In the Court of Appeal for the Northwest Territories

Citation: *R.* v. *Lepine*, 2013 NWTCA 08

Date: 2013 11 25
Docket: A-1-AP-2013-000002
Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Respondent

- and -

Vernon Lepine

Appellant

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment of the Majority

Dissenting Memorandum of Judgment of
The Honourable Madam Justice Bielby

Appeal from the Conviction by
The Honourable Madam Justice K.M. Shaner
Dated the 29th day of November, 2012
Sentenced the 27th day of February, 2013

Memorandum of Judgment

The Majority:

A. Introduction

[1] This conviction appeal concerns two matters:

1. Allowing cross-examination of the accused before the jury on his full criminal record, and
2. When a jury asked the judge a legal question just before final jury addresses and the trial judge's final charge were to begin,
    (a) giving only a partial and interim answer then, and deferring the fuller answer to the final jury charge, and
    (b) giving a standard instruction as the ultimate answer (in the final charge).

B. Facts

[2] A jury found the appellant guilty of a sexual assault. The complainant fell asleep on a bed following a drinking party. She testified that she awoke to feel a hand inside her pants and something inside her. She said the appellant, whom she knew, was present and apologizing.

[3] The appellant testified, denied the event, and gave an alibi which his new wife largely confirmed.

[4] Defence counsel applied to bar the Crown from raising during the cross-examination any of the accused appellant's fairly long but somewhat dated criminal record. The trial judge heard argument, then refused the application, and allowed the Crown to put into evidence the whole record. She later gave written reasons: 2012 NWTSC 87.

[5] The facts respecting the jury question are given in Part D.1 below.

C. Cross-Examination on Previous Criminal Convictions

[6] The leading case is ***R v Corbett*** [1988] 1 SCR 670, 85 NR 81, 41 CCC (3d) 385 in which six judges took part. Dickson C.J.C. wrote a judgment in which two others concurred. LaForest J. dissented, but Dickson C.J.C. agreed (para 49) "with the discretion recognized by the reasons of LaForest J.". That judge emphasized the established discretion of a trial judge to exclude evidence whose prejudicial effect outweighs its probative value. And he went on (at pp 435-438 CCC) to discuss several factors to consider when doing that weighing as to criminal record.

[7] The trial judge's written reasons about cross-examination identified the specific factors listed in ***Corbett***, and then applied and weighed each of them. No one suggests that the trial judge

made any error of law or principle in adopting and applying any of that, with one possible exception. The appellant's counsel's factum seems to suggest that an attack on the character of the complainant during the trial is necessary to admit the record, i.e. that absence of attack bars admission. The appellant argues the trial judge erred in this analysis.

[8] That is not how we read ***Corbett***. An attack on the complainant's character is merely an additional or alternative factor suggesting admitting the record in a case where it might otherwise not be admitted. The existence or absence of such an attack is not an extra ground for denying admission. In any event, the trial judge correctly found that there had been no attack on the complainant's character here.

[9] The appellant now says that the trial judge should have excluded the whole criminal record, or (in the alternative) all but its last comparatively minor conviction. The appellant seems to suggest different weights for the relevant factors which the trial judge weighed. That is a factual topic, and clearly we owe the trial judge deference here. In our view, her decision was reasonable. Reweighing facts or future events is especially unsuitable for a fresh decision by an appeal court with a transcript. On this topic of previous criminal record on appeal, see ***R v Simpson***, 2004 ABCA 146, 348 AR 178 (para 15) and the Ontario Court of Appeal in ***R v Paul***, 2009 ONCA 443, 249 OAC 200 (paras 13-15), leave den (2010) 404 NR 397 (SCC), and ***R v Saroya*** (1994) 76 OAC 25, 36 CR (4th) 253 (CA) (para 5).

[10] There were previous convictions for assault; however, none had any sexual elements revealed by the record, and so it would have been hard for the jury to think that they were similar fact evidence. At worst, they could have been evidence of general bad character. The trial judge several times during and at the end of the trial clearly warned the jury not to reason in that way about propensity or bad character (see pp 203 and 297-98).

[11] A number of the appellant's convictions were for offences of dishonesty and so highly relevant to credibility. Some were neither offences of dishonesty, nor violence, but of unwillingness to obey rules and court orders. That is relevant where lack of credibility, and even sponsoring alibi evidence, were live issues. Legitimate cross-examination on the record is not limited to offences of dishonesty: ***R v Paul***, *supra* (para 15), and ***R v Saroya***, *supra* (paras 10-11).

[12] The trial judge considered both whether to edit out certain types of offences, and also possibly editing out the earliest convictions. However, any attempt to delete something would produce countervailing drawbacks, as the trial judge demonstrated. In particular, it could leave the impression that the accused appellant had been of good character, at least in his mature years, and that is patently not so if one looks at the full record. See ***R v Saroya***, *supra* (para 13).

[13] Much of our criminal procedure is based on the assumption that juries are honest and will sincerely try to apply the law as the trial judge directs them to. We are unwilling to presume the contrary; for one thing, it is impossible for the Crown to prove what this jury, or juries in general, think. Parliament obviously feels the same way. See ***R v Corbett***, *supra* (pp 399-401 CCC).

[14] Admitting the whole criminal record (via cross-examination) was not unreasonable, and there is no editing which the case cried out for, nor any obvious incurable risk. We give no effect to this ground of appeal.

D. Jury Question

1. The History

[15] After the close of evidence, the trial judge held an extended conference with counsel about what should and should not go into the judge's final charge to the jury. The judge also ruled on an application by the Crown to reopen its case to admit another piece of evidence. The jury was not present of course. The jury then sent in a written question to the trial judge:

> In a situation where the decision comes down to a question of credibility, is lack of credibility on the part of the defence enough to pass the beyond a reasonable doubt test?

[16] The trial judge told counsel what she had in mind about how and when to answer this question, and asked for comments from counsel. The Crown agreed with her suggestions. Defence counsel never commented on the trial judge's suggestions. Instead he asked for a mistrial, suggesting that the question showed pre-judgment or bias by the jury. He also sought more time to research the law. Both counsel agreed that the matter should go over to the next day.

[17] The trial judge at once the same day then recalled the jury and explained the pause until the next day, and some of the many practical disadvantages of carrying on that same day. She did not tell them of the mistrial motion.

[18] She said that she and counsel had discussed the jury's question. She then said this to the jury:

> The first thing I want to tell you about this is, as you recall I instructed you earlier, and I realize you have heard all the evidence, but I did instruct you earlier about the presumption of innocence and the importance of keeping an open mind and not drawing conclusions until you have heard not only all of the evidence but also the submissions of counsel and my final instructions to you. Typically, credibility is something that I would deal with when I am giving you my final charge particularly when, as here, a defendant has testified on their own behalf. There is very special instruction that goes along with that.
>
> So I am not going to answer the question fully right now because it will be dealt with when I give you the final charge, but I did for the time being feel that it is very important that I remind you that you cannot form opinions and conclusions until you have heard everything, including the submissions of counsel and my final

instructions.

(Transcript p 262, lines 27-47)

[19] The trial judge then excused the jury until the next morning. After they left, she asked counsel if there was anything else for that day. Apart from a minor point by the defence (irrelevant here), neither counsel suggested anything, and the court rose for the day.

[20] The next morning, counsel argued the mistrial motion at length, and gave authorities to the trial judge. She then gave reasons denying the mistrial motion. She asked if there was "anything else on this". A long discussion on an unrelated topic then ensued.

[21] The jury were then immediately recalled. The two counsel gave their final addresses, and the trial judge gave her final charge.

[22] Though denying the mistrial motion is a ground of appeal in the notice of appeal which the appellant himself filed in jail, his new counsel did not argue in his factum, nor orally, that there should have been a mistrial. The only two grounds of appeal argued are those discussed in this judgment.

[23] The appellant's counsel suggests to us that a full answer to the question, not a truncated one, should have been given the same afternoon before the court rose for the day, and that leaving part to the next morning's jury charge was an error. He also argues that the answers to the question in the final charge to the jury were incomplete.

2. Timing of the Answer

[24] Everyone agrees that it is unusual for a jury to pose a question before they are charged or have begun their final deliberations. That is partly because trial judges tell juries, as did this trial judge, neither to deliberate, nor to form opinions, until the trial is over and they are sent out to consider their verdict.

[25] The appellant's factum gives a few authorities about a different question (interim mid-trial instructions about a new issue emerging from the evidence); but it cites no timing case about premature jury questions.

[26] The Crown has found one case on the topic, ***R v Armstrong***, 2011 ONCA 709, 280 CCC (3d) 75 at 83 (paras 36-41). There the trial judge's refusal to answer a mid-trial question by the jury was held proper. That trial judge told that jury to wait for instructions on the law later. The Ontario Court of Appeal held that it would be wrong to assume that the jury had reached a unanimous conclusion on anything, and that the question could be a query from a single juror.

[27] An answer to a post-charge jury question always tells the jury not to emphasize that topic, nor take it out of context, just because it is a separate and last instruction. The answer is to be read in light of the whole jury charge and the basic principles in it. It is impossible to give that caveat to the jury before the charge has been given. One cannot tell people to bear in mind what they never

have heard. The alternative would be a full jury charge before final argument by counsel, a novel idea.

[28] We find it useful to consider some basic propositions.

[29] A trial judge has management of a trial, and a jury trial entails many complicated and sometimes conflicting management considerations. Events are unpredictable, and the number of permutations and combinations of hundreds of events, large and petty, can be enormous. The proper aim is always to reach a fair, prompt, practical solution. Often more than one solution would work. Sometimes no possible solution is entirely satisfactory. And foresight never has the accuracy which hindsight seems to offer. Management issues are often factual, indeed simply practical, not legal. We accord great deference to logistical decisions by case management judges. The same appellate deference should be given to timing and management decisions by trial judges, especially those presiding over jury trials.

[30] Indeed, the trial judge is present and knows the trial dynamics. She sees how all the players react, including whether the jury seems to understand or looks puzzled, and whether the jury looks compliant or sceptical (or worse). None of that is evident in a transcript.

[31] Authority supports that standard of review. The cases sometimes phrase that as appellate deference owed to judges holding criminal trials and their timing and administrative decisions. Sometimes they use the word "discretion". Sometimes they say that the topic is factual, not legal. Some cases ask whether the trial judge denied the fundamental rights of the accused to call evidence and have counsel. But the cases all point in the same direction, and give trial judges much elbow room. See ***Darville v R*** (1956) 116 CCC 113, 115 (SCC); ***Emkeit v R*** [1974] SCR 133, 139, 6 CCC (2d) 1; *dicta* in ***R v Barrette*** [1977] 2 SCR 121, 10 NR 321, 29 CCC (2d) 189 (para 6); ***R v WFM*** (1995) 169 AR 222, 41 CR (4th) 330 (CA) (para 12); ***R v Manhas*** [1980] 1 SCR 591, 32 NR 8, 17 CR (3d) 331; ***R v Felderhof*** (2003) 180 OAC 288, 180 CCC (3d) 498 (CA) (para 57). The ***Felderhof*** decision was cited with approval in ***R v Nixon***, 2009 ABCA 269, 464 AR 1, 246 CCC (3d) 149, affd 2011 SCC 34, [2011] 2 SCR 566, 417 NR 274, 271 CCC (3d) 36.

[32] We speak here of appellate deference to the timing of the answer. No one ever contemplated not giving a full definitive answer to the question (nor even postponing that beyond the next morning). The importance of jury questions is not contested or triggered here.

[33] Authorities on the need to answer jury questions fully are of no help when the issue is not **what** to answer, but only **when** to answer. For one thing, they are all about jury questions given after part of the jury's final deliberations.

[34] A jury question after the final charge is different in character than one before it.

[35] Despite the appellant's terminology, the jury question in issue here was neither given post-charge during deliberations, nor given mid-trial. It was raised after all evidence, and immediately before final addresses and the trial judge's final charge were to be given. Nor did it arise because something unusual happened, nor because of hearing inadmissible facts.

[36] Indeed, the only reason that the jury did not receive the trial judge's final charge within an hour or so of the jury question, was because of what defence counsel did. Trial defence counsel could have commented on when and how to answer the jury question. But he did neither. Instead he immediately moved for a mistrial because of the question. He would naturally not so move and also comment on a possible answer to the question: a mistrial order would render the jury question academic, indeed make the jury academic.

[37] Defence counsel then compounded the situation by asking for an immediate overnight adjournment. He never suggested that the jury question be fully answered the same day, nor objected when the trial judge answered it only partially. After all, that would logically conflict with the force of his mistrial motion. He made a strategic choice, and the defence now attempts an about-face on appeal. It relies on the delay which it itself requested, as a ground for a new trial.

[38] Of course we do not suggest that the defence counsel then had improper or oblique motives. A mistrial is the opposite of continuing the trial, and to try to argue both would be very odd, and very poor advocacy. It was natural for defence counsel to pick one. He evidently thought that a new trial, more time, a new jury, and new evidence, would be better for his client. That was proper, but (like any election) it created inevitable consequences.

[39] The defence's express concern at this trial was a premature decision by the jury. But the trial judge had already told the jury not to decide anything until the end of the trial and final charge (p 112).

[40] And the immediate answer which the trial judge gave the same day to this jury question said the same thing (p 262). We cannot see what more the trial judge could have done to prevent a premature jury conclusion.

[41] We are to presume that jurors will obey their oaths and try the case according to the instructions they get from the trial judge. If we could not start with that presumption, jury charges and all the case law about them would be largely useless. See Part C above.

3. Contents of the Answer to the Question

[42] As noted, the substantive part of the answer to the jury question came the next morning during the trial judge's final charge. It occurred twice: once as general principles of law and procedures, and then again as applied specifically to the case's live factual issues. (See pp 296 and 304.)

[43] Furthermore, the first of these two passages was prefaced by these words from the trial judge:

> Now what I am going to say next relates to the question that you gave to me yesterday about how to treat a defendant's evidence.

So the jury could be certain that they had an answer to their question, and had it just then. It is true that the trial judge used the words "relates to", but jury charges and answers to jury questions are to

be read generously and not in a narrow or technical way, nor *contra proferentem*. ***R v Daley***, 2007 SCC 53, [2007] 3 SCR 523, 369 NR 225, 226 CCC (3d) 1 (paras 30-31, 55-58). In any event, the words following were both an answer to the jury question, and also a necessary part of the final charge.

[44] Indeed that double function (general rules and then application to the issues here) illustrates the wisdom of waiting for the full careful final charge to give a proper and contextual answer to the jury question. Full contextual answers would be impossible (or highly puzzling) in a preliminary answer before charge.

[45] We now return to the substance of the trial judge's answer. The appellant's factum seems to suggest that the jury question was about what use to make of the accused's previous convictions. We do not agree. In our view, the jury question is about the well-known topic discussed in the leading case of ***R v DW*** (often called ***W(D)***) [1991] 1 SCR 742, 122 NR 277, 63 CCC (3d) 397. In any event, we cannot imagine how to answer the question without including that.

[46] The jury question neither mentions nor implies previous convictions at all. It is about **any** lack of credibility by the defence, and its ultimate effect.

[47] Indeed, the jury question speaks of "the defence", not the accused appellant. There were two defence witnesses: the appellant and his new wife. Both were cross-examined at some length by Crown counsel. Cross-examination is very important in setting what issues are live. A jury charge (or answer to a question) is about live issues.

[48] The two defence witness' cross-examination suggested many grounds to question their accuracy or credibility: previous contrary statements, whether the evidence of another was procured or spontaneous, quality of memory, and possible intoxication. The appellant's previous criminal record emerged near the end of the cross-examination of the accused; that part of the transcript is only a little over a page long. The cross-examination of the other defence witness had nothing to do with anyone's previous criminal record. As to her, previous convictions were an irrelevant topic. In any event, the jury were fully charged, more than once, on how to handle the previous convictions.

[49] Did the relevant passages (about 2 pages of transcript in the appeal book) from the trial judge's final jury charge do enough to answer the jury's question? The appellant's factum does not suggest any inadequacy there (only in the preliminary answer the previous afternoon). Nor did the appellant's counsel's factum suggest that those two pages were wrong or incomplete. His oral argument merely complained briefly that not enough was said about the dangers of using a previous criminal record to infer a propensity to break the law. In other words, they did not say enough about what we find to be a topic not raised by the jury question.

[50] Any one topic in a jury trial almost inevitably leads to another. That is why trial judges wait until the end of the trial and then give a careful charge covering all the important topics. To insist on a preliminary answer before that stage, is to open up hundreds of possible criticisms about other related topics not covered. Non-contextual answers can often confuse or mislead lay people.

[51] One might perhaps wonder whether the jury should have been told that the answer to their question was "no". But so brief an answer in some circumstances could be misleading. It would not always be accurate if some or all the jurors thought the Crown's case very strong, believable, and unchallenged as to credibility, for example. If the only place in the trial where doubt could reasonably arise is flatly contradicting evidence from "the defence", then any short answer to the question would be closer to "yes" than to "no". If a short answer was necessary, then it would have to be "it depends". What does it depend on? The classic three-part "***W(D)***" jury instruction tells what it depends on. That is what the trial judge gave the jury, twice. One time related it to the factual issues.

[52] The Supreme Court of Canada and countless appellate decisions have endorsed that charge, and the defence did not object to that at trial, nor on appeal. (Nor did the Crown.) The trial judge did not err in giving that answer and charge, in our view.

[53] There were no flaws in that part of the charge, and it was explained and put into context. It was a satisfactory answer to the jury questions and appropriately so labelled. We see no flaw in how the question was answered.

[54] The issue is not whether something else could have been said. Often more than one solution will work. The issue is whether the trial judge's solution was fair and reasonable. A perfect jury charge is not required, and is often almost impossible. An ill-timed jury question does not change that.

E. Conclusion

[55] We dismiss the appeal.

Appeal heard on October 22, 2013

Memorandum filed at Yellowknife, N.W.T.
this day of November, 2013

Côté J.A.

Authorized to sign for: Veldhuis J.A.

Bielby J.A. (dissenting):

[56] While I agree with the majority that the trial judge made no reviewable error in her treatment of the Crown's cross-examination of Mr. Lepine on his prior criminal convictions, I respectfully disagree with its conclusions in relation to the effect of her failure to answer the first question received from the jury. That failure, in these circumstances, rendered the conviction unsafe and I would, in the result, have allowed the appeal and directed a new trial.

Facts

[57] As noted in the majority decision, the appellant, Vernon Lepine, was tried on a charge of sexual assault. The complainant testified to the assault and to the appellant's identity. Mr. Lepine denied the assault and his wife gave alibi evidence, testifying that he was home with her when it was alleged to have been committed. The trial judge allowed him to be cross-examined on his record of 22 convictions from 1986 to 2004, and a further conviction in 2004 for failing to attend court. None of his convictions were for sexual assault.

[58] Unusually, the jury sent a question to the trial judge at the conclusion of the evidentiary portion of the trial, but before counsel had delivered their closing addresses and before the judge had charged the jury. It read:

> In a situation where the decision comes down to a question of credibility, is lack of credibility on the part of the defence enough to pass the beyond a reasonable doubt test?
>
> (Transcript, p 262, lines 20-25)

[59] The trial judge consulted with counsel. Defence counsel sought a mistrial, suggesting that the content of the question showed pre-judgment or bias by the jury. He asked for some time to research the law with the result that the trial was adjourned to the next day by consent. Before the jury members were sent home, the trial judge met with them and advised that she and counsel had discussed their question. She did not answer their question but rather stated:

> The first thing I want to tell you about this is, as you recall I instructed you earlier, and I realize you have heard all the evidence, but I did instruct you earlier about the presumption of innocence and the importance of keeping an open mind and not drawing conclusions until you have heard not only all of the evidence but also the submissions of counsel and my final instructions to you. Typically, credibility is something that I would deal with when I am giving you my final charge particularly when, as here, a defendant has testified on their own behalf. There is a very special instruction that goes along with that.
>
> So I am not going to answer the question fully right now because it will be dealt with when I give you the final charge, but I did for the time being feel that it is very important that I remind you that you cannot form opinions and conclusions until

> you have heard everything, including the submissions of counsel and my final instructions.
>
> (Transcript, p 262, lines 27-47)

[60] These statements do not amount to a direct or an indirect answer to the jury's question.

[61] The next morning the mistrial action was argued and dismissed. It was followed by the final addresses of counsel, and then by the trial judge's charge. During the charge, she provided the standard *W(D)* warning as follows:

> Even if you do not believe all of [Mr. Lepine's] evidence, however, if what he said and the other evidence perhaps also convinces you or leaves you with a reasonable doubt about his guilt or any element of the offence, then you have to find him not guilty. Remember, he does not have to prove beyond a reasonable doubt that he is innocent. He just has to raise a reasonable doubt and that is very different.
>
> Even if Vernon Lepine's evidence does not leave you with a reasonable doubt, you can find him guilty only if on the rest of the evidence that you do accept you are convinced of his guilt beyond a reasonable doubt.
>
> (Transcript, p 296, line 29-45)

The trial judge repeated the *W(D)* analysis later in her charge but did not (on that occasion, or elsewhere) directly answer the jury's first question.

[62] During deliberations the jury asked a second question:

> Request to know how Vern pled to all previous convictions listed on his criminal record, Exhibit 2.
>
> (Transcript, p 316, lines 18-20)

The trial judge responded by stating:

> First of all, I will indicate that you will not be given that information. It is not in evidence and the evidence has now closed.
>
> Secondly, I will ask that you not speculate on what the answer to that question might be. It is not proper for you to speculate, and it is only proper for you to take what is before you, which is a criminal record with convictions. How he pleaded on each of those is irrelevant and it is not in evidence, so that will not be provided to you.
>
> (Transcript, p 317, lines 4-14)

[63] The trial judge did not repeat her mid-trial instruction as to how the criminal record should be treated. The jury then retired once more, ultimately returning a verdict of guilty on the charge of sexual assault.

Failure to Answer a Question from the Jury

[64] Mr. Lepine, on appeal, argues that the trial judge erred in failing to answer the first question from the jury either at the time it was asked or later during the charge. He argues that the jury's first question, as illuminated by the later second question, gives rise to the concern that it engaged in forbidden reasoning by using Mr. Lepine's convictions for earlier offences as evidence of his guilt on the charge before them, or by concluding he was guilty simply because they disbelieved the evidence called by the defence.

[65] The Crown argues that the jurors could have analyzed or divined the answer to their first question, by applying the *W(D)* instruction later given by the trial judge in her jury charge.

[66] I disagree with the majority view, expressed in paras 42-43, 49, 53 and elsewhere in its decision, that the trial judge answered the jury's first question. She did not. At the time the first question was asked, the trial judge should have told the jurors that lack of credibility on the part of the defence is not enough, on its own, to "pass the beyond a reasonable doubt test". She should have followed that statement by giving the standard *W(D)* warning, and again repeated it later during her charge. She would then have left the jury under no misapprehension as to the answer to its question, by giving them a full and fair answer on the spot.

[67] The trial judge's failure to respond to the first question directly raises the possibility that the jury continued to deliberate without an answer to the first question and during those deliberations erroneously reasoned that a negative conclusion as to the credibility of defence witnesses was fatal to Mr. Lepine's defence, notwithstanding the trial judge's admonition against premature deliberation.

[68] This concern is not laid to rest by the contents of the final charge. In it, the trial judge did not fulfill her promise to answer the jury's first question. It is true that she prefaced the portion of her charge addressing *W(D)* by stating, "what I am going to say next relates to the question that you gave to me yesterday about how to treat a defendant's evidence". Nonetheless, the trial judge did not answer the jury's question in her comments which followed. To arrive at an answer to their question, the jury would have had to correctly apply the trial judge's standard *W(D)* instruction. It is not safe to assume that the jury did that, given the trial judge's failure to take them through an application of the *W(D)* analysis in the context of that question. This concern is heightened by the jury's return to the issue of credibility in asking the second question, post-charge and post-receipt of the trial judge's *W(D)* instructions.

[69] The issue is not, therefore, one simply of the timing of the answer, as suggested in paras 33-34 of the majority decision, but rather the consequences of a failure to answer at all.

[70] Questions from juries are of particular importance in assessing the fairness of a trial because they illuminate the issues which are troubling to the triers of fact at a critical time. As the

Crown stated in its own factum, questions from the jury indicate its desire for direction on an issue that is important, and perhaps troubling. The trial judge must provide a clear, correct and comprehensive answer; see *R v Anderson*, 2013 ABCA 160, [2013] AWLD 3489.

[71] As the Manitoba Court of Appeal stated in *R v Layton*, 2008 MBCA 118 at paras 17-19, [2009] 10 WWR 118, aff'd 2009 SCC 36, [2009] 2 SCR 540:

> How a judge answers a question from a jury is extremely important. This is so because it comes at the crucial time of deliberation by the jury and usually indicates that the jury is struggling with a particular issue. As a result, the answers will be given special emphasis by the jury.
>
> The significance of how a judge responds to a question from the jury cannot be overstated and it has been the subject of much commentary in the Supreme Court. See, for example, *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, *R. v. Naglik*, [1993] 3 S.C.R. 122 and *R. v. Pétel*, [1994] 1 S.C.R. 3.
>
> In *S. (W.D.)*, Cory J. writing for the majority, explained the importance of a judge giving a full response that assists the jury with their question (at p. 528):
>
> > It is true that directions to a jury must always be read as a whole; however, it cannot ever be forgotten that questions from the jury require careful consideration and must be clearly, correctly and comprehensively answered. This is true for any number of reasons which have been expressed by this Court on other occasions. A question presented by a jury gives the clearest possible indication of the particular problem that the jury is confronting and upon which it seeks further instructions. Even if the question relates to a matter that has been carefully reviewed in the main charge, it still must be answered in a complete and careful manner. It may be that after a period of deliberation, the original instructions, no matter how exemplary they were, have been forgotten or some confusion has arisen in the minds of the jurors. The jury must be given a full and proper response to their question. The jury is entitled to no less. It is the obligation of the trial judge assisted by counsel to make certain that the question is fully and properly answered.

[72] The concerns prompting the need for a full answer to jury questions are heightened where a jury asks those questions prior to being charged. It suggests that the jury may be deliberating early, despite having been warned against such a practice at the commencement of the trial. Where, as here, the question indicates that the jury is not only weighing the evidence, but is also considering drawing improper conclusions from it, the concern grows that an unsafe verdict has been reached.

[73] I cannot agree with the majority's suggestion, in paras 45 and 46 of its decision, that the first jury question did not directly speak of Mr. Lepine's record and, therefore, that there is no

realistic possibility that the jurors were troubled by what to make of his criminal record. The first question was wide enough to raise this possibility and the nature of the second question, directly aimed at that record, supports this conclusion. Considered together, they give rise to the strong possibility of an unsafe conviction. Similarly, the suggestion that the jury's concern about defence credibility could have arisen from Mr. Lepine's wife's testimony rather than his own, is no answer. It does not address the very real possibility that the jurors were focused on Mr. Lepine's credibility and the impact of his criminal record on that credibility.

Treatment of a Jury Question Posed Mid-trial

[74] The first question undoubtedly created a unique situation. Counsel have been unable to locate an authority which deals with a question the jury posed post-evidence but pre-charge. The case cited by the majority, in para 26 of its decision, *R v Armstrong*, 2011 ONCA 709, 280 CCC (3d) 75, can be distinguished from that under appeal.

[75] Armstrong dealt with a question raised mid-trial after evidence commenced but before it concluded. The question did not indicate any risk of forbidden reasoning but rather simply suggested that the jury was confused about the charges being tried. It erroneously believed that the charges included one of assaulting the police. The trial judge provided a response agreed upon by all counsel. In upholding the decision, the Ontario Court of Appeal noted that the question arose at the conclusion of the first day of the trial, on which at least one witness indicated that the appellant had been arrested for assaulting a police officer, and nothing more was said about any allegation of assault thereafter.

[76] A trial is not over until the trial judge delivers her charge. Therefore, notwithstanding the unusual timing of the jury's first question in this case, it was simply a mid-trial question which demanded a mid-trial instruction by way of response. Mid-trial jury questions are not unusual, nor do they attract any lesser standard of answer than a jury question raised during deliberations.

[77] Counsel have advanced no reason to treat jury questions posed mid-trial with a lesser degree of attention than those posed during deliberations. Indeed the asking of an unsolicited question, mid-trial, suggests a particular level of immediate jury concern about the topic. The question shines a light into the mind of the jurors at the moment of asking, giving a clear indication of the particular problem that the jury is confronting. Where that question suggests that the jury may be engaging in erroneous reasoning, for example because it is ignorant of the *W(D)* test, the question should be answered in an immediate, clear and careful manner.

[78] Proper practice directs that a trial judge use a mid-trial instruction to address a jury question raised mid-trial. The practice of providing a fulsome mid-trial instruction to the jury regarding the proper use of certain evidence, as well as addressing the issue in the final charge to the jury, was recognized in *R v Cahill*, 2006 ABCA 119 at para 18, 384 AR 301. Not only should a mid-trial instruction be given when necessary but such an instruction should be given to the jury immediately when an issue arises; see *R v Kociuk* (RJ), 2011 MBCA 85, [2011] MJ No 340*; R v Normand*, 2002 MBCA 95, [2002] MJ No 271. The value of an immediate response is discussed in *Normand* at para 20 as follows:

> I do not doubt a jury's capacity to disregard evidence it is told to disregard, but only if the instruction to disregard it is given promptly before the jury has time to absorb the inadmissible information, and the instruction is accompanied by an explanation of why it would be wrong for the jury to consider it, as was done in *R. v. Gregoire (L.Y.)*

[79] While the case under appeal does not deal with inadmissible evidence but possible impermissible assessment of evidence, in breach of *W(D)*, the risk of leaving the juror's first question unanswered remains the same – the concern is left to gel in the jurors' minds, and may become more difficult or impossible to dislodge by what is eventually said by the judge in her charge.

[80] By way of further example, in *R v Precup*, 2013 ONCA 411, [2013] OJ No 2836, the key issue on appeal was "whether the trial judge erred in his treatment of bad character evidence concerning the appellant" (at para 2). The Court of Appeal articulated the importance of a mid-trial instruction after this evidence was tendered by stating, at para 43:

> In my view, this is a case where, once the Crown's approach to Dr. Kunjukrishnan's cross-examination and Crown counsel's highlighting of the Prior Incidents revealed itself, **it would have been preferable for the trial judge to have provided a limiting mid-trial instruction to the jury at the time when the evidence was received**. See Hon. Mr. Justice David Watt, *Helping Jurors Understand* (Toronto: Thomson Canada Limited, 2007), at 141. A mid-trial instruction would have alerted the jury to the proper use of the evidence concerning the Prior Incidents and of the information on which that evidence was based, about which the jury could then have been reminded later in the charge [emphasis in original].

The Ontario Court of Appeal set aside the convictions and ordered a new trial as a result. The proper procedure, in terms of ensuring a fair trial, was followed in *R v Hamilton*, 2009 ONCA 267, [2009] OJ No 1231, where the "trial judge gave a clear and concise mid-trial caution to the jury against the use of the evidence of the appellant's criminal record for propensity reasoning" (at para 7). The failure to follow this procedure has resulted in a conviction which is unsafe.

[81] I respectfully disagree with the majority's observations, at paras 27, 50 and elsewhere in its decision, that it would have been impossible or misleading for the trial judge to respond to the jury's first question at the time it was asked because any answer would have to come with a warning to the jurors to consider it in light of the whole jury charge, which would be given later. That approach logically ends with the conclusion that no mid-trial jury instruction could thus ever be given by a trial judge on any subject, which is hardly the case.

Beyond Judicial Discretion

[82] This is not simply a procedural or case management type of issue upon which deference should be shown to that judge. It goes to the substance of the case against Mr. Lepine. In none of the cases on the extensive list of authorities dealing with a discretion on the part of the trial judge,

given in para 31 of the majority's decision, did the adequacy of a response to a jury question arise, nor were they cited by either party. None support the proposition, suggested in para 30 of the majority's decision, that a trial judge's failure to answer a jury's question is owed deference because she can accurately read the body language of each of the twelve jurors and thereby discern that they do not need an answer to the question they have asked.

[83] Further, the parties did not argue that the failure to answer a question from a jury, or answering it only partially or in a misleading fashion, is protected from appellate review as an aspect of the trial judge's proper exercise of discretion.

Strategic Choice

[84] The record does not support the suggestion that defence counsel somehow took improper strategic advantage of receipt of the jury's unexpected question by making an application for a mistrial, followed by a request for an overnight adjournment to prepare to argue same. While that delayed the giving of the charge, it is not clear whether the charge would have been given on the day the jury asked the question or the following day in any event.

[85] Further, the delay in delivering the charge was not the critical delay in answering the jury's question. The critical delay arose from the trial judge's decision not to answer the question when it was posed, after consultation with counsel. It could have been answered at that time, independent of the mistrial application.

Conclusion

[86] These concerns point to a real likelihood that the jury engaged in forbidden reasoning in arriving at its verdict which is, in the result, unsafe. I would therefore have allowed the appeal and remitted the matter for retrial.

Appeal heard on October 22, 2013

Memorandum filed at Yellowknife, N.W.T.
this day of November, 2013

Bielby J.A.

Appearances:

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for the Appellant

A-1-AP-2013-000002

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

Between:

Her Majesty the Queen

Respondent

- and -

Vernon Lepine

Appellant

MEMORANDUM OF JUDGMENT
