisprudence highlights this, is that if that course is followed, there is the danger that a jury will sit there waiting for four hours, won't continue to try and work to get a unanimous verdict but their deliberations will be tainted with the knowledge that, well, we can just wait for four hours and then we can deliver a majority verdict. So I think that that is the, in my submission, that —

CHAMBERS J:

Downside.

MR MANDER:

— that's the concern with that approach.

McGRATH J:

Could you — is that in your submissions and alternatively can you give us a particular reference to a page and a particular Australian case?

MR MANDER:

Well, all the Australian cases tend to make reference to that and indeed also discuss the situation of making any reference to majority verdicts in the context of a *Black* or *Papadopoulos* direction because in a number of those Australian cases the Judge has, in giving the Australian, the *Black* direction, has made reference to the fact, "The time has not come when you can give a majority verdict," and then goes on to recite the *Black* model direction. And there is a lot of discussion as to whether that is even appropriate because you are raising in the minds of jurors the fact that a time may well come when we can just get out of this by following the majority verdict procedure.

To get to your point, Sir, the case of *Ingham v R* [2011] NSWCCA 88 is perhaps the best case because it — that's a judgment of the New South Wales Court of Criminal Appeal, which is at tab 8 of the Crown's bundle, and the Court of Appeal in that case reviews the various cases of the Australian States which differ in their approach but certainly it highlights this concern that a jury must not be distracted by premature reference to majority verdicts before the time has come when in fact they can deliver a majority verdict.

McGRATH J:

So that case discusses the authorities generally?

MR MANDER:

It does, and a number of those —

McGRATH J:

It might not be, if you like, the highest of the authorities but it discusses everything that's there.

MR MANDER:

It does. It reviews those cases, many of which are also contained in the bundle.

McGRATH J:

Yes, I see there are a number. Thank you.

MR MANDER:

And on that point, they also discuss the appropriateness of the trial Judge referring in their summing up to majority verdicts and certainly the New South Wales Court of Criminal Appeal concludes that it is appropriate for the trial Judge to make reference to the fact that, as a matter of law, a majority verdict may become available at some time but you have not reached that point at this stage.

McGRATH J:

So the — but what the Judge did in this case would not be contrary to the line of Australian authorities you're referring to?

MR MANDER:

It would not be although it would be contrary to some states.

ELIAS CJ:

In what respects?

TIPPING J:

Making reference to the possibility of a majority verdict in your summing up.

ELIAS CJ:

Yes.

MR MANDER:

Yes.

WILLIAM YOUNG J:

If the Judge doesn't then the jury is going to think that the system is bonkers because they probably know about it and they are later going to get a majority verdict direction if they don't and it's just another distraction that the trial process can do without.

TIPPING J:

They are told they've got to be unanimous with no qualifications and then, hey presto, a button is pushed after a certain time and they don't have to be unanimous.

MR MANDER:

That's — absolutely, Sir. Western Australia and the Northern Territory, those are cases cited at paragraphs 77 and 81 of the *Ingham* judgment, which sets out a view that you ought not to make a reference. On that, it perhaps could also be noted that at tab 20 of the Crown's bundle, the UK Practice Directions have been set out and at paragraph 46 of that document which is page 2903 of the document —

ELIAS CJ:

Sorry, which tab is this?

MR MANDER:

Sorry, Ma'am. Tab 20.

ELIAS CJ:

Yes.

MR MANDER:

Paragraph 46.

ELIAS CJ:

Yes.

MR MANDER:

Some directions are set out, or model directions are set out as to the approach to directing a jury on majority verdicts and your Honours will note at paragraph (b) there is a model direction there, which is substantially the same as that which the trial Judge adopted in this case.

TIPPING J:

And was approved in New South Wales.

MR MANDER:

Indeed.

TIPPING J:

Yes.

MR MANDER:

Perhaps just while on that document, a majority verdict is, of course, available in the UK after a jury has been deliberating for two hours. The Practice Direction makes reference to two hours, 10 minutes which I think is to allow time for, to ensure that indeed they have been sitting down deliberating for two hours.

46.2 refers to the situation where they haven't been deliberating for two hours but to come back in and what the approach of the Court should be, or what the questions that should be asked of the jury.

46.3 refers to the situation where a jury returns, either for the first time or subsequently or, except for after two hours. What is notable there again, and it refers to a matter that I raised with the Court earlier, is that they should be asked to retire once more. This is when they answer that they do not have a unanimous verdict, they should be asked to retire once more and told they should continue to endeavour to reach the unanimous verdict but if they cannot the Judge will accept a majority verdict as in section 17(1), which is the UK statute.

So, again, in the UK, notwithstanding the jury's directed that a majority verdict is now available, they are also told that you can, you should still —

TIPPING J:

That's a little impractical, isn't it? I mean, if you're told that at 11/1 it's okay, you're not likely to carry on to, trying to get 12/nil after that. It seems to me to be more theoretical than sense.

MR MANDER:

There is no context to these directions but it does raise the issue as to when should a Judge direct about the law as it relates to majority verdicts. I think there's been some discussion that it should not be raised with the jury until there is some indication that they are struggling or some indication that they may not be able to produce a unanimous verdict but that also I suspect raises the issue, well, Parliament has provided for after four hours and after a period of time that the trial Judge considers reasonable, having regard to the nature and complexity of the case. So it does raise the issue as to whether, is a jury not entitled to be told, even if they haven't made any indication that they are struggling for unanimity, that they be instructed as to the fact that they can return a majority verdict.

We have proceeded on the basis that a jury should not be told anything about the section until there is some type of indicator that they may not be able to reach a unanimous verdict but there is nothing in the statute that indicates that that is indeed what is required.

ELIAS CJ:

Do we have the statute?

CHAMBERS J:

Tab 1.

ELIAS CJ:

Tab 1, thank you.

TIPPING J:

The statue empowers the Court to accept. It gives the jury no right to deliver a majority verdict.

MR MANDER:

No.

TIPPING J:

Even if all these are fulfilled the Judge could, the way this is worded, say, for whatever reason, it would have to be a sound reason, “No, I'm not.”

McGRATH J:

“But just because of me accept.”

TIPPING J:

Yes.

MR MANDER:

Yes.

TIPPING J:

I mean, I think that again may be more theoretical than agreeable but nevertheless I — some other member of the Court may — I wouldn't want to try and tie —

WILLIAM YOUNG J:

It made —

TIPPING J:

— tie Judges’ hands up in this area.

WILLIAM YOUNG J:

It may, the reference to “may” may simply be the fact that Judges don't have to accept any verdict. For instance, if a proposed verdict such as Justice Lang got in Gisborne recently is one that’s impossible in law, as it turns out, because you needed three people to be found guilty then you have a discretion not to accept the verdict and that may be all that the “may” here indicates. I don't know.

TIPPING J:

I mean, it does say here, “At least four hours”, so the control is in the hands of the Judge quite substantially and the Judge may — who knows when the Judge is going to be satisfied that enough time has elapsed.

ELIAS CJ:

Well, the Judge has to be of the view in subsection (2)(d) —

TIPPING J:

Yes.

ELIAS CJ:

— so it's, it is highly discretionary.

TIPPING J:

It's really for as long as the Judge thinks appropriate but certainly never less than four hours. That's the effect of it, isn't it?

MR MANDER:

It is. If the Judge reaches the view that the period of time that's elapsed is reasonable, having regard to the nature of the case, the Judge may independently take the view that, well, I can now accept a majority verdict and then begs the question, should the trial Judge tell and communicate to the jury, in the absence of any other indicator, that I am prepared to take a majority verdict?

TIPPING J:

Well, that again I think would have to be left to depend on the circumstances. I think the Judge could take the initiative but probably wouldn't until things had really been going on for quite a long time, because the primary focus is still on unanimity, one would think, in the sense that this is simply empowered. The primary approach must — the best verdict is a unanimous one. This is a fallback would be the view I'd tend to take of it, but you certainly wouldn't let — and then that brings us right back to this case. What do you do then?

MR MANDER:

It does, some of it just is left unsaid and the Courts have been, obviously have been left to try and work it out.

The submission I seek to emphasise or maybe re-emphasise is that the *Papadopoulos* direction so-called is a matter of discretion for a trial Judge and this Court itself has confirmed that a great deal of latitude is given to trial Judges and that's in the *Hookway* leave decision at tab 6 in making that assessment as to whether or not a *Papadopoulos* direction is to be given.

It's perhaps worth going to that. It's tab 7, I'm sorry, at paragraph 3 which was an application for leave to appeal from the *Hookway* decision of the Court of Appeal, which was the previous case I was referring to involving the directions given by Justice Wylie. Paragraph 3 sets out what, in my submission, as always been the position with respect.

CHAMBERS J:

This *Hookway* was prior to the law change, wasn't it?

MR MANDER:

No, Sir.

CHAMBERS J:

Is it not?

MR MANDER:

It was — it involved a majority verdict case.

CHAMBERS J:

I'm sorry, sorry.

TIPPING J:

There's one point I'd like, before I forget it, Mr Mander, to have your help on. You have suggested and submitted that the reminders which we're talking about shouldn't be necessary or are not necessary. Is there anything that you would wish to advance to suggest that there's some positive reason why that would be undesirable for them to be given? I understand entirely your submission that they're necessary, and it's a submission of some substance, but can you point to anything that would, on which it could be said that it's undesirable.

MR MANDER:

Not to provide the —

TIPPING J:

To give these reminders about true to oath and consequences of impact.

MR MANDER:

Only the danger which has always been recognised in relation to giving a *Papadopoulos* direction. There are many cases where appeals have been taken, the trial Judge ought not to have given the *Papadopoulos* direction. He or she should have discharged the jury. The point it reached whereby providing a perseverance direction there is a real risk that some juror has not been true to their oath.

WILLIAM YOUNG J:

The only — I think that's not quite an answer to Justice Tipping's question.

MR MANDER:

No.

WILLIAM YOUNG J:

We're not really contemplating a perseverance direction. He's saying what's wrong with giving a stick to your oath and if there's no agreement there will be a new trial in all probability. What would be the harm of doing that at the time a majority verdict is reached and so on?

TIPPING J:

Because there is implicit perseverance in the fact that you're going to give a majority direction. It's on a different premise, but it is inviting him to continue but on a different premise as to how the verdict might be composed.

MR MANDER:

Two responses. The first one, which there is a counter-response to which is that it's, in my submission, mixing two different situations. Majority verdicts are available as a matter of law. Why can't a jury be told about them without any sort of intervention or interference in the way they are presently deliberating? So they should be left, their deliberations to date have been legitimate. The way they've organised themselves and the way they have proceeded to date is, on its face, proper and appropriate. The trial Judge should give a majority verdicts direction as a matter of law because that is what the law provides in this situation. Why complicate it or why — what's to be gained by complicating or perhaps seeking to interfere in the way that the jury has proceeded to date?

Now, I anticipate the response to that will be because we've got an indication that they're struggling and they're having difficulty and then my counter in response to that is well, is that necessary in of itself to actually provide the direction in the first place?

WILLIAM YOUNG J:

There's possibly a slight amplification of what you've said and that is that there's certainly a view that the attention span of jurors is a scarce resource, and it's best not wasted on things that aren't necessary. So the more that's thrown at jurors, the more scope for misunderstanding or distraction and it may be that some jurors would find it irritating or distracting to be told what they regard as absolutely obvious: that they should be true to their oath.

MR MANDER:

Mmm.

WILLIAM YOUNG J:

So that could be a distraction, if there's no, nothing to suggest that any of them aren't being true to their oath. Now it's very different if you've got a jury note saying, I'm being bullied, or we're being bullied, or there's someone in the jury room who's completely perverse, normally in slightly more muted terms than that but then perhaps something is required to be said but if there's no indication of it then it's just introduced as something extraneous and perhaps distracting.

MR MANDER:

And if I may add to that, in my submission, the concern is to give primacy to a unanimous verdict and the majority verdicts, verdict alternative, is a change from the premium that we have always placed upon an unanimous verdict, and one of the ways in which we can get some assurance that the jury has not gone to a majority verdict lightly, is by directing them that they must ensure that there is no probability of them being able to deliver unanimous verdict. And it may be that that is the important direction to be giving to a jury at that time, as opposed to also including other directions about being true to your oath and that type of thing.

ELIAS CJ:

But isn't it precisely in that, that there's no likelihood of coming to a majority verdict and therefore a majority verdict will be taken, that they have to be reminded that they

shouldn't just be compromising for the sake of getting out of things and they have to adhere to their oath? Sorry, your response, you said that there were two points. I'm just mindful of the time and I was going to take the morning adjournment unless you wanted to finish off the point?

MR MANDER:

Well, I have a second point if your Honour would like to hear that.

ELIAS CJ:

Yes.

MR MANDER:

The second point is, again I suspect I may have already referred to it which is: why is it that the majority verdict — the fact that you've reached a point in time where you think it's appropriate to deliver a majority verdicts direction, that it's felt necessary also to give a tailored type of *Papadopoulos* direction to get some reassurance that the jury is legitimately going about its task? I pose the question, couldn't the same argument be made when you aren't in a majority verdict situation but given the length of time the jury has been deliberating in order to get some assurance that, or guarantee that the jury is still working the way it ought to be working, you should also give such a direction? And, in my submission, that step would be quite unique.

ELIAS CJ:

Sorry, isn't that the *Papadopoulos* direction? I don't quite understand. I thought really the only way in which a Judge does intervene is by giving a perseverance direction, unless there's an inquiry, are you making progress, but that's not a direction.

MR MANDER:

The *Papadopoulos* direction is usually brought out when a jury reports we're deadlocked —

ELIAS CJ:

But it need not be. It can be given if a jury is just beavering away and nothing is happening, and time is ticking by. A Judge can — a Judge may make enquiries and then may give a *Papadopoulos*.

MR MANDER:

Well, in my submission it would be very rare —

ELIAS CJ:

Yes, I accept that.

MR MANDER:

— for a trial Judge to give a *Papadopoulos* and take that step which is something which Judges, in my experience, are doing less and less, unless they thought that we've almost come to last chance saloon.

ELIAS CJ:

To impasse.

MR MANDER:

Yes.

ELIAS CJ:

Yes.

McGRATH J:

Mr Mander, can I just ask, do those arguments really apply to the, to whether or not there should be an indication generally to the jury what the consequences will be of their being discharged, i.e. the likelihood of a new trial? They apply really, don't they, to the possible direction of remaining true to your oath rather than that? I would have thought that that could routinely be given without any real risk.

MR MANDER:

Without any reference to the fact there's going to be another trial?

McGRATH J:

I would have thought that the jury could be told that if they're discharged, it's likely there will be another trial, and that could be a matter of general — if that was generally done without any of the risks you're talking about in relation to a possible direction on staying true to your oath.

MR MANDER:

Well, in my submission again that would be perceived by some as applying illegitimate pressure.

WILLIAM YOUNG J:

As coercive.

ELIAS CJ:

Well it depends how you say it, doesn't it? All right, let's take the adjournment now, thank you.

COURT ADJOURNS: 11.40 AM
COURT RESUMES: 11.57 AM

ELIAS CJ:

Yes, Mr Mander.

MR MANDER:

Just to finish off on the point that Justice McGrath raised, about referring to whether one ought to refer to the fact that there will be another trial. My learned friend placed emphasis on the words of the Court of Appeal in *R v Accused* [1988] 2 NZLR 46 which is at tab 2, which set out the model direction which — the model perseverance direction which has been followed since and it is correct that certainly President Cooke did emphasise that it is preferable and appropriate that the jury know what is going to happen. However, if one goes to the direction itself which is set out at page 59 of the report under tab 2, it is apparent that the reference to the fact that there will be another trial is a means by which subtle pressure is placed upon a jury.

At line 16, page 59, the standard words are set out there, "Judges always hesitate to discharge a jury because it usually means that the case has to be tried again before another jury and experience has shown that juries are often able to agree in the end if given more time." Further down, at line 37, "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."

Again, those words, in the standard perseverance direction, have always been viewed as putting a piece of subtle pressure on a jury: "well if you don't make a

decision someone else is going to have to be charged with making that decision". So in my submission, in terms of the appellant's argument that a *Papadopoulos* direction should have been given in this case, by reference to the failure of the Judge to tell the jury that, don't worry, another jury will look at this matter, it doesn't really bear scrutiny when one looks at the words that would have been delivered to a jury in this case which would have been to, in fact, put more pressure, in my submission, on the jury.

It is also perhaps notable that the High Court of Australia in *Black v R* (1993) 179 CLR 44 which is set out in tab 3 and which sets out its model direction which has been followed in Australia, at pages 51 and 52, that the High Court of Australia did not think it appropriate to refer to the likelihood of a retrial, or what would happen if no agreement was reached and certainly did not include any reference to the fact that there would necessarily need to be another trial in its perseverance direction.

McGRATH J:

Because the argument that's been advanced against you on that is that the jury, without such an indication, might well think that the accused will walk scot-free, even though there's been no agreement as to whether or not that the offences — that he was guilty of the offences.

MR MANDER:

Well —

McGRATH J:

There's two arguments here, that's the point I'm making, isn't it?

MR MANDER:

Indeed but it's apparent that three jurors were, apparently on the figures, didn't see that as a difficulty. They were prepared to countenance that. Their position was that they were prepared to find the person — well, this is reading far too much into the figures but —

McGRATH J:

It is, yes.

MR MANDER:

On the appellant's reconstruction, the position had been reached that they apparently were in the not guilty camp, so they were prepared to countenance that.

The other issue is the issue as it relates to the jury being kept in limbo. It is my strong submission that it is clear that the Judge made it plain to the jury that they were not going to be kept a deal further. In the casebook, at page 60, it's been eluded to already, the Judge's direction is set out and there are numerous references throughout that direction that the matter is going to come to a conclusion very soon. At page 2, the Judge states, "I gather that you realise 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".

The last paragraph, "Now with the knowledge that I am telling you that I will accept verdicts of 11/1, 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 will allow, that you will address the one outstanding issue for me. I will call you back into Court at a time in the not too distance future, so that if you are truly locked with no possibility of rendering the majority verdict I will discharge you".

So, in my submission, it is plain that the jury was under no illusion that it would not be put in a position whereby they would be asked to deliver a verdict by exhaustion. It's clear that the option was available to jurors to maintain their view, in the knowledge that they would be discharged.

In my submission, in essence, what the trial Judge did in the totality of that direction, was to inform the jury that, you're now able to return a majority verdict but if you can't, so be it and that is not, in my submission, an objectionable approach in the circumstances and, in my submission, it is not one which risks, or raises the spectre of an unsafe verdict.

WILLIAM YOUNG J:

Can you – sorry, I'm just looking at *Black*. Do they actually deal specifically with an anodyne reference to the possibility of retrial? I mean, they pick up the comment, the view that there shouldn't be reference to great public inconvenience of a retrial and there's no reference to retrial in the approved direction but do they discuss anodyne directions?

MR MANDER:

I don't recollect —

WILLIAM YOUNG J:

No. The reference is at page 52, considerable public inconvenience.

MR MANDER:

Yes, which of course was eliminated from, well, from the *Papadopoulos* direction —

WILLIAM YOUNG J:

Yes.

MR MANDER:

— in *R v Accused*.

McGRATH J:

Which they approved.

MR MANDER:

Which they —

WILLIAM YOUNG J:

Well, no, they didn't actually. They —

McGRATH J:

The head note suggests they did.

WILLIAM YOUNG J:

Because their own direction doesn't have any reference to the possibility of a retrial.

McGRATH J:

In all probability, yes.

TIPPING J:

And the *Papadopoulos* has a spin on it because it says "regrettably". It doesn't just state the fact. I never said "regrettably" because I objected to it.

MR MANDER:

Yes, well the submission I make, it clearly is a subtle form of pressure.

TIPPING J:

Well, it's fairly blunt when you say "regrettably".

MR MANDER:

So, in my submission, it would not have enhanced the appellant's position in this case to —

TIPPING J:

I suppose Judges slavishly follow it because that's the safe course.

MR MANDER:

Ah —

ELIAS CJ:

But again, without slavishly following it, why would it not be of advantage to say, in an anodyne way as might be the case, that it won't mean you needn't feel that this is the end of the road? So don't let's be prisoners of *Papadopoulos* —

MR MANDER:

No.

ELIAS CJ:

— but what are we trying to achieve here. We're trying to make sure that there is a fair and safe process that's put in place. Why is it not safe and fair to say, don't feel under pressure because you've tried and the probability is that there'll be another trial?

MR MANDER:

Per se I don't think there is any difficulty with that.

ELIAS CJ:

No.

MR MANDER:

But it just begs the question, what are you trying to achieve by communicating that to the jury. You are under no pressure. Well, they apparently feel that they are under no pressure because they haven't — there's no apparent illegitimate deliberations going on. In my submission, it just begs the question, what is sought to be being achieved by delivering that direction?

ELIAS CJ:

The risk that people will fold because if you can give a majority decision, well look, what's the harm in going with the majority.

MR MANDER:

Well, again, at risk of going around in circles —

ELIAS CJ:

Yes.

MR MANDER:

— the situation is that there's nothing to be concerned about. You wouldn't give the direction. But you could give a majority verdict direction.

ELIAS CJ:

Yes.

TIPPING J:

I know this might invite speculation, Mr Mander, and if you think it does please say so, but I have to say I am struck by the speed with which the jury came back after the majority verdict direction. In the light of all the history of the case, history of the deliberations, I am very struck by it. Now, you may be entitled to say, well your Honour's struck because you're speculating, but it is a very…

MR MANDER:

Well, Sir, that was going to be my first submission.

TIPPING J:

I fed it to you. Is there an even better submission?

MR MANDER:

Well, it has already been touched upon already today. The Judge has made reference to majority verdicts in his summing up. They — what is apparent, in my submission, is notwithstanding the reference to stalemate in the message, they still appear to be prepared to continue to work —

TIPPING J:

But within half an hour at most, potentially 15 minutes, two of them have changed.

CHAMBERS J:

Well, I wonder if it is that short a period because what we don't know is when the note was written and we all know as trial Judges that there's often, there can be quite a time lapse between writing the note in the Court, the crier getting it to the Judge and counsel getting together, in which period the jury are still working. So even by the time the Judge came back we just don't know whether they were still 9/3.

TIPPING J:

Well, that's true but we don't know.

CHAMBERS J:

It's all just we don't know. All I'm saying is it's not necessarily a shorter period.

TIPPING J:

Well, it is possible that someone had changed in that time but you'd have thought they might have mentioned that to the Judge but, anyway, I'm probably in an area which is impossible to make much submission on. It's just a residual unease, Mr Mander, that this is a remarkably quick — sometime's triggered two of them. This majority verdict direction has triggered two of them to change a view that they have held for 10 hours.

MR MANDER:

But the counterfactual is what if the Judge had given a *Papadopoulos* direction and they'd come back within 20 or half an hour, 20 minutes or half an hour. The claim then would have been this Judge should not have given a *Papadopoulos* direction —

TIPPING J:

Yes.

MR MANDER:

— because look what it's done.

TIPPING J:

Well, that's a fair point.

MR MANDER:

Within half an hour of the *Papadopoulos* they've changed their figures. Indeed, they've got a unanimous verdict. And so, in my submission, what the appellant is contending for is not the answer in this case. The answer must be, are these verdicts safe and when one examines the majority verdict directions that were given correctly as a matter of law, it is very difficult to find a connection in terms of the illegitimacy of what, or any sort of illegitimate connection between what the Judge did in directing on majority verdicts and what happened subsequently.

WILLIAM YOUNG J:

The note must have almost certainly been given before lunchtime, would it be?

TIPPING J:

Yes.

WILLIAM YOUNG J:

Could it really be dealt with in six minutes, or perhaps it was, perhaps Ms Hughes referred to something happening at 2 o'clock?

MR MANDER:

Well, the — what we do have in terms of the record is at page 60, which is the record on the, obviously it's been recorded on the electronic recording, which is the Judge has commended addressing the Court — addressing the jury in answer to the question at two minutes past two.

TIPPING J:

Where's the note? Is it dated? Is it timed?

MR MANDER:

It's not timed.

TIPPING J:

Although it may well be on the Court record if we got the — yes, the counsel must have had the Court timing from the Court record book in the Court of Appeal because we know the Court of Appeal was able to give precise times to things.

McGRATH J:

What about page 64, first line?

CHAMBERS J:

Yes, what it doesn't tell us, however, is when the question was given to the Court crier but presumably that is recorded somewhere.

TIPPING J:

The Judge was out for lunch. He wouldn't have been given the question until two even though it might have been —

CHAMBERS J:

Yes.

McGRATH J:

I see.

MR MANDER:

I can certainly endeavour to try and make some enquires to try and —

WILLIAM YOUNG J:

Well, it may have been given. I mean, if — it does suggest that it was received at 2 o'clock. Counsel were already in chambers.

TIPPING J:

Who were in chambers, but it was — it's a question of how long it took to get from the crier’s hands to the Judge.

WILLIAM YOUNG J:

Yes.

MS HUGHES QC:

Would it be of assistance if I advised the Court what happened now or would you rather Mr Mander —

ELIAS CJ:

Well, we really want to — it should be on the Court record and we can get that from the Court of Appeal, Ms Hughes. It might be the safest course to follow. In fact it may be that, I'm not sure whether our registry holds the Court file, does it? No.

CHAMBERS J:

Apropos the point you were making previously, Mr Mander, of course in the Court of Appeal I can remember at least two or three cases we've had where the very complaint was made that the *Papadopoulos* was given, a quick verdict thereafter and the submission then being made that this was an unsafe verdict because the *Papadopoulos* was given. So that's the normal course which I suspect we may have found a complaint about here, had it been given.

MR MANDER:

Indeed, Sir. Just two final topics that I'd seek to address the Court on. The first is the discussion in *R v Watson* [1988] 1 All ER 897 which is at tab 14 of the Crown's bundle which is the judgment of the English Court of Appeal which re-examined the old *Walhein* direction.

Throughout pages 900 through to 903, the Court examines various cases over the years where juries have been directed in accordance with the *Walhein* direction and also have been given majority verdict directions and it concludes, at the top of page 903, in the second paragraph, stating, "The result of these more recent decisions seems to be this: there is or may be a material irregularity if the *Walhein* direction is given either (a) at too earlier a stage in the jury's deliberation or (b) before the majority direction or (c) whenever it is given, if given in terms which may have the effect of placing improper pressure on the dissident minority of the jury." The Court then goes on to reiterate its concern relating to pressure being placed on a jury, "This is an important matter of procedure and a reappraisal of the situation is overdue," that is the proprietary of perseverance directions now that majority verdicts were available.

The Court continue, “One starts from the proposition that a jury must be free to deliberate without any form of pressure being imposed on them, whether by way of promise or of threat or otherwise. They must not be made to feel that it is incumbent on them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so.”

Further down the page, the last paragraph, the English Court of Appeal of emphasised and quote, “It is a matter for the discretion of the Judge whether he gives that direction,” this is the new post-*Walhein* perseverance direction as set out and indented above, “whether he gives that direction at all and if so at what stage of the trial. There will usually be no need to do so. Individual variations which alter the sense of the direction, as can be seen from the particular appeals which we’ve heard, are often dangerous and should, if possible, be avoided. Where the words are thought to be necessary or desirable, they are probably best included as part of the summing up or given or repeated after the jury have had time to consider the majority direction.”

So the preference of the English Court is that you keep them separate, that the majority verdict direction is one that is provided first and that absent a majority decision the, what is now the *Watson* perseverance direction, can be given and there was a concern that the previous cases had highlighted difficulties with reconciling the majority direction and the perseverance direction when they ought to be kept separate.

Just finally your Honours, in relation to this particular case, it is my submission that — well, I’m repeating the submission I made 10 minutes ago which is that, in my submission, notwithstanding what can be “speculated” about as to the way in which — because we happen to know the numbers, the jury ultimately reached a majority verdict but notwithstanding that it's my submission that nothing illegitimate was done by the Court in this case which could be said to have influenced or have tainted the jury’s process or the manner by which they arrived at their ultimate verdict and that anything, any examination beyond that, in my submission, one is in the realms of speculation and guess work.

I won't repeat the written submissions but at paragraphs 39 and 40 the Crown addresses the specific circumstances of this case and makes its submissions in relation to the situation which gives rise to this appeal.

TIPPING J:

I'm sorry, Mr Mander, could I please invite you to go back to page 903 of *Watson*. I just want clarification on one issue. It's the page where the Court sets out the replacement, if you like, for *Walhein.* It appears to be tailored to be part of a majority direction as well as tailored to be a direction when you are still looking for unanimity, you see, because of the brackets "10 of" –

ELIAS CJ:

Sorry, which paragraph?

McGRATH J:

What section of the page are you on?

TIPPING J:

It's on letter (h), little letter (h).

WILLIAM YOUNG J:

Sorry, what page?

TIPPING J:

Page 903 of *Watson.* So it just seemed to me that their Lordships were contemplating that this is a direction that might be given as part of a majority direction.

MR MANDER:

Well, my submission is that the way that they've — the way the Court has tailored them, the model direction, is that it can be given either while the jury is still deliberating in terms of a unanimous verdict.

TIPPING J:

Yes.

MR MANDER:

It can reach the two hour point.

TIPPING J:

Yes.

MR MANDER:

And we've referred to the Practice Directions, and can be told that you can now return a majority verdict but continue to strive for unanimity and after that point in time it can also be given the *Watson* direction and what's in brackets there provides for that situation when they've reached the point where the majority verdict is an option. In my submission, it's not indicative that you can do a majority direction, or certainly is not illustrative of a majority direction coupled with a perseverance direction.

WILLIAM YOUNG J:

It does actually say it right just below it that it's a matter —

MR MANDER:

Yes.

WILLIAM YOUNG J:

— of discretion when this is given?

MR MANDER:

Yes.

TIPPING J:

Well, I'm not sure. I agree that that's what they say but I'm just looking at it from the point of view that they at least contemplate that you might give that sort of direction as part of a majority direction if you choose to give it. In other words, there is nothing wrong with putting in the — the only thing that's missing from that along the lines that we've been discussing is the consequences of an impasse, the retrial point. If you just added that —

CHAMBERS J:

Except that earlier in the judgment they have highlighted the difficulties that come if you give a *Walhein* direction before the majority direction.

TIPPING J:

Yes, well that's what's confusing me a little. I personally, at the moment, can't see anything particularly wrong with adopting that plus the — it's nice and short, plus the retrial point as part of a majority verdict direction but that's the point of in the case. It just seems to be quite short, simple and tidy. I can't — I'm not really persuaded at the moment that you're going to set up any particular difficulties but I have to reflect on your arguments.

MR MANDER:

The other consideration to bear in mind is that the English statute doesn't require the jury to consider whether or not there is any probability of —

TIPPING J:

Yes.

MR MANDER:

— them reaching a unanimous verdict.

TIPPING J:

Yes.

MR MANDER:

So they don't need to be directed about that.

TIPPING J:

That doesn't have to come into it.

WILLIAM YOUNG J:

Did the *Watson* — the English Courts don't, the Judges don't refer to the likelihood of a retrial?

MR MANDER:

No.

TIPPING J:

I'm not sure that there's authority in England that says clearly one way or the other, is there, about that?

MR MANDER:

Well, I should say, as far as I'm aware, the direction set out in *Watson* is the standard perseverance direction. Presumably trial Judges are still able to tailor the directions in individual cases.

TIPPING J:

They've been given a pretty strong warning off —

MR MANDER:

They have Sir, yes.

TIPPING J:

— under little (j).

MR MANDER:

Yes.

TIPPING J:

Anyway, thank you, Mr Mander. I just thought — that was a point that puzzled me at least.

McGRATH J:

Watson doesn't appear to have been referred to in *R v Accused*, or have I got that wrong?

MR MANDER:

Yes, it is referred to, Sir and indeed it's perhaps worthwhile —

McGRATH J:

That's where the word "cardinal" as used by the President came from. He took that from, the cardinal rule, he took that from Lord Lane's judgment, did he or is that just a standard term in this area?

MR MANDER:

I'm not sure, Sir.

McGRATH J:

Right.

TIPPING J:

Yes, *Watson* is cited, referred to in the head note, so they must have had it in mind.

McGRATH J:

Right, thank you.

MR MANDER:

Page 56 of the Court of Appeal's decision —

TIPPING J:

Watson was hot off the press.

McGRATH J:

I see, I see, I missed it, thank you. Yes, it was certainly hot off the press, less than a year.

MR MANDER:

But it's line — the last paragraph on page 56, line 45, the Court of Appeal noted the amendment to the *Walhein* direction in light of *Watson*.

McGRATH J:

Yes.

MR MANDER:

And the fact that it was related to the introduction in the UK —

McGRATH J:

Thank you.

MR MANDER:

— of majority verdicts.

TIPPING J:

That's what led me to wonder whether the authority in England was as clear as that because in our case there is this reference to a retrial and Sir Robert, as he then was, thought this was pretty important. So that, on one deal it isn't consistent with *Watson*. We've added, admittedly in the — without reference to majority verdicts.

MR MANDER:

I suspect, Sir, it's more a case of what we didn't take out because *R v Accused* reviewed the old *Papadopoulos* direction in light of *Watson* and they took out the reference to public expense and inconvenience and also a reference, as it was included in this case by the trial Judge, a reference to hardship and the ordeal of witnesses. So they were taken out —

TIPPING J:

Mmm, yes.

MR MANDER:

But it would appear as if the reference to the fact there'll have to be another trial, which existed in the original *Papadopoulos* decision, the Court of Appeal in *R v Accused* obviously didn't see fit to remove that either.

TIPPING J:

No.

McGRATH J:

Nor did they see fit to remove the "regrettably".

MR MANDER:

No, Sir, indeed.

McGRATH J:

Thank you. That's been helpful for me.

MR MANDER:

Now, I'm not sure if I can assist your Honours any further.

ELIAS CJ:

Thank you, Mr Mander. Ms Hughes?

MS HUGHES QC:

If I can deal with the timing issue. Page 64 records that both counsel were in chambers when the note was provided and that indeed is the case. So his Honour was in chambers. We had visited him there and the note was then passed at that time. So the suggestion that there'd been an hour or more delay seems, with respect, to be most unlikely.

CHAMBERS J:

Why is that unlikely?

MS HUGHES QC:

Because the crier delivered the note from the jury to the Judge, Sir.

CHAMBERS J:

Yes. Well, anyway, we ought to be able to find out exactly when it was written.

MS HUGHES QC:

Yes, that's exactly what happened. That we were, all three of us, in chambers, knock on the door and there was the crier with the note. So it would, with respect, be a most unlikely thing for the jury to write the note then sit on it for an hour before passing it to the crier.

TIPPING J:

It's not the jury sitting on it. It's the crier sitting on it.

CHAMBERS J:

No, it's not the jury sitting on the note and the Judge being, presumably having lunch.

MS HUGHES QC:

Well, he was certainly in his chambers at 2 o'clock, Sir.

ELIAS CJ:

Not everyone stays out until 2.15.

MS HUGHES QC:

No, and of course, as this makes clear, counsel didn't need to be found from anywhere. We were already there. If I can simply respond to some of the matters raised by my friend. There was a question raised, I think by the Court, that perhaps the jury thought a 9/3 split was a majority verdict. Well, that wasn't the question they asked and that can't explain the transformation from 9/3 to 11/1, simply to comply with what is, in fact, a majority verdict. If in fact 11 persons thought that he was guilty for instance, then why wouldn't the note have said, we are split 11/1, is this a majority verdict?

It is quite properly said that the perseverance direction is a matter for the discretion of the Judge but if guidance is sought by a jury then it should be given and that discretion should be reasonably exercised. This Judge knew that it was a single issue trial, the length of time that they had retired, the fact they were unanimous on two counts and 9/3 split on six and they have sought his help. In combination, those factors obliged him to give the perseverance direction.

It is also said that a jury may feel distracted at being reminded of its oath or pressured. Well, it is precisely when a jury is at its most tired that you might think that they would benefit from being reminded of that oath because that is the time that they are vulnerable to making decisions for comfort, if you like, rather than principle.

It has been said by my friend that I had submitted that the jury was effectively being kept in limbo by the Judge returning them to their consideration when he'd made it clear that he wouldn't keep them for a great deal longer. They knew he'd already kept them there for more than 10 hours with a night in the middle and they had made their position clear and they were still required to go back and carry on. So they did not know how much time they were going to have and you might well think that that in itself put pressure on them, particularly when confronted with the reality that an 11/1 split and you can go home now.

The ultimate question to be asked, of course, are these verdicts safe and I say they are not. The speed of change, the inadequacy of the direction and the request for assistance unheeded, all point to the fact that the verdicts are not safe. If

Papadopoulos had been given then there may well have been an appeal but clearly the fact that there might have been an appeal on that ground cannot be a reason for not giving a *Papadopoulos* direction. Any such appeal would undoubtedly have been unsuccessful. It can't be a reason for not giving the direction.

There's nothing further I have to add. Unless there's anything I can assist the Court with?

ELIAS CJ:

No, thank you, Ms Hughes. Thank you counsel for your help. We'll reserve our decision in this matter.

COURT ADJOURNS: 12.33 PM