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**Date: 2006-02-22**  
**Docket: 0501-0006-A**

[\[Noteup\]](#) [\[Cited Decisions and Legislation\]](#)

## In the Court of Appeal of Alberta

**Citation: *R. v. Ferguson*, 2006 ABCA 36**

**Date: 20060222**  
**Docket: 0501-0006-A**  
**Registry: Calgary**

**Between:**

**Her Majesty the Queen**

Respondent

- and -

**Michael Esty Ferguson**

Appellant

**Restriction on Publication:** By order of the Honourable Mr. Justice Hawco of the Court of Queen's Bench of Alberta dated October 14, 2004, there is a ban on publishing information that may identify the jurors. See the *Criminal Code*, s. [631\(6\)](#).

**The Court:**

**The Honourable Chief Justice Catherine Fraser  
The Honourable Mr. Justice Keith Ritter  
The Honourable Mr. Justice Clifton O'Brien**

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**Reasons for Judgment Reserved of the Honourable Mr. Justice O'Brien  
Concurred in by the Honourable Chief Justice Fraser  
And Concurred in by the Honourable Mr. Justice Ritter**

Appeal from the Conviction of  
The Honourable Mr. Justice Hawco  
Dated the 30<sup>th</sup> day of September, 2004  
Sitting with a jury

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**Reasons for Judgment of  
The Honourable Mr. Justice O'Brien**

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**I. Introduction**

[1] The appellant, Michael Estey Ferguson, appeals his jury conviction for manslaughter. At the time of the offence, Ferguson was a veteran police officer with the R.C.M.P. stationed at Pincher Creek, Alberta.

[2] In the early morning hours of October 3, 1999, Ferguson took Darren Varley into custody at the Pincher Creek Hospital. Varley had been driven to the hospital by his sister to check on the status of his friend, Rod Tuckey, who had been injured earlier that evening in a fight in which both Varley and Tuckey had been involved with other patrons outside the bar in which they had been drinking. Varley was intoxicated at the time. Ferguson had been dispatched to attend at the hospital to investigate the alleged assault on Tuckey.

[3] When Ferguson arrived, he spoke with Varley, Varley's sister and a number of others. Varley was also concerned about his fiancé, Chandlee Bachand, who had left the bar earlier. He believed that she had gotten into a van with strangers and he was concerned about her. He attempted to provide Ferguson with details of the circumstances of Bachand's going missing and a description of the van. Varley was excited, upset and agitated in his manner toward Ferguson who became angry and, after an exchange of words, witnesses at the scene saw Ferguson punch Varley in the jaw causing his mouth to bleed. Varley was not placed under formal arrest at this time. But Ferguson said that Varley would be arrested for public intoxication and, after

handcuffing him, placed him in the police vehicle.

[4] A number of witnesses expressed concern about the attitude and actions of Ferguson toward Varley at the hospital. Sarah Weatherill and Pat Bitango both complained to Ferguson and Weatherill asked him for the home phone number of Gary Mills, the NCO in charge of the Pincher Creek Detachment. Bitango and Varley's sister asked a male friend of Varley's to go to the police station to make sure that he was all right.

[5] Ferguson took Varley to the Pincher Creek Detachment and placed him in the cells. One of the guards at the Detachment, Piet Schiebout, testified that at no time beyond mentioning that Varley was going to be placed under arrest was Varley ever formally arrested, given his right to counsel, or afforded an opportunity to phone a lawyer. Varley had asked a number of times why he was being placed into cells and resisted being taken there.

[6] Ferguson was alone with Varley in the cell when Schiebout testified that he heard two shots fired close together. According to Ferguson, Varley attacked him and there was a struggle for control of Ferguson's gun. Ferguson admitted to firing the weapon twice, the bullets striking Varley in the head and stomach. Ferguson subsequently claimed to have been in fear of his life and that he had fired "instinctively" in self defence.

[7] In the meantime, Sarah Weatherill followed up the concerns she had expressed at the hospital about the conduct of Ferguson and placed a telephone call to Sergeant Mills at his residence at approximately 4:00 a.m. to advise him of those concerns. She was interrupted by Mills who at that time received a call from another officer reporting on the shooting of Varley.

[8] Varley was transported to Calgary Foothills Hospital where he later died. Expert medical evidence confirmed that Varley died from a gunshot wound to the head. Forensic evidence from the Medical Examiner's office indicated that the two shots were probably fired from a range of greater than nine inches. While the stomach wound was not fatal, the head injury was. Both medical and blood spatter evidence were consistent with Varley being bent over clutching his abdomen when the shot to the head was fired.

[9] Ferguson was charged with second degree murder contrary to s. [235\(1\)](#) of the *Criminal Code of Canada*. The trial was conducted before a trial judge sitting with a jury. The trial judge completed the charge to the jury in the latter part of one day. The jury was told to deliberate until 8:00 p.m. or 9:00 p.m. that evening and to commence deliberations at 9:00 a.m. the next day. A verdict of not guilty of murder but guilty of



manslaughter, her decision did not reflect her true feelings. She requested the trial judge, if he had the power to do so, to permit her to “withdraw” her vote. In her letter, she outlined her reasons for having voted to convict – including pressure by other members of the jury – and explained the reasons for her change of heart.

[14] The trial judge caused copies of the letter from the juror to be provided to each counsel. The letter was sealed. A publication ban was issued preventing identification of the juror who had written the letter. The trial judge then heard counsel’s submissions on the import of the letter. Defence counsel sought to have the trial judge conduct a meeting with the juror, on the record, to inquire whether the jury award reflected her “true verdict at the time the verdict was delivered” and further whether her concerns arose from extraneous matters. The Crown objected.

[15] The trial judge concluded that he did not have the authority to make inquiries of the juror of the nature sought by defence counsel and ruled that he was *functus officio* as the jury had been discharged.

#### **IV. Grounds of Appeal**

[16] The defence submits that the trial judge erred in law in answering the inquiry made by the jury in the absence of the accused and counsel and that the curative provision under s. 686(1)(b)(iv) cannot be invoked to overcome this contravention of s. 650 of the *Code*.

[17] The defence additionally submits that Ferguson’s conviction for manslaughter has resulted in a miscarriage of justice because the juror’s letter reveals that the jury’s verdict was less than a true and unanimous verdict. (This ground was identified as Ground of Appeal No. 1 in the Notice of Appeal filed herein.)

#### **V. Trial Judge’s Response to Jury Inquiry**

[18] An accused is entitled to be present in court during the whole of his or her own trial. This entitlement is connected to the entitlement of an accused, after the close of the case for the prosecution, to make full answer and defence personally or by counsel. These fundamental rights of an accused are codified in s. 650 of the *Code*.

[19] The right and duty of an accused to be present at his or her trial has been interpreted as entitling the accused to be present at all events which could involve his or her vital interests, thus affording the accused an opportunity to acquire first-hand knowledge of the proceedings: ***R. v. Parnell*** (1983), 9 C.C.C. (3d) 353, (Ont. C.A.). On the other hand, it is clear that communications of a purely administrative nature need

not be dealt with in open court: **R. v. Giuliano** [reflex](#), (1984) 14 C.C.C. (3d) 20 (Ont. C.A.).

[20] The procedure to be followed where a judge receives an inquiry from the jury which engages s. 650 was outlined by Martin, J.A. in **R. v. Dunbar and Logan** (1982), 68 C.C.C. (2d) 13 (Ont. C.A.) at 31:

Where a trial judge receives an inquiry (which is not of a purely administrative nature) from the jury after they have retired to consider their verdict, he should:

- (a) read the communication in open court in the presence of all parties;
- (b) give counsel an opportunity to make submissions in open court prior to dealing with the question;
- (c) answer the question for the jury in open court in the presence of all parties.

[21] The Supreme Court of Canada has repeatedly emphasized the importance of a trial judge providing clear, correct and comprehensive answers to questions from the jury: **R. v. S.(W.D.)** [1994 CanLII 76 \(S.C.C.\)](#), [1994] 3 S.C.R. 521. As explained by the Supreme Court in **R. v. W. (D.)** [1991 CanLII 93 \(S.C.C.\)](#), [1991] 1 S.C.R. 742, at 759-60:

When a jury submits a question, it gives a clear indication of the problem the jury is having with a case. Those questions merit a full, careful and correct response.

The jury's questions indicate any particular areas of concern of its members and reveal the matters that are worrying them.

[22] It is within this framework therefore that the trial judge's response to the jury in this case must be examined. Does the fact that the trial judge answered the subject inquiry from the jury in the absence of the accused and without consulting counsel require that a new trial be directed? The answer depends upon consideration of the following:

- (1) What was the nature of the inquiry?
- (2) Did the answer involve the accused's vital interests?
- (3) Is s. 686(1)(b)(iv) of the *Code* applicable to cure any

procedural irregularities which occurred in this matter?

[23] Here a form described as a decision tree had been provided to each juror. In his closing advice to the jurors, the trial judge had said to the jury that he was going to give the decision tree to “each one of you”: AB 1878/9-12. He also said: “Don’t be marking your answers in yet”: AB 1878/25. This being so, it is understandable how a question arose in the minds of one or more jurors as to whether the form needed to be completed on an individual basis before the jury rendered its verdict.

[24] What was the nature of the inquiry? Is it properly characterized as an administrative matter? In *R. v. Fontaine* [2002 MBCA 107 \(CanLII\)](#), (2002), 168 C.C.C. (3d) 263 (Man. C.A.), Steel, J.A. discussed the characterization of communications between a judge and jury in the following terms at para. 57:

It is obvious that not every communication between a judge and a jury would affect the vital interests of the accused. Matters such as when the jury would retire for the night or break for lunch or arrangements for smokers are purely of an administrative matter and need not be dealt with in open court. See, for example, *R. v. Hamilton* (1980), 58 C.C.C. (2d) 467 (Que. C.A.). Could it be said that these two notes discussing the deliberations of the jury were purely administrative matters and therefore did not need to be disclosed? Did these notes have the potential to affect the outcome of the trial?

[25] The Court in *Fontaine* interpreted the notes in question as indicating that the jury was having difficulty in reaching a unanimous verdict so as to make the question one which was more than purely administrative. When a jury expresses a concern about an issue affecting the substantive decision-making process, then this cannot be characterized as an administrative matter as it may indicate their desire for, or need of, direction on a particular issue. On the other hand, the courts will treat communications sent from a jury to a judge as being purely administrative if they do not have any bearing on the matters in issue before the jury or do not otherwise disclose a concern or worry of the jury that must be addressed.

[26] Here, can it reasonably be thought that an inquiry as to whether or not a form, which was provided to assist the jurors in their deliberations, was intended to be completed by each member individually personally reflects any concerns or worries about the issues before the jurors or any problems they were encountering in their deliberations? In the words of *Fontaine*, did the inquiry have any potential to affect the outcome of the trial?

[27] The defence argues the inquiry suggests that one or more of the jurors may not have been in agreement with a “conclusion” requiring unanimous agreement and suggested further that the inquiry “might hint” at a difficulty the jury might have been having in achieving unanimous consensus. Or for that matter, that one or more jurors might have been confused about the need for unanimity.

[28] I interpret and characterize the jury question as did the trial judge – as a simple inquiry whether it was necessary for each juror, given the trial judge’s instructions, to complete the form. However, even if one could read into the jury inquiry a question as to whether the decision of the jury had to be unanimous, the fact is that the verdict rendered by this jury was unanimous. There is nothing on this record to support any suggestion that the jury had any misunderstanding as to the requirement for a unanimous verdict.

[29] The trial judge in his charge to the jury emphasized the requirement that their verdict be unanimous. He told them, and then repeated, that they could not find the accused to be guilty unless they were unanimous in their verdict. The inquiry made in this instance related to the completion of a form and did not engage any substantive issue nor disclose any uncertainty as to the requirement of unanimity.

[30] Moreover, the defence argument on this point is very much in the nature of an afterthought. An appeal court is entitled to take into account the reaction of the appellant’s trial counsel. In *R. v. Khan*, [2001 SCC 86 \(CanLII\)](#), [2001] 3 S.C.R. 823, the Supreme Court listed certain elements as providing “reference points” in determining whether a miscarriage of justice has occurred within the meaning of s. 686(1)(a)(iii) of the *Code*. This included the response of defence counsel to an irregularity. By analogy, those considerations apply to a case such as this. In his concurring judgment, LeBel, J. stated, at para. 86:

If the accused’s counsel himself saw no unfairness resulting from a certain irregularity at trial, this would tend to indicate that the trial was not unfair, in reality or appearance. Even if an irregularity might seem prejudicial to the accused, the failure to object may very well be a calculated tactical decision by defence counsel. Hence, courts must be careful to avoid second-guessing such tactical decisions (see e.g. *R. v. G.D.B.*, [2000 SCC 22 \(CanLII\)](#), [2000] 1 S.C.R. 520, 2000 SCC 22, at paras. 34-35 ....)

[31] Here, Ferguson was represented by experienced and knowledgeable trial counsel. His reaction, upon being advised by the trial judge of the jury’s inquiry and how

he had handled it, was, like Crown counsel's, immediate and affirmative. In my view, counsel's response was a commonsense acknowledgment that the inquiry did not bear on the substantive issues before the jury and that it was not indicative of any concern or worry on the part of the jury relative to any such issue. Counsel for both the Crown and for the defence were entirely satisfied with the handling of the inquiry as evidenced by their response to the trial judge's comments. Further, their responses demonstrate no concern that anything other than an administrative issue – whether completion of a form by individual jurors was required – was at stake.

[32] Another way to consider this issue is to ask whether what took place in the absence of the accused might affect the fairness of the trial. That is the approach which this Court took in *R. v. Rosebush et al*, [reflex](#), (1992), 77 C.C.C. (3d) 241. There, this Court considered whether the trial judge violated the right of the accused to be present at their trial when he had communications with the jury in their absence. The communication in that case included an interview with one of the jurors to investigate what a jury officer reported privately to the judge of what had been said to him by the juror. The Court recognized that anything that affects the fairness of a trial would involve an accused's vital interests so as to entitle him to be present at such time: see *R. v. Vezina*, [1986] 1 S.C.R. 2, which adopted the statement by Martin, J.A. in *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510, that the right of an accused to be present at his trial includes the right to “direct knowledge of anything that transpires in the course of his trial which could involve his vital interests . . .”.

[33] In *Rosebush*, this Court held that if, on the facts of a case, it is uncertain whether the accused's vital interests are involved, the trial judge may, in the absence of the accused, investigate the matter. Once it appears that vital interests are in issue, then the issue must be determined in the presence of the accused. The trial judge in *Rosebush* had conducted his interview with the juror without a reporter and without prior consultation with counsel and had concluded that no issue involving the fairness of the trial remained to be dealt with. The court pointed out that the more prudent practice would be to have a reporter present and to invite comment from counsel before making a final decision on what steps to take.

[34] Ferguson points out that there is no written record either of the actual question posed through the jury officer or the trial judge's response. However, this is not entirely correct. There is a record of what transpired: it is contained in what the trial judge placed on the record as to what had transpired. The defence then contends that this Court does not know if what the trial judge said was correct because the trial judge might have been confused about the nature of the inquiry. Or the jury officer might have incorrectly communicated the inquiry. Or the jury officer might even have given an incorrect answer to the jury. In my view, these submissions fall within the category of speculation. I do not consider it appropriate in these circumstances to engage in

speculation about what might have happened had the jury officer not complied with his or her sworn duty. That is particularly so where, as here, ample opportunity existed for the defence to explore these issues when the trial judge placed the substance of the inquiry and his response on the record. And yet, the defence chose not to do so.

[35] Moreover, I note that the jury did not in fact ask any further questions after the inquiry about completing the form. Presumably, therefore, the jury was satisfied with the answer given by the trial judge. Therefore, while, as in *Rosebush*, the recording of the messages exchanged would have been preferable, it is not fatal not to have done so.

[36] In this case, the trial judge determined that the inquiry did not relate to the vital interests of the accused and his handling of the inquiry was approved by counsel when it was related to them. It will be recalled that the jury had not yet been brought in to give its verdict. Had there been any real question as to the matters reported upon by the trial judge, defence counsel could have invited investigation to obtain the details of the question and of the response. However, both Crown and defence counsel accepted, as they had reason to do given the circumstances, that the substance of the inquiry and response was reflected in the trial judge's statement to them. The trial judge's explanation did not elicit any request for inquiry of the jury prior to the delivery of their verdict or for polling of the jury after its verdict was delivered. The reasonable inference is that it was obvious to all concerned that the inquiry did not bear on the accused's vital interests or any issues before the jury or otherwise manifest any concerns of the jury with respect to any substantive issues.

[37] Finally, even if the handling of the jury inquiry in the absence of the accused could be construed as a breach of s. 650 leading to a loss of jurisdiction, I have concluded that it was a procedural irregularity only, one of a technical nature causing no prejudice to the accused and one in respect of which s. 686(1)(b)(iv) of the *Code* might be properly invoked. This section provides:

686.(1) On the hearing an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

. . .

(b) may dismiss the appeal where


. . .

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[38] In *Rosebush*, this Court was of the view that no breach occurred of the accused's right to be present during his trial. However, the Court proceeded to invoke, if necessary, the power granted by s. 686(1)(b)(iv) of the *Code* to refuse to give effect to any error. It was pointed out that no harm came of any error as it was "was technical and judgmental in nature". The Court concluded:

It would bring the administration of justice into disrepute if we exercised our saving power in the face of a flagrant breach of a fundamental right like the right to be present at trial. But by no means can this incident be so described.

[39] The Manitoba Court of Appeal in *Fontaine* likewise recognized that a technical breach of s. 650 is subject to the curative provision under s. 686(1)(b)(iv) stating at para. 66:

[Section 686(1)(b)(iv)] was considered by the Ontario Court of Appeal in *R. v. Cloutier*  [reflex](#), (1988), 43 C.C.C. (3d) 35 (leave to appeal refused, [1989] 2 S.C.R. vi, 50 C.C.C. (3d) vi), in circumstances where the accused had been excluded from a portion of his trial contrary to s. 577 (now s. [650](#)) of the *Criminal Code*. The court held in that case that it was appropriate to apply s. 686(1)(b) (iv) to the breach of the accused's right to be present at his trial in the circumstances of that case. However, in so doing, the court made it clear that the absence of prejudice to the accused was not the only factor to consider. The appearance of justice should also be taken into account.

[40] I am likewise of the view that even assuming that an irregularity occurred here, it should not serve as a basis to set aside Ferguson's manslaughter conviction. Instead, s. 686(1)(b)(iv) should be invoked to the extent necessary to do so. The rationale for applying this section was explored by the Supreme Court in *Khan* at paras. 71 and 73:

[Section] 686(1)(b)(iv) is the provision under which alleged "miscarriages of justice" as understood by para. (a)(iii) may eventually be cured, if they are found to be mere procedural irregularities not rising to the level of a failure of justice....

Whether a "miscarriage of justice" has occurred asks whether the trial was unfair, or alternatively whether an appearance of unfairness was created.... This last element should be

evaluated in relation to a reasonable and objective observer, by asking if the irregularity would be such as to taint the administration of justice in his or her eyes.

[41] In my view, the accused had a fair trial in reality and in appearance. There is no evidence of any prejudice that Ferguson suffered by reason of the subject inquiry and response. As noted, the jury verdict was a unanimous one. If effect were given to the appellant's submission that the taint of the alleged irregularity requires yet another trial, I believe that a well-informed reasonable observer would be astonished at such a result. The jury's inquiry suggested no concern or worry on the part of the jury relative to matters of substance which might affect the vital interests of the accused. Moreover, Ferguson's counsel was well satisfied prior to the verdict with how the inquiry was dealt with. And he elected not to pursue the issue further. This too goes on the scale in evaluating the fairness of the trial. This ground of appeal fails.

## **VI. Admissibility of Juror Letter**

[42] By agreement of counsel, the juror's letter was placed before this Court for its consideration in determining whether or not the letter is admissible. The ban on publishing information that may identify any of the jurors, including the one who wrote the letter, remains in effect and counsel and this Court on oral argument of the appeal have dealt with the letter in such a manner so as not to divulge the juror's identity.

[43] In Canada, there are two constituents of jury secrecy:

- (1) the common law which excludes evidence from a juror relative to jury deliberations; and
- (2) the statutory prohibition contained in s. 649 of the *Code* which makes it an offence for a juror to disclose information relating to jury proceedings save in very limited circumstances.

[44] Jury secrecy as a foundational rule of our criminal justice system has existed for more than two centuries. It was in ***Vaise v. Delaval*** (1785), 1 T.R. 11; 99 E.R. 944 that Lord Mansfield held that jurors could not provide evidence of their own misconduct during jury deliberations. This rule was affirmed by the Supreme Court of Canada in ***Danis v. Saumure***, [1956] S.C.R. 403 in which Kerwin, C.J. stated at p.406:

Statements or affidavits by any member of a jury as to their deliberations or intentions on the matter to be adjudicated upon are never receivable.

[45] The rules, practices and policy considerations relative to jury secrecy were extensively canvassed by the Supreme Court of Canada in *R. v. Pan*; *R. v. Sawyer* [2001 SCC 42 \(CanLII\)](#), [2001] 2 S.C.R. 344. Pan and Sawyer had argued that the common law rule infringed the *Charter of Rights and Freedoms* and that the statutory provision contained in the *Code* restricting disclosure of jury proceedings was constitutionally invalid. Pan sought to admit evidence of what had transpired in the jury room among the jurors at his trial to demonstrate that the trial judge erred in declaring a mistrial because the jury had in fact reached what the defence contended was a verdict of acquittal. Sawyer, following the jury verdict in his case, sought to introduce evidence that certain improprieties had taken place during the deliberation process.

[46] The Supreme Court rejected their attempts to introduce evidence of what went on in the jury room and affirmed the continuance of jury secrecy. There are three rationales for the rule: (1) the promotion of full and frank debate by the jurors free from potential extrinsic pressures; (2) the assurance of finality and the authority of a verdict; and (3) the protection of jurors from repercussions. If discussions between jurors were the subject of after-the-fact scrutiny, it is easy to understand why this could seriously undermine full and frank debate amongst jurors. Also, it is highly debatable how reliable any such attempt to reconstruct a jury verdict would be. Jurors' memories are likely to fade, not only with respect to the facts as found by the jury but equally important with respect to the applicable law. The result would be a reinterpretation of events once the relevant information was no longer fresh in the jurors' minds. Finally, an after-the-fact assessment of a jury verdict would generally require examining the decision-making process of all jurors, not simply the one who asserts a certain state of affairs.

[47] Moreover, numerous safeguards exist to ensure that jurors remain true to their oaths, including the availability of pre-emptory challenges and challenges for cause, the requirement of the juror oath itself, judicial exclusion of prejudicial evidence, judicial instructions to the jury, the sequestering of jurors during deliberations, the non-publication of proceedings taking place in the absence of the jury, the requirement for unanimity and the right to poll jurors individually after the verdict is read.

[48] Moreover, jury secrecy rules are not absolute. In *Pan/Sawyer*, the Supreme Court distinguished between intrinsic and extrinsic matters affecting a jury decision, the former being inadmissible but the latter being admissible. The Court recognized that the distinction is not always clear and that it was necessary to strike a balance between protecting the secrecy essential to the jury system, on the one hand, and revealing serious concerns undermining the integrity of the verdict. For future guidance, Arbour, J. reformulated the rule as follows at paras. 77-78:

. . . in my view a proper interpretation of the modern version of Lord Mansfield's rule is as follows: Statements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations are inadmissible in any legal proceedings. In particular, jurors may not testify about the effect of anything on their or other jurors' minds, emotions or ultimate decision. On the other hand, the common law rule does not render inadmissible evidence of facts, statements or events extrinsic to the deliberation process, whether originating from a juror or from a third party, that may have tainted the verdict.

[49] Ferguson submits that the claim by the juror that she did not vote in accordance with her belief at the time that Ferguson was not guilty constitutes an admission extrinsic to the deliberation process. I do not share this characterization of the contents of the juror's letter. To the contrary. Indeed, this is a classic case of a juror who voted one way during the trial and who, a number of days later, now entertains second thoughts about the decision she made. As such, it is a perfect example of why a juror is not allowed to come forward, after agreeing to a verdict, and contend that he or she should have/ought to have/wishes they had voted differently, whether for acquittal or conviction. This not an instance of a complaint by the juror of physical coercion, threats to her family or anything of the nature casting doubt on the integrity of the system.

[50] This juror wrote a letter after having had four days to listen to public commentary on the jury verdict, four days to hear any concerns or criticisms offered by her family and friends and four days to re-visit and second guess the decision she made. Of course, as with all jury verdicts, we will never know the precise extent of post-decision events and influences on the mind of the members of the jury. But what we do know is that, whatever the inner workings of this juror's mind, there is no doubt that she voted for conviction for manslaughter. The reasons for that vote are part of the jury deliberative process. The fact that the juror is now racked by self-doubt or self-rationalization about the decision she made ought not to be permitted to undermine the integrity of the decision she reached with the other members of the jury. Jurors are expected to deliberate together and to vote together and it would undermine the system to permit a juror to undo a verdict reached together by re-casting her vote after a number of days of self-reflection and rationalization as to why she might have voted differently.

[51] Nor is this a case in which there is any question as to whether the jury verdict was properly recorded. It was.

[52] In the end, an inquiry into the matters disclosed by the juror in her letter would necessarily invite an examination into the inner workings of the deliberative process and would necessarily require disclosure of what went on within the confines of the jury room. As already noted, sound policy reasons exist for rejecting an attempt by any juror to impeach a verdict either through disclosure after the public verdict of any private and secret reservations at the time of the vote or by repudiating the vote count by that juror in the discharge of his or her duties because of a change of mind in the days following the jury verdict.

[53] This case is similar in principle to *R. v. Frebold* [2001 BCCA 205 \(CanLII\)](#), (2001), 152 C.C.C. (3d) 449, a decision of the British Columbia Court of Appeal. In that case, the trial judge also received a letter from a juror after the verdict but before sentencing. The substance of that letter is described by the court at para. 29:

In broad terms the letter expresses dissatisfaction with the process of decision making that occurred in this case. The juror felt bullied into the guilty verdict and regrets joining in that verdict. The juror complains that a majority had made up their minds right away and were impatient and aggressive, even verbally abusive at times, with those who were undecided and wanted to review the evidence carefully. The juror and one other were smokers and had to leave the jury room to smoke. The letter alleges that deliberations continued in their absence.

[54] The defence attempt to introduce the letter as fresh evidence was rejected by the British Columbia Court. Donald, J.A. in delivering its judgment stated at para. 40:

In my judgment the content of the juror's letter in this case is solely taken up with deliberations and as such bears directly on intrinsic matters covered by the secrecy rules... Jurors have a difficult enough job without running the risk that their comportment in the jury room will become the subject of public scrutiny. Some jurors may be stubborn, overbearing, hyperaggressive, dismissive of others or many other bad things in working towards a decision ... but that is a problem inherent in a jury system. It should be remembered that the right to a jury has been constitutionally enshrined in s. 11(f) of the *Charter*.

[55] I am satisfied that this juror's after-the-fact rationalization of what motivated her thinking – or more properly, what she now wishes she would have done – falls squarely into the category of second thoughts. As such, they cannot form the basis for impeaching this jury conviction for manslaughter. As explained by the Supreme Court in *Pan, supra*, at para. 172:

The verdict would be fragile indeed if the consensus were not crystallized in time but could be revisited by the individual juror who, for whatever reason, had second thoughts on the matter. Even if such revisiting were allowed, there are several reasons why juror disclosures about the deliberation process may not provide a reliable or proper basis to set aside a verdict duly recorded and assented to in open court. The reliability of juror accounts about the deliberation may be tainted by emotion, personality clashes with other jurors, subsequent regret over the verdict or any number of human responses.

[56] Thus, for these reasons, I have concluded that the trial judge was correct in the circumstances of this case not to admit evidence of the nature disclosed in the juror's letter and to have rejected defence counsel's invitation to embark upon an inquiry into what are properly characterized as matters intrinsic to the decision-making process. For the trial judge to have done so would have violated jury secrecy rules.

[57] Further, the trial judge was also correct in determining that he was *functus officio*. While a trial judge may retain a residual discretion in certain narrow and limited circumstances in which the proper recording of a jury verdict is in doubt, this is not one of such instances. The jury's verdict convicting Ferguson of manslaughter had been accurately recorded and the jury had been discharged. The trial judge's function relative to the verdict had ended.

[58] I accept that even though the trial court was *functus*, an appellate court may intervene if there has been a miscarriage of justice. However, for the reasons explained, it would be equally improper for this Court to engage in an after-the-fact evaluation of the intrinsic processes of the jury. Excluding evidence of those processes does not constitute a miscarriage of justice. Accordingly, this ground of appeal also fails.

## VII. Conclusion

[59] In the result, the appeal is dismissed.

[60] There are two orders which remain outstanding restricting publication in this case;

firstly, an order made by Hawco, J. on October 14, 2004, sealing the letter received by him from the juror and banning publication of information that may identify the jurors and, secondly, an order made by O'Leary, J.A. on January 1, 2005, sealing Ground of Appeal No. 1 of the Notice of Appeal filed by the appellant. Our judgment necessarily deals with the first ground of appeal and we vacate the order made by O'Leary, J.A. The order of Hawco, J. continues in effect, as well as any applicable statutory restrictions on publication.

Appeal heard on October 11, 2005

Reasons filed at Calgary, Alberta  
this 22<sup>nd</sup> day of February, 2006

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O'Brien J.A.

concur: \_\_\_\_\_ |

Fraser C.J.A.

concur: \_\_\_\_\_ |

Ritter J.A.

**Appearances:**

R. Saull  
for the Crown Respondent

N. C. O'Brien, Q.C.  
for the Appellant

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