IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M 24 of 2012

Between:

DIMITRIOS LIKIARDOPOULOS **Appellant**

and

THE QUEEN **Respondent**

APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED

2. The single ground of appeal raises the following issues:
   a) Is it open at law to convict of murder on the basis of counselling or procuring – a derivative form of criminal liability – when none of the alleged principals have been convicted of murder and indeed the Crown have accepted pleas of guilty from those offenders to offences other than murder, namely manslaughter or accessory after the fact to manslaughter?
   b) Alternatively or additionally, was it an abuse of the process of the Supreme Court for the Crown to have sought the appellant's conviction on the basis that he had counselled or procured others to commit murder in these circumstances?

PART III: NOTICES UNDER S 78B OF THE *JUDICIARY ACT* 1903 (CTH)

3. The appellant certifies that the question whether any notice should be given under s 78B of the *Judiciary Act* 1903 (Cth) has been considered. There is not thought to be a need for such a notice.

Date of document: 10 April 2012
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PART IV: CITATION OF THE REASONS FOR JUDGMENT

4. The Court of Appeal's judgment is not contained in any authorized report. Its medium neutral citation is *Likiardopoulos v The Queen* [2010] VSCA 344.

PART V: NARRATIVE STATEMENT OF FACTS

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Introduction

5. The factual background to the appellant's trial is summarized in the judgment of the Court of Appeal.[1] A brief summary follows:

The deceased's body is discovered

6. On 14 August 2007, the body of Christopher O'Brien was discovered in a creek in the Dandenong Mountains. Mr O'Brien, a 22-year-old with a mental age of about 14, had been missing since March 2007. Medical evidence could not determine the cause of death because of the absence of adequately preserved soft tissue. There were several injuries to
20 the skeleton consistent with the deceased having been struck to various parts of his body but it could not be determined whether those things occurred before, after or around the time of death (for example, a rib injury might have occurred when the body was dumped).[2]

Charge, trial, verdict and sentence

7. The appellant and several others were charged with the murder[3] of Mr O'Brien. On 13 February 2009, the appellant's trial by jury commenced in the Supreme Court before Curtain J.[4] On 25 February 2009, the appellant was found guilty of murder.[5] On 5 June 2009, the appellant was sentenced to 20 years' imprisonment with a non-parole period of
30 17 years.[6]

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[1] *Likiardopoulos v The Queen* [2010] VSCA 344 at [1]-[38].
[2] See, e.g., T 676-677. (See also the evidence of Dr Blau at T 260-283.)
[3] Contrary to common law. The maximum penalty for murder (life imprisonment) is prescribed by statute, *viz* s 3 of the *Crimes Act* 1958 (Vic).
[4] Two previous juries had been empanelled on 5 and 11 February 2009 but in each case discharged a day later. See the endorsements on the presentment.
[5] See the endorsement on the presentment and T 886.
[6] *R v Likiardopoulos* [2009] VSC 217.

Pleas of guilty to lesser offences for co-accused

8. Prior to the appellant's trial, the Crown had accepted pleas of guilty to lesser offences by the appellant's co-accused:
    a) Shalendra Singh, "CL"[7] and Darren Summers pleaded guilty to being an accessory after the fact to manslaughter;[8] and
    b) John Likiardopoulos (the appellant's son) and Hakan Aydin pleaded guilty to manslaughter.[9]

9. Mr Singh, CL and Darren Summers were sentenced by Lasry J on 5 August 2008.[10] As Lasry J observed in his reasons for sentence, the offence for which they were sentenced was not based directly on the attack on the deceased but on the involvement of the three in the aftermath of the death, including cleaning up the premises and failing to assist the police, or in diverting them, in their inquiries.[11] In relation to Mr Singh, for example, he falsely told police in his statement that he had last seen the deceased five months earlier at Mr Summers' house and had never been present at the appellant's house while the deceased was assaulted.[12]

10. John Likiardopoulos and Mr Aydin were each sentenced by Lasry J on 30 September 2008.[13] John Likiardopoulos was sentenced on the basis that he had joined with the appellant, Mr Aydin and unspecified others in assaulting the deceased. He had done so with a hammer along the spine, neck, elbows and ankles of the deceased. He also forced him to drink toxic substances and eat chilli flakes.[14]

11. Mr Aydin was sentenced on the same factual basis as John Likiardopoulos.[15] Lasry J accepted submissions on behalf of Mr Aydin that the appellant was in control of what was happening and that his role was less prominent than that of the appellant and John Likiardopoulos.[16]

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[7] CL was so described because he was aged 17 at the time of the incident.
[8] Contrary to s 325(1) of the *Crimes Act* 1958 (Vic).
[9] Contrary to common law. The maximum penalty for manslaughter (20 years' imprisonment) is prescribed by statute, *viz* s 5 of the *Crimes Act* 1958 (Vic).
[10] *R v Singh & Ors* [2008] VSC 293.
[11] *R v Singh & Ors* [2008] VSC 293 at [13]-[15].
[12] *R v Singh & Ors* [2008] VSC at [15].
[13] *R v Likiardopoulos* [2008] VSC 387; *R v Aydin* [2008] VSC 388.
[14] *R v Likiardopoulos* [2008] VSC 387 at [7].
[15] *R v Aydin* [2008] VSC 388 at [8].

12. Mr Aydin and Mr Singh gave evidence for the prosecution at the appellant's trial.[17]

Crown case against the appellant

13. The Crown case against the appellant at trial was that, on 8 March 2007, Mr O'Brien died as a result of injuries inflicted upon him by the appellant and others over the preceding two days or so at premises at which the appellant and others lived in Noble Park. Briefly, there was evidence of the following:

a) Mr O'Brien had been detained, punched, kicked, struck with objects, forced to drink household detergent and forced to eat chilli flakes during the two-day ordeal.

b) The motive for the attacks was said to be punishment for stealing a mobile telephone from the premises.

c) The attacks were perpetrated by a number of persons (at varying times and in varying degrees), among whom were the appellant, John Likiardopoulos, Mr Aydin, Mr Singh, CL and Paul Gavagan.

d) Whilst some of the attacks (including some of the assaults and the ingestion of detergent and chilli flakes) occurred when the appellant was asleep, in another part of the house or at another address altogether,[18] and whilst there was evidence that the appellant told others who had just assaulted the deceased to leave him alone, the appellant himself on occasions assaulted the deceased (for example, he was said to have punched the deceased in the face, causing a tooth to fall out) and he directed others to attack the deceased on occasions when he was present.

e) When it appeared that Mr O'Brien had died, panic set in and the appellant directed others to dispose of the body and clean up the premises, which they did.

f) The appellant had made admissions to others to involvement in the assault.

Complicity and intention to cause really serious injury

14. The Crown's case on murder was not that the appellant's actions directly caused death or that he or anyone else had an intention to kill the deceased; rather, it was that the appellant was responsible in complicity for the death of the deceased and that he had an intention to cause really serious injury.

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[16] *R v Aydin* [2008] VSC 388 at [16] & [26].
[17] This evidence is summarized in the judge's charge at T 745-761 (Mr Aydin) and T 765-784 (Mr Singh).
[18] See, e.g., T 731.

15. The Crown relied on two heads of complicity – "joint criminal enterprise"[19] and "counselling and procuring"[20] – and the judge gave directions on those concepts as set out below.

Joint criminal enterprise

16. The judge directed that it would be murder by joint criminal enterprise if the Crown proved four things:

    a) that the appellant entered an agreement with one or all of Mr Aydin, John Likiardopoulos and Mr Singh to cause really serious injury and that agreement remained on foot at the time the deceased was killed;
    b) that the appellant participated in that agreement in some way (e.g., by his own assault on the deceased);
    c) that, between them, the parties to the agreement committed all the acts necessary to commit murder; and
    d) that the appellant's intention was to inflict really serious injury on the deceased.[21]

17. The judge also directed that the appellant need not be present at the time the acts causing death were performed.[22]

Directions on counselling or procuring

18. As to counselling or procuring, the judge directed that it would be murder if the Crown proved three things:

    a) that someone committed murder;
    b) that the appellant knew or believed that the principal offender or offenders who committed that act or acts had an intention to cause really serious injury; and
    c) that the appellant intentionally assisted or encouraged the principal offender or offenders to do so.[23]

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[19] T 676-678, 701-707, 731-734 & 874-877; *Likiardopoulos v The Queen* [2010] VSCA 344 at [41]-[42].
[20] See the prosecution final address at T 574-575; the judge's charge at T 676-678, 707-712 & 874-877; and *Likiardopoulos v The Queen* [2010] VSCA 344 at [76].
[21] T 676-678, 701-707, 731-734 & 874-877; *Likiardopoulos v The Queen* [2010] VSCA 344 at [41]-[42].
[22] T 731-734 & 874; *Likiardopoulos v The Queen* [2010] VSCA 344 at [42]-[43]. Complaint was made of this direction in the Court of Appeal and on the application for special leave to appeal to this Court, but special leave to appeal was not given on this ground.
[23] T 676-678, 707-712 & 874-877; *Likiardopoulos v The Queen* [2010] VSCA 344 at [76].

19. As to the second element, the judge also directed that the appellant need not know or even believe that death would result from the act or acts of the principal offender or offenders.[24]

20. As indicated above, for the purposes of joint criminal enterprise, the judge directed the jury that the Crown case was that the appellant agreed with Mr Aydin, John Likiardopoulos and/or Mr Singh to inflict really serious injury on the deceased. When it came to counselling or procuring, the judge left any "one or all or any number of them" as the potential principal offender or offenders who had committed murder.[25] Throughout the directions on counselling and procuring, the principal offender or offenders (or "actors") were not named, though at one point the judge referred to whether the prosecution had proved the appellant counselled and procured Mr Aydin, John Likiardopoulos, Mr Singh and perhaps CL.[26]

Crown approach to counselling and procuring at trial

21. In his final address, the prosecutor referred to the appellant as having counselled and procured "others".[27] The prosecutor relied in particular on the evidence of Mr Aydin and Mr Singh. The judge said that the prosecution alleged that the appellant had counselled or procured "the actors to commit murder".[28]

22. Before the jury, in cross-examination by the appellant's counsel, it was established that Mr Aydin had pleaded guilty to manslaughter and that Mr Singh had pleaded guilty to being an accessory after the fact.[29] However, in his final address, the prosecutor stressed to the jury that it was irrelevant how Mr Aydin and Mr Singh were dealt with.[30] The prosecutor also submitted that it was irrelevant what had happened to John Likiardopoulos and CL.[31] Whilst submitting that Mr Aydin and Mr Singh clearly wanted to downplay their roles in the assault on the deceased,[32] the prosecutor urged the jury to accept their evidence as reliable.[33]

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[24] T 709; *Likiardopoulos v The Queen* [2010] VSCA 344 at [76]. Complaint was made of this direction in the Court of Appeal and on the application for special leave to appeal, but special leave was not granted on this ground.
[25] T 708.20.
[26] T 713.17.
[27] See, e.g., T 574.
[28] T 711.17.
[29] See, e.g., the judge's charge at T 738.9-739.11, 754.25-755.3 & 778.31-779.8.
[30] T 581.24-583.11.
[31] T 583.12-583.15.
[32] T 596.19.
[33] T 611.15-613.15.

Appellant's case

23. The appellant did not give evidence or call witnesses. He denied that he was part of a joint criminal enterprise with others to murder (or commit manslaughter against) the deceased or that he counselled or procured anyone to do so. Counsel for the appellant invited the jury to return a verdict of guilty of being an accessory after the fact to homicide by another or others, which alternative the judge left to the jury.[34]

PART VI: APPELLANT'S ARGUMENT

Error by the Court of Appeal

24. For reasons that follow, it is submitted that, in the circumstances identified above, it was impermissible to leave the case against the appellant as one of counselling and procuring others to commit murder and that the Court of Appeal erred in failing so to hold.[35]

Derivative liability as a counsellor or procurer

25. First, liability by way of counselling or procuring (or being an accessory before the fact) is derivative.[36] If there is no murder by a principal, there can be no liability for murder as an accessory by way of counselling or procuring.

26. In *Osland v The Queen* (1998) 197 CLR 316, a case concerning *inter alia* the principles of acting in concert and whether Mrs Osland's conviction was inconsistent with the jury's failure to convict her co-accused son at their joint trial or with his acquittal at a subsequent separate trial, several members of this Court considered Mrs Osland's reliance on *Surujpaul v The Queen* (1958) 42 Cr App R 266.[37] For example, McHugh J said this:[38]

> Counsel for Mrs Osland also relied on *Surujpaul* as authority for the proposition that when persons are jointly charged with murder they cannot be convicted as accessories unless one or more of them has been convicted as a principal. But the conviction in that case was as an accessory before the fact. As I pointed out earlier, the liability of an accessory before the fact is derivative. There can be no conviction as an accessory before the fact unless there is a principal offender. In *Surujpaul*, all the co-accused were acquitted

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[34] T 718-731; *Likiardopoulos v The Queen* [2010] VSCA 344 at [36]-[37].
[35] *Likiardopoulos v The Queen* [2010] VSCA 344 at [114]-[129].
[36] *Osland v The Queen* (1998) 197 CLR 316 at 324[14] per Gaudron and Gummow JJ; 341[70]-342[71] & 351[95] per McHugh J; and 406[233] per Callinan J.
[37] *Surujpaul* is also reported at [1958] 1 WLR 1050; [1958] 3 All ER 300.
[38] *Osland v The Queen* (1998) 197 CLR 316 at 351[90]. See also Gaudron and Gummow JJ at 324[14].

> both as principals and as accessories before the fact. That case has no bearing on the criminal responsibility of a person for the acts of the actual perpetrator when the former is alleged to be acting in concert and present at the scene with the latter. (Footnotes omitted.)

27. And Callinan J said this:[39]

> *Surujpaul* ... , upon which the appellant relied in this connexion, is clearly distinguishable. That was a case of one trial of five people. At the end of it, although all of the accused (including the appellant) were acquitted of murder as principals, and the other four of being accessories before the fact, the appellant was found guilty as an accessory before the fact to murder. It was the acquittal, and, I would emphasise, acquittal of everyone, of murder that made a guilty verdict of accessory to murder offensive to the law as to logic. In those circumstances there was, for juristic purposes no murder in respect of which any one of the accused could have been an accessory. (Footnotes omitted.)

28. Similarly, in the present case there was, for juristic purposes, no murder by any of the persons relied on as potential principals. Thus, it is contrary to both law and logic that the Crown was permitted to invite the jury to convict – and that the jury was allowed to convict – the appellant of murder based on counselling or procuring another or others to commit murder when none of those relied on as the principal offender or offenders had been convicted of murder and indeed the Crown had accepted pleas of guilty from those offenders to offences other than murder, including manslaughter and being an accessory after the fact.[40]

29. Since one or more of the jury may have convicted on the basis of counselling or procuring, there has been a wrong decision on a question of law and/or a miscarriage of

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[39] *Osland v The Queen* (1998) 197 CLR 316 at 406[233].

[40] Also in *Osland v The Queen* (1998) 197 CLR 316 at 402[218]-403[221], Callinan J considers the operation of s 323 of the *Crimes Act* 1958 (Vic), which provides: "A person who aids, abets, counsels or procures the commission of an indictable offence may be tried, indicted or presented and punished as a principal offender". Callinan J opines, without deciding, that "[t]he object of the enactments seems to have been to do away with derivative liability" (at 402[218]). It is respectfully submitted that that is not correct if his Honour means that it is no bar to reliance on the doctrine of counselling or procuring in a murder trial that the alleged principal or principals have been not been convicted of something less than murder and indeed the Crown accepted pleas of guilty to those offences other than murder. Later (at 402-403[220]), Callinan J says: "If it were necessary to decide the point I would be inclined to hold that the practical effect of the section is to make it irrelevant to decide whether the accused struck the blow or did a final act to complete a crime. The section appears to eliminate the need for a trial of a person formerly thought to be an accessory only, to await and depend upon the attainment or conviction of the principal". In so far as the second sentence suggests that s 323 allows that an alleged counsellor or procurer may be tried before the attainment of a conviction of the principal, that is, it is respectfully submitted, correct but that does not impact on any point to be made on behalf of the appellant in this appeal. Gaudron and Gummow JJ mentioned s 323 as well (at 329[26]), but only briefly.

justice within the meaning of s 568(1) of the *Crimes Act* 1958 (Vic). As there is no occasion to apply the proviso to s 568(1), the conviction must be set aside.

Abuse of process

30. Secondly, and alternatively or additionally, it is submitted that the Court of Appeal erred in failing to determine that what had occurred in the present case was an abuse of the process of the Supreme Court.

31. In Australia, two fundamental policy considerations underpin consideration of abuse of process in criminal proceedings:

> The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice.[41]

32. These considerations transcend the interests of parties to the litigation. They are concerned, at base, with the integrity of the criminal justice system as administered by appellate courts.

33. It is submitted that the administration of justice was brought into disrepute by the Crown asserting in the appellant's trial that one or more others – including not only John Likiardopoulos and CL but also witnesses called by the Crown, Messrs Aydin and Singh – had murdered the deceased at the appellant's behest despite the facts that none of those others had been convicted of murder and indeed it was the Crown that had accepted pleas of guilty from those others to offences other than murder.

34. This Janus-headed approach by Crown was an unfair use of the Supreme Court's process. The failure of the Supreme Court – and of the Court of Appeal – to prevent the Crown from taking that approach had, and has, a tendency to erode public confidence in the administration of criminal justice.

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[41] *Williams v Spautz* (1992) 174 CLR 509 at 520 per Mason CJ, Dawson, Toohey and McHugh JJ; approved in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 264-265[8] per Gleeson

Relief sought

35. Despite the abuse of process, the relief sought on this appeal is not a permanent stay on a murder prosecution *per se*. In conformity with the principles relied upon, the order sought is that there be a retrial, not an acquittal (although it would be a matter for the Director of Public Prosecutions whether a retrial on murder – as opposed to manslaughter – were pursued).

36. However, it is submitted that the reasons of the Court should also make clear that, at any such retrial, the Crown is to be prevented from seeking a conviction for murder on the basis of counselling and procuring – because such a doctrine requires that there be a principal or principals who have committed murder when that is simply not so in law and/or in any event because it would be impermissible given the Crown has already accepted that those persons have not committed murder.

37. Instead, the Crown should be confined to proceeding with murder on the basis of joint criminal enterprise. Further, the Crown should be prevented from asserting that those others engaged in the joint criminal enterprise committed murder or any offence other than the offences which the Crown has previously accepted they committed.

Hui Chi-ming v The Queen

38. The Court of Appeal determined this ground against the appellant by following the approach of the Privy Council in *Hui Chi-ming v The Queen* [1992] 1 AC 34.[42] There are similarities with the present case in that the accused who struck the blow (Ah Po) and killed the deceased was acquitted of murder but convicted of manslaughter. Other co-accused in a similar position to Hui Chi-ming accepted the Crown's offer to plead guilty to manslaughter, whereas Hui Chi-ming rejected that offer and was tried on and convicted of murder at a subsequent separate trial. However, there are important differences between *Hui Chi-ming* and the present case.

39. First, counselling or procuring, which was not relied on in *Hui Chi-ming*, is a derivative form of liability, whereas the doctrines relied on in *Hui Chi-ming* – concert and an extended form of joint enterprise (or, what in Australia would be described as extended

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CJ, Gummow, Hayne and Crennan JJ and in *Dupas v The Queen* (2010) 241 CLR 237 at 244[16] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

[42] *Likiardopoulos v The Queen* [2010] VSCA 344 at [122]-[129].

common purpose) – are direct or primary forms of liability. The acts of the principal perpetrating the crime do not become those of the counsellor or procurer, whereas the acts of the principal perpetrating the crime do become those of the non-perpetrator involved in a joint enterprise because he or she has agreed to commit those acts.[43] Thus, in the same way that joint criminal enterprise, properly handled, was open (at least in theory) in the appellant's case, so too in *Hui Chi-ming*, despite the acquittal of Ah Po, it was open (at least in theory) to prosecute Hui Chi-ming for murder on the basis that Ah Po had committed the acts causing death pursuant to an agreement with Hui Chi-ming but that it was a matter for the jury whether Hui Chi-ming was possessed of the requisite *mens rea* for murder (even if Ah Po did not have the requisite *mens rea*).

40. Secondly, in the appellant's case, the Crown accepted pleas of guilty to offences other than murder (including non-homicide offences) from the persons it later alleged were the principal offenders who committed murder, whereas in *Hui Chi-ming* the Crown pressed for a murder conviction in the case of Ah Po but the jury acquitted him (perversely, said Lord Lowry[44]).

41. Thirdly, since in the present case the cause of death was not known and since the case was left as one in which any one or more of the alleged principal offenders could be the one or ones to whose liability the appellant's (derivative) liability was attached, it is impossible to know on what basis the appellant was convicted, whereas in *Hui Chi-ming* there was no doubt that Ah Po was the person who was said to have struck the fatal blow or blows.

Criticism of *Hui Chi-ming v The Queen*

42. In any event, the decision in *Hui Chi-ming* has not escaped heavy criticism. Professor Andrew L-T Choo argues that, in circumstances where the Privy Council accepted that what had occurred was a "serious anomaly" and that Hui Chi-ming would undoubtedly have been acquitted if tried jointly with his co-accused, "the refusal of Lord Lowry to hold that the prosecution of the defendant for murder constituted an abuse of process is to be deplored".[45] Professor Choo went on to opine:[46]

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[43] *Osland v The Queen* (1998) 197 CLR 316 at 341[70]-342[73] per McHugh J; see also Kirby J agreeing at 383[174] and Callinan J agreeing at 413[257].
[44] *Hui Chi-ming v The Queen* [1992] 1 AC 34 at 57A.
[45] Choo A L-T, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd edn, Oxford University Press, 2008 ("Choo"), p 51.
[46] *Ibid.*

> Equally objectionable is Lord Lowry's suggestion that any injustice to the defendant could, in any event, be mitigated by commutation of his death sentence by the executive. This is, ironically, just the type of attitude which the abuse of process doctrine is meant to counteract. It seems to fly in the face of the oft-quoted words of Lord Devlin in *Connelly v DPP*:[47] "Are the courts to rely on the Executive to protect their process from abuse? Have they not an inescapable duty to secure fair treatment for those who come or are brought before them?"

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43. Professor Choo also noted[48] the subsequent decision of the Court of Appeal of England and Wales in *R v Petch* [2005] 2 Cr App R 40. Messrs Petch and Coleman had been convicted of murder at trial following the prosecution's refusal of Mr Petch's offer to plead guilty to manslaughter. The prosecution case was that Messrs Petch and Coleman had been part of a joint criminal enterprise with others to assault the deceased, who ultimately died after falling through a window. Two other men, one of whom the prosecution alleged was the principal offender, had left the jurisdiction soon after the incident but were brought back, after the trial of Messrs Petch and Coleman, at different times. Given weaknesses in the case against the principal, the prosecution were prepared
20 to accept his offer of a plea of guilty to manslaughter. Messrs Petch and Coleman subsequently argued that the Crown's subsequent acceptance of the principal's plea to manslaughter rendered their convictions for murder unsafe. In rejecting that argument, Pill LJ (speaking for the Court, which included Ouseley and Davis JJ) held:[49]

> The acceptance of [the alleged principal's] plea to manslaughter on the basis that [the prosecution] were not confident that in June 2003 a jury would reach a verdict of guilty of murder does not cast doubt upon the verdicts upon the appellants on the evidence at their trial in March 2002.
>
> 30 The approach in *Hui Chi-ming* plainly supports that conclusion in our judgment, including the citing with approval of Eveleigh J's statement in *Andrews-Weatherfoil*. The charge of murder against the present appellants could not be called an overcharge and there was ample evidence to support the convictions. The prosecution's alleged lack of consistency, resulting from pragmatic considerations, which has resulted in an anomaly different from, but in its way as striking as, that in *Hui Chi-ming,* does not open the door to a finding that the verdicts upon the appellants were unsafe. The law does not permit the court to take an overall view of the situation retrospectively and, in the interest of even-handedness, to declare the convictions of the appellants
> 40 unsafe.

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[47] *Connelly v DPP* [1964] AC 1254 at 1354.
[48] Choo, pp 51-52.

44. However, as Professor Choo observed,[50] Pill LJ[51] sounded the following note of caution about the future of *Hui Chi-ming*:

> Subsequent developments in the law may, with respect, encourage a review of the approach in *Hui Chi-ming* to how prosecutions in second trials based upon the same events as earlier trials are to be conducted. The prosecution were consistent in that case but to proceed against a secondary party for murder when the principal offender has already been convicted only of manslaughter creates a particular sense of grievance absent in the present situation. (Emphasis added.)

45. The latter remarks are apposite in the appellant's case, for there is a particular sense of grievance in proceeding against him on the basis that others committed murder when they had been convicted or something less and Crown had already accepted that those others were guilty of those lesser offences.

46. For the reasons given, the decision in *Hui Chi-ming* is distinguishable from the present case. Further, to the extent that it might be thought to stand in the appellant's way, this Court should decline to follow *Hui Chi-ming*.

PART VII: APPLICABLE LEGISLATION

47. **Section 568 of the *Crimes Act* 1958 (Vic)**: The determination of the appellant's application to the Court of Appeal was, and his appeal to this Court is, governed by s 568 of the *Crimes Act* 1958 (Vic), which provided as follows:

> (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:
> Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided n favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
> (2) Subject to the special provisions of this Part the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal or direct a new trial to be had.

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[49] *R v Petch* [2005] 2 Cr App R 40 at [46]-[47].
[50] Choo, p 52.
[51] *R v Petch* [2005] 2 Cr App R 40 at [49].

PART VIII: ORDERS SOUGHT

48. The appellant seeks orders that:

a) the appeal to this Court be allowed and the order of the Court of Appeal refusing the application for leave to appeal against be set aside; and

b) in lieu thereof, the application for leave to appeal to the Court of Appeal be granted, the appeal be allowed, the conviction be set aside, the sentence be quashed, a retrial be directed and an indemnity certificate be granted to the applicant pursuant to s 14 of the *Appeal Costs Act* 1998 (Vic).

Dated this 10th day of April 2012.

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