

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: Director of Public Prosecutions v Lehrmann (No 5)

Citation: [2022] ACTSC 296

Hearing Date: 27 October 2022

Decision Date: 27 October 2022

Before: McCallum CJ

Decision: (1) Discharge the individual juror pursuant to s 8 of the *Juries Act 1967* (ACT).
(2) Discharge the balance of the jury.

Catchwords: **CRIMINAL LAW** — JURISDICTION, PRACTICE AND PROCEDURE — discharge of jury — juror misconduct — trial for sexual assault — where juror found to have had access to research material that was not provided to the jury during the trial — academic article about sexual assault — where research article brought into the jury room — where the jury are given directions by trial judge to not conduct their own inquiries — where the jury are deliberating — where a *Black* direction has been issued — whether the jury must be discharged

Legislation Cited: *Juries Act 1967* (ACT), s 8
Jury Act 1977 (NSW), s 68C

Cases Cited: *Black v The Queen* [1993] HCA 71; 179 CLR 44

Parties: Director of Public Prosecutions
Bruce Lehrmann (Accused)

Representation: **Counsel**
S Drumgold SC with S Jerome (DPP)
S Whybrow with K Musgrove and B Jullienne (Accused)

Solicitors
ACT Director of Public Prosecutions (DPP)
Kamy Saeedi Law (Accused)

File Number: SCC 264 of 2021

McCALLUM CJ:

1. After a trial that ran for 12 days and following five days of deliberation by the jury, it has regrettably been necessary to discharge, first, one of the jurors and then the balance of the jury. These are my reasons for making those orders.
2. Contrary to what may have been anticipated, the jury has not been discharged due to an inability on their part to reach a unanimous verdict. At the time they were discharged, the jury was still deliberating following my giving them a *Black* direction on Tuesday afternoon: *Black v The Queen* [1993] HCA 71; 179 CLR 44. Instead, the jury has been discharged because I have received cogent evidence that at least one juror has had access to research material that was not provided to the jury during the trial.
3. Before outlining the circumstances in which this matter was drawn to my attention, I wish to record my gratitude for the courage, integrity and good sense displayed by the Sheriff's officers who inadvertently made this discovery. The conduct of the Sheriff's officers involved in this trial has been exemplary. They have worked in difficult circumstances. The Court is fortunate indeed to be so well served.
4. I have heard evidence this morning that, during routine tidying of the jury room by three Sheriff's officers after the conclusion of proceedings yesterday, one of the officers accidentally bumped one juror's document folder onto the floor. The jurors' document folders are plastic boxes with a clear front. When the officer picked up the box to replace it on the chair from which it fell, he noticed part of the title page of an academic research paper, the source of which suggested that the topic of the paper might be sexual assault.
5. The matter was promptly brought to my attention. The juror's document box was not opened. However, by searching the date and publisher of the paper (which were visible through the cover), my associates were able to identify what appeared to be the article in question. The identity of the paper found by my associates has been confirmed in evidence this morning by the juror in question to be the paper in their document box. The subject matter of the paper is indeed sexual assault. Specifically, it is a discussion of the unhelpfulness of attempting to quantify the prevalence of false complaints of sexual assault and a deeper, research-based analysis of the reasons for both false complaints and scepticism in the face of true complaints.¹

¹ Note: following the discharge of the jury, I was informed by the Sheriff's officers that the same juror was also in possession of two additional academic articles on the topic of sexual assault.

6. It is neither possible nor helpful to speculate as to the use to which this information might have been put in the jury room, if any. The juror in question has this morning given an explanation that the document was not used or relied upon by any juror. However, it is appropriate in the circumstances to approach that evidence with some scepticism. At the very least, the fact that the paper was located and taken into the jury room by the juror indicates that it may have influenced that juror's contribution to the jury's deliberations. The unfairness to both parties is manifest.
7. During the course of the trial, on my calculation, the jury must have been given at least 17, and possibly more, warnings or directions as to the prohibition on undertaking any research or inquiries of their own. In my opening remarks to the jury, I said:

Sometimes it happens in jury trials that jurors become curious about a matter. They might think that they might learn more if they went to visit the place where something is alleged to have happened, or consider - sometimes jurors have been reported to have tried to re-enact various things to see if something could happen the way someone said. And you will appreciate from what I have said to you that that is absolutely forbidden, members of the jury. You mustn't try to undertake your own inquiries or try to re-enact any aspect of the offence or consider any external evidence about the consumption of alcohol or about any matter that might arise during the trial. You must rest exclusively on the evidence you hear in this courtroom.

A good way of testing that is, if you are learning something about this trial and I am not there, then you should not be doing it. You should only be learning about this trial in this room in my presence. So, if you find yourself getting curious and undertaking internet research or talking to people about their areas of expertise, think to yourself, "Well, Chief Justice McCallum isn't here so I probably shouldn't be doing this." That is not a bad way of testing what you should hear in this trial. You should only hear the evidence in this trial in my presence when it comes before you in this courtroom. I hope that makes sense.

8. Subsequently, each day of the trial when I allowed the jury to go home, I said words along the following lines (and these are the words I said on the first day):

It is extremely important that you not undertake any inquiries of your own in relation to these proceedings and you will have heard by now that there has been a lot of media attention to the case. Please don't go Googling Brittany Higgins or Bruce Lehrmann or any of the other people you have heard mentioned. Please don't seek out publicity in relation to this case. For the reasons I explained before, it would be very unfair to the accused if you sought information outside what you are you going to hear in evidence in these proceedings.

9. My recollection was that I had said words to that effect each day. My associates have confirmed by a brief search that I made the remarks on every day of the trial.
10. In any event, it is now beyond dispute that the research article made its way into the jury room. A review of the article reveals that it could be deployed to support either side of the central issue in this case, which was whether an act of sexual intercourse was proved beyond reasonable doubt. The discovery of the article and the fact that it was brought into the jury room, of itself, necessitated the discharge of the whole jury.

11. In New South Wales, this conduct would amount to an offence. Section 68C(1) of the *Jury Act 1977* (NSW) provides:

A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror.

12. There is no such offence in the Australian Capital Territory, but it is beyond question that the conduct of the juror is such as to abort the trial. Both counsel for the prosecution and for the accused agreed with my decision in that respect. It should go without saying that this outcome is both unexpected and unfortunate.

13. Before leaving this topic, I want to record my gratitude to all counsel who appeared in the matter for the exemplary way in which they conducted themselves.

14. The role of counsel in criminal trials, particularly defence counsel, is sometimes poorly understood. In this trial, all counsel have conducted themselves with the utmost integrity, fairness, honesty and, perhaps most importantly, fearlessness. They are to be commended, not criticised, for doing so.

15. For those reasons, the orders I have made this morning are to discharge the individual juror pursuant to s 8 of the *Juries Act 1967* (ACT) and to discharge the balance of the jury.

I certify that the preceding fifteen [15] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Chief Justice McCallum

Associate:

Date: 27 October 2022