

## Jury Failure to Agree

---

### Black Direction

Where the jury indicate that they are unable to reach a verdict and the preconditions for allowing a majority verdict direction under s 59A of the *Jury Act* are not or not yet satisfied, a direction as outlined by the High Court in *Black v The Queen* ([1993](#)) [179 CLR 44](#) at 51 should be given, keeping in mind of course that the jury must be free to deliberate without any pressure being brought to bear on them:

**I have been told that you have not been able to reach a verdict so far. You are entitled to take as long as you wish to reach your verdict, but because of the time you have already devoted to your deliberations, I wish to say this. I have the power to discharge you from giving a verdict, but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given enough time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.**

**Each of you has sworn or affirmed that you will conscientiously try the charges and decide them according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light. You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. The process of considering your verdict should involve weighing up one another's opinions about the evidence and testing them by discussion. This often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong. That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.**

**Experience has shown that often juries are able to agree in the end. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be discharged. So, to allow you to give consideration to what I have said, I ask you to retire again and see whether you can reach a verdict. If you need any further**

**assistance let me know. But I remind you not to reveal your voting figures in favour of conviction or acquittal in any communication to me.<sup>1</sup>**

Where there is a complaint by a juror as to the conduct of another juror during deliberations, it is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial. However, the appropriate course in such a case is not to deal with the situation by separating and questioning individual jurors.<sup>2</sup> Rather, when this type of problem arises the whole jury should be asked in open court, through their speaker, whether as a body it is likely that they would be able to reach a verdict, if given more time and asked whether the court could be of any assistance to the jury. The course then to be taken is a matter for the judge's discretion; whether to give a *Black* direction or take some other course.<sup>3</sup> In cases where a majority verdict is not allowed, such as murder, the judge should not discharge an individual juror at a time when it is known that the jury is in disagreement and the juror that is discharged is the sole dissenter, as that carries the risk of giving rise to a public perception that a subsequent verdict is an impermissible majority verdict.<sup>4</sup> Furthermore, the power to discharge an individual juror pursuant to s 56(1) of the *Jury Act* 1995 should only be exercised where the circumstances clearly call for its exercise.<sup>5</sup> A juror's refusal to discuss the evidence prior to deliberations cannot of itself constitute a basis for his or her discharge under s 56(1)(a). Nor does the fact that strongly held opposing views have led to a deterioration of relations between the jurors necessarily provide a basis for a juror's discharge under s 56(1)(a).

Where the complaint made against a juror is that he/she is disregarding the judge's directions on the law, and the trial judge chooses not to discharge the jury but to give a *Black* direction, the judge should in addition give a clear and emphatic direction reminding the jury that they must follow the judge's directions on matters of law.<sup>6</sup>

As to whether reference should be made to the circumstances being imminent for the taking of a majority verdict, where the jury indicates it is deadlocked before the time has come to consider a majority verdict: see *R v VST* (2003) 6 VR 569; [2003] VSCA 35 at [38] and *RJS v The Queen* (2007) 173 A Crim R 100; [2007] NSWCCA 241 at [22] – [23] where such reference was found to undermine the *Black* direction. But see *Doklu v The Queen* (2010) 208 A Crim R 333. See also *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29, where it was held at [44] that there was no error in combining a *Black* direction with a direction as to majority verdicts.

---

<sup>1</sup> The judge should not be told details of voting figures and if so informed should not disclose that detail to the prosecution or defence: See *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29 at [27]; *R v Smith* [2015] 2 Qd R 452.

<sup>2</sup> That approach will be appropriate where a matter external to the jury as a body arises, see *R v Orgles & Orgles* (1993) 98 Cr App R 185.

<sup>3</sup> *R v Roberts* [2005] 1 Qd R 408, *R v Orgles & Orgles* (1993) 98 Cr App R 185.

<sup>4</sup> *R v Roberts* [2005] 1 Qd R 408.

<sup>5</sup> *R v Roberts* [2005] 1 Qd R 408. See Discharging a Juror in 'General Summing Up' No 5B.

<sup>6</sup> *R v Smith* [2005] 2 All ER 29.