IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M 102 of 2013

BETWEEN:

SAMUEL JAMES
Appellant

10 **-and-**

THE QUEEN
Respondent

20 # SUBMISSIONS FOR THE APPELLANT

Date of document: 20th September 2013
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I

INTERNET PUBLICATION

1.1 These submissions are in a form suitable for publication on the internet.

II

ISSUES

2.1 Whether a trial judge's duty to ensure a fair trial, in trials other than for murder, entails that a judge leave to a jury for its consideration, and notwithstanding the forensic decisions of counsel at trial, lesser alternative verdicts that are properly open on the evidence.

2.2 Whether that statement of principle – representative of the law in (at least) New South Wales and South Australia – is sound, rendering misstated the law as it has hitherto been exposed by the Court of Appeal in Victoria.

III

NOTICE

3.1 The Appellant certifies that he has considered whether notice should be given under s. 78B of the *Judiciary Act* 1901 and determined that notice is not necessary.

IV

JUDGMENT BELOW

4.1 The reasons for judgment of the Court of Appeal, Supreme Court of Victoria, given on 19 March 2013, are available on the internet as *James v R* [2013] VSCA 55.

V

FACTS

5.1 The Appellant refers to, and adopts, the statement of relevant facts set out by the Court of Appeal[1] in the judgment of Priest, JA at paras [121] and [123]-[145], and supplemented by Whelan, JA at [23]-[68].

VI

ARGUMENT

10 6.1 The Appellant commends to this Court the dissenting judgment of Priest, JA and his Honour's analysis of the issues at trial and the relevant law.

INTRODUCTION

6.2 In the Court of Appeal the Appellant submitted that there had resulted a substantial miscarriage of justice as a consequence of a failure on the part of the trial judge to leave to the jury alternative verdicts of intentionally causing injury (as an alternative to intentionally causing *serious* injury) and recklessly causing injury (as an alternative to recklessly causing *serious* injury).[2]

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1 *James v R* [2013] VSCA 55 ("*James*").

2 In order for there to be a conviction for intentionally causing *serious* injury under s 16 of the *Crimes Act* 1958 it is necessary that a jury be satisfied that an accused *intended* to cause *serious* injury (not just that he intended to cause mere *injury*, or intended to do an act which *in fact* resulted in serious injury). Were a jury to be satisfied that an accused intended to cause *some* injury – but not serious injury – and no lesser alternative was before them, an acquittal would follow. Where, however, the lesser alternative of intentionally causing injury is available, the jury would be entitled to return a verdict of guilty on the lesser offence. The same analysis applies *mutatis mutandis* to the offence of recklessly causing serious injury under s. 17 of the *Crimes Act* 1958: see *R v Westaway* (1991) 52 A Crim R 336 at p. 337 per Brooking, JA; *LLW v R* [2012] VSCA 54 at [2].

6.3 At the Appellant's trial, the defence conceded from the outset that KS had suffered serious injury. It remained a live issue whether the Appellant *intended* to cause *serious* injury (rather than injury); and, on the second count, whether the Appellant foresaw the probability of his causing *serious* injury (rather than injury).[3]

6.4 Following the prosecutor's opening to the jury, and the defence response to the opening, the trial judge sought to clarify with defence counsel the issues in the trial. Counsel stated that on the first count, '[t]he *two* issues are intent, in that the jury will need to be satisfied he had an intention in relation to his actions, and obviously the intention to cause serious injury…'[4] (A like analysis applied to the second count.)

10 6.5 The issues in the trial were not confined solely to determining whether – in the words of Whelan, JA on behalf of the majority in the Court of Appeal - 'the impact between the vehicle and Mr. Sleimann [KS] was deliberate or not.'[5]

6.6 Certainly, the prosecutor was in no doubt that in issue at trial were the Appellant's '*two intentions,* the first intention… to cause the act, the second intention… to cause the serious injury'.[6]

6.7 Nevertheless, and despite 'intent' having been expressly identified as an issue in the trial, the question whether it was necessary to leave for the jury's consideration the lesser alternatives of intentionally causing injury and recklessly causing injury was not raised until after the jury had retired to consider their verdicts.[7]

20 6.8 Immediately before they retired, the judge directed the jury in the following terms:[8]

> What is in dispute in this case in relation to the principal charge of intentionally causing serious injury is [the Appellant's] state of mind; that's the issue there. The prosecution, as

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3 *T* at p. 57.

4 *Ibid* at lines 6-19. [Emphasis added.]

5 *James* at [44] per Whelan, JA.

6 *T* at p. 721, lines 22-28. If the jury were satisfied that the Appellant intended to cause serious injury (or was relevantly reckless) they would then go on to consider self-defence.

7 *T* at pp. 721-22.

8 *Charge* at pp. 697-99. [Emphasis added.]

> I told (sic.), must prove beyond reasonable doubt that, at the time [the Appellant] did the acts that you find caused [KS's] injury, he *intended* to *seriously* injure [KS]. So this *element will not be satisfied if he only intended to injure [KS]*, but happened to seriously injure him. He has to have intended to seriously injure him... [A like direction was given on the second count charging recklessly causing serious injury.]

6.9 During deliberations, and despite that direction, the jury asked for further clarification of 'the difference between intent and being aware that [the Appellant's] acts would probably cause serious injury'.[9] The judge gave a further direction in terms designed again to make clear that it did not suffice for a finding of guilt on each of counts 1 and 2 that the Appellant *intended*, or was *reckless* as to, his causing KS only *injury*.[10]

6.10 After the further direction, the following exchange ensued:[11]

> [PROSECUTOR]: Your Honour, the other thing is, because there has now been a further direction on this particular point, and we have now spoken about – Your Honour's taken the jury directly to foreseeing the probability of serious injury and intentionally causing serious injury, it's a bit late in the day, *but of course there is the alternative that the jury is always capable of finding in charges of this sort, of foreseeing, intending injury as an alternative to intending serious injury.*
>
> HER HONOUR: Oh, I don't think so, [Mr. Prosecutor]. Not realistically in this case. Look at his ankle. He had bones sticking out of his ankle. I don't think anybody is going to say that's not a serious injury.
>
> [PROSECUTOR]: No, no, I don't mean that, Your Honour, *but as we have been speaking of the two intentions, the first intention is to cause the act, the second intention is to cause the serious injury.* Your Honour has highlighted that he must intend to cause the serious injury. *If they thought he was intending to cause injury, but didn't think he was intending to cause serious injury...*
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> HER HONOUR: I understand your point, but I don't – it's not been put ...
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> [PROSECUTOR]: The consequence.

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9 *T* at p. 704, lines 8-13.

10 *T* at pp. 718-20. [Emphasis added.]

11 *T* at pp. 721-22. [Emphasis added.]

HER HONOUR: It's not been put, it would be adding another offence – the jury has been told that it's not enough for the offence with which he's been charged to have that intent.

[PROSECUTOR]: It's just that when, yes, I know, the only reason I raise it now is I [was] listening to Your Honour going through in more detail the elements of the crime, I *query whether it's not appropriate to say, well, of course if you weren't satisfied of that element you would return a verdict of intentionally causing injury.*

HER HONOUR: Well, I don't think [defence counsel] will support that.

[PROSECUTOR]: I am sure he won't.

HER HONOUR: At that stage and I don't think that the case hasn't been...

[PROSECUTOR]: And I don't either.

HER HONOUR: I am sorry, I didn't hear that but anyway it doesn't...

[PROSECUTOR]: No, I said I'm sure he won't support it.

HER HONOUR: The case hasn't been framed in that way, I think to introduce that at this stage would deprive the accused man of the possibility of an acquittal on that basis.

6.11 Defence counsel for his part reminded the judge that the prosecutor 'did disavow those alternatives last week... specifically disavowed them.'[12]

6.12 It is plain that the prosecutor – who was very experienced – perceived the real possibility that the jury properly had open to them on the evidence verdicts that rendered the Appellant guilty of the lesser alternatives. It is just as plain that defence counsel – for forensic reasons – sought not to have the lesser alternatives left.

6.13 The substance – though not the timing – of the prosecutor's application was sound. The offences of causing injury intentionally and causing injury recklessly were, at common law and by operation of statute,[13] alternatives proper to the offences

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12 *T* at p. 722, lines 25-27.

13 *LLW v R* [2012] VSCA 54 at [2]; *Criminal Procedure Act* 2009, s. 239(1).

respectively the subject of counts 1 and 2. They ought at all material times to have been offences that the jury were required to consider.

6.14 It was contended in the Court of Appeal that, such was the duty reposed in the trial judge to leave to the jury alternatives that were realistically open on the evidence, it transcended the forensic choice made by Appellant's counsel. By majority, that contention was rejected.

GENERAL PRINCIPLES AND DEFENCES

6.15 Generally, an accused person is bound by the conduct of his or her counsel at trial.[14] Further, and again generally, the system of trial by jury proceeds on the assumption that juries will faithfully adhere to the directions they are given.[15] Further still, and despite the forensic decisions made by counsel during a trial, at common law a trial judge has an obligation to give any direction necessary in the circumstances to avoid 'a perceptible risk of [a] miscarriage of justice'.[16]

6.16 *Ex hypothesi* a trial judge must leave to a jury any defence which is fairly raised on the evidence.[17] Indeed, the cases are replete with examples of miscarriages of justice arising from a failure to leave a viable defence, no matter the attitude of counsel at

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14 *TKWJ v R* (2002) 212 CLR 124; *Patel v R* (2012) 290 ALR 189; (2012) 86 ALJR 954.

15 *Gilbert v R* (2000) 201 CLR 414 at [13] per Gleeson, CJ and Gummow, J.

16 *Longman v R* (1989) 168 CLR 79 at p. 86; *Bromley v R* (1986) 161 CLR 315 at pp. 324-25.

17 *Pemble v R* (1971) 124 CLR 107 at pp. 117-18 per Barwick, CJ; *Parker v R* (1963) 111 CLR 610 at p. 616 per Dixon, CJ. Section 15 of the recently enacted *Jury Directions Act* 2012 requires a judge to 'give the jury any direction that is necessary to avoid a substantial miscarriage of justice'; but, in an apparent response to *Pemble*, s. 16 has sought to abolish any rule under which a judge is required to direct the jury about 'any defences and alternative offences open on the evidence but which have not been identified as such during the trial.' The introduction of the Act since the Appellant's trial can have no bearing on whether his trial miscarried. And the Act does not, in any event, settle what might be meant by '*but which have not been identified as such during the trial*'. Finally, the Act can have no effect on the wider implications of the Appellant's case outside Victoria.

trial,[18] including cases where trials have relevantly miscarried despite the defence having been inconsistent with an Appellant's case at trial.[19]

6.17 The principle to which courts now relevantly adhere is that, notwithstanding the forensic decisions and tactical choices of counsel, and notwithstanding that it may be inconsistent with an accused person's case at trial, if on the evidence a defence is properly open (such defence being either a pathway to conviction on a lesser offence or acquittal), a trial judge is bound to leave it to the jury.

6.18 An allied principle of general application is that defence counsel cannot concede a matter of law to the detriment of his or her client.[20] It is a principle to which (at least recently) too little attention has been given. Thus, in *R v Stokes & Difford* (a case in which defence counsel had sought to avoid a direction to the jury on intoxication), Hunt J, applying *Pemble*, held:[21]

> The disavowal by counsel then appearing for the appellant that intoxication was being raised as an issue, though no doubt made for tactical reasons which were bona fide thought to be in the best interests of their clients, did not relieve the judge of the duty to give directions in relation to that issue in this case: *Pemble* (1971) 124 CLR 107 at 117–118, 130. *Counsel cannot concede a matter of law to the disadvantage of the accused*: Pemble at 133; *Galambos* (1980) 2 A Crim R 388 at 395, 396–397. *The judge must comply with his duty to put to the jury any issue sufficiently raised by the evidence even if that issue gives an air of unreality to the case sought to be made by the accused in relation to some other issue.* [Emphasis added.]

6.19 True it is that in the Court of Appeal the nature of the error alleged was not the failure to give a direction or leave a defence: rather, it was the failure to leave an alternative verdict that might have resulted in a conviction for a lesser offence. But there exists no or insufficient a basis, in principle or logic, to distinguish between them. So much has been acknowledged by this Court in the context of trials for the offence of murder. A trial judge must always be astute to secure for an accused person a fair trial according to

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18 *Van Den Hock v R* (1986) 161 CLR 158; *R v Shea* (1988) 33 A Crim R 394; *R v Thorpe* [1999] 1 VR 326.

19 *R v Kear* [1997] 2 VR 555.

20 *R v Stokes & Difford* (1990) 51 A Crim R 25.

21 *Ibid* at p. 32 per Hunt, J.

law, no matter the forensic decisions of counsel, and no matter the nature of the offence being tried. Trial judges are not relieved of the responsibility to ensure that a trial is conducted properly because counsel chooses to run the trial in a particular way.

VIABLE ALTERNATIVE VERDICTS

6.20 Whether a lesser alternative is open on the evidence adduced at trial or is 'viable' – such as to compel (at least in murder trials) its being left to a jury – will depend upon its being 'real' or 'not remote', or not an 'artificial possibility'.[22]

6.21 Issues of nomenclature aside, a viable case is one '*where upon one possible view of the facts, it would be open*' to a jury to find an accused person guilty of a lesser offence.[23] Similarly, in *Pemble*,[24] Barwick, CJ referred to 'the [jury's] possible use of the relevant facts... which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.'

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22 See, eg, *Jensen v R* (1991) 52 A Crim R 279; *R v Benbolt* (1993) 60 SASR 7; *R v Kane* (2001) 3 VR 542; *R v Willersdorf* [2001] QCA 183; *R v Parsons* (2004) 145 A Crim R 519; *R v King* (2004) 59 NSWLR 515; *R v Saad* (2005) 156 A Crim R 533; *R v Nous* (2010) 26 VR 96. All are variations of the same inquiry. They refer to the evidentiary threshold which triggers the obligation on a trial judge to give particular directions to the jury, whether it be to leave a complete or partial defence, or a lesser alternative. Thus, in *Parker v R* Dixon, CJ found that:

> '... the issue before the Court of Criminal Appeal was whether *by any possibility the jury might not unreasonably discover in the material before them* enough to enable them to find a case of provocation. The selection and evaluation of the facts and factors upon which that conclusion would be based would be for the jury and it would not matter what qualifying or opposing considerations the Court might see; they would not matter because the question was one for the jury and not for the Court.' [Emphasis added.]

The Appellant commends to this Court that formulation. It does so for at least two reasons. *First*, its pedigree can hardly be more authoritative. *Secondly*, there is no reason to distinguish a trial judge's duty to direct a jury on a viable defence, from his or her duty to leave viable lesser alternatives to a jury for their consideration. The point is perhaps most apparent in cases involving partial defences which in turn require of a jury that it consider lesser alternatives: eg *Pemble v R* (1971) 124 CLR 107.

23 *R v Gill; R v Mitchell* (2005) 159 A Crim R 243 at p. 245 per curiam; cf *Gilbert v R* (2000) 201 CLR 414 at pp. 421-422 per Gleeson CJ and Gummow; *Gillard v R* (2003) 219 CLR 1 at p. 14 per Gleeson CJ and Callinan J and at pp. 41-42 per Hayne J.

24 (1971) 124 CLR 107 at pp. 117-18.

6.22 A viable case need not be the only case open,[25] nor need it be the case preferred on review by an appellate court. The focus of the inquiry is the evidence upon which a jury might legitimately act upon or the jury's possible use of the relevant facts. The inquiry is jury-focused. The focus is not on the way in which the parties put their respective cases at trial. Nor is it on whether a trial judge or an appellate court considers the case to be powerful or compelling: rather, it is on whether a jury properly instructed could have lawfully acted upon it.

THE TRIAL AND THE CROWN'S SUBMISSIONS TO THE COURT OF APPEAL

6.23 The Respondent contended in the Court of Appeal that, on the evidence adduced at trial, there was no realistic lesser alternative open. The submission was predicated upon two assertions. *First*, it was submitted that the jury could not have but been compelled to conclude that the Appellant intended to cause (or was reckless as to his having caused) serious injury.[26] *Secondly*, it was contended that, because the jury returned a guilty verdict on the primary count of intentionally causing serious injury, it meant that, its having adhered to the judge's directions, the jury must have been in fact satisfied that the Appellant intended to cause KS serious injury.

6.24 The first contention betrays, on the part of the Respondent and the majority in the Court of Appeal, a misapprehension of the scope of a jury's function. The second is predicated upon a misapprehension of principle: it relies upon authority[27] that has, in this Court and in intermediate appellate courts outside Victoria, been overtaken by statements of principle that better reflect the approach that ought to obtain to cases such as the present.

6.25 In support of its assertion that no lesser alternative was open on the evidence led at trial the Crown relied primarily (if not almost entirely) upon the eyewitness testimony of

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25 See *Carney v R; Cambey v R* (2011) 217 A Crim R 201 at pp. 206-07 and 214-15 per curiam.

26 It was a submission that apparently found favour with Whelan, JA (and impliedly with Maxwell, P) in the Court of Appeal: see *James* at [82].

27 See, eg, *Ross v R* (1922) 30 CLR 246 at pp. 254 and 273; *Mraz v R* (1955) 93 CLR 593 at pp. 508 and 513-15; *R v Evans and Lewis* [1969] VR 858 at pp. 869 and 871 ("*Evans*").

Monica Woods and the evidence of the forensic physician, Dr. Nicola Cunningham.[28] The effect of Monica Woods's evidence was that KS was thrown after colliding with the Appellant's car and then run over. Dr. Cunningham gave evidence that KS's injuries 'suggested that they were the result of direct and forceful blunt trauma'.

6.26 But just as the jury would not have been entitled capriciously to reject that evidence, neither were they bound wholly to accept it.

6.27 Monica Woods was cross-examined – with some success – with the view to undermining the accuracy and reliability of her observations. She had not included in her original statement to police some of the more graphic aspects of her later account at trial.. It was - to Priest, JA at least - 'plain' that it 'would have been open to the jury to have had a reasonable doubt about those aspects, and the accuracy of her evidence more widely.' Similarly, although again the jury were not entitled capriciously to reject the evidence of Dr. Cunningham, the jury were not bound wholly to accept it either.

6.28 The Appellant's case in this Court is not concerned with whether the jury's verdict was unsafe.[29] The issue is whether, when properly assessed, the evidence adduced at his trial founded a guilty verdict on a lesser alternative. In the end, the jury would have, it is submitted, been well entitled to conclude that they could not reject to the criminal standard the thesis that KS was struck only a glancing blow; or, perhaps more importantly, *that the Appellant's appreciation* was that he had only struck a blow less severe than what appears to have been the case.

6.29 Indeed, KS testified as much: despite his claimed lack of recall at trial he had told police in his first statement, and accepted in cross-examination,[30] that the Appellant '*had put*

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28 *James* at [178] per Priest, JA; see also at [68] per Whelan, JA.

29 In which case this Court would be asked to assess the Crown case at its highest.

30 *James* at [180] per Priest, JA; cf at [82] per Whelan, JA. The transcript reveals the following exchange (at *T.* 136):

> Counsel: '... Did you then say in your statement, "... he put the car into reverse and swung the steering wheel so that the front of his car hit me as he reversed."? Did you say that in your statement?' ----- 'I have no memory of that.'
>
> Counsel: 'Why would you say – do you say that that's wrong, what you said in your statement?' ---- 'No, No.'

the car into reverse and swung the steering wheel so that the front of his car hit [him] as it reversed'. At the very least, and based on that evidence, the jury were entitled to have had a reasonable doubt about Monica Woods's version of events, and about the opinion of Dr. Cunningham.

6.30 It was open - and reasonably open - to the jury to find that the Appellant did not intend to cause KS serious injury. It was also open - and reasonably open - to the jury to find that the he did not foresee the probability that he would cause KS serious injury. At the very least, it was open to the jury to have entertained a reasonable doubt about each.

6.31 Verdicts on the lesser alternatives were properly open to the jury and should have been left. That they were not caused the trial to miscarry.[31]

THE DUTY TO LEAVE LESSER ALTERNATIVES

6.32 This Court's judgments in *Gilbert*[32] and *Gillard*[33] both involved an examination of the circumstances in which, on a charge of murder, the alternative verdict of manslaughter should be left to a jury.

6.33 In *Gilbert* the trial judge had instructed the jury that a verdict of manslaughter was not open. The High Court held that it should have been left.[34] *Evans* was disparaged[35] and held to be inconsistent with *Pemble*.[36]

6.34 *Gillard* too involved a charge of murder where manslaughter had not been left to the jury as an alternative. Appellant's counsel had resisted an attempt by the prosecutor to have the trial judge direct the jury that verdicts of manslaughter were available. The

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31 s. 276(1)(b) of the *Criminal Procedure Act* 2009; *Andelman v R* [2013] VSCA 25 at [78], [83]-[86], [94]-[104], applying *Baini v R* (2012) 246 CLR 469.

32 *Gilbert v R* (2000) 201 CLR 414 ("*Gilbert*").

33 *Gillard v R* (2003) 219 CLR 1 ("*Gillard*").

34 Gleeson, CJ and Gummow, J jointly and Callinan, J separately; McHugh and Hayne, JJ dissenting in separate judgments.

35 *Gilbert* at [8], [16] and [20] per Gleeson, CJ and Gummow, J

36 *Ibid* at [8].

High Court held that a viable case for manslaughter was properly open and should have been left.[37]

6.35 Whether *Gilbert* should be confined to cases of murder, or has wider application, has been considered by the Victorian Court of Appeal on a number of occasions.[38] The general principle, distilled from the case law,[39] is that *Gilbert* and *Gillard* are confined to murder trials. In cases involving other offences, an appellate court can have regard to the conduct of counsel – particularly when it amounts to 'calculated abstention' – in determining whether a judge should have left a lesser alternative.

6.36 This Court is invited to subject that line of authority to scrutiny. It ought to favour in its stead an approach consistent with its own statement of principle in *Gilbert* and *Gillard*;[40] and with intermediate appellate courts in NSW and South Australia. If a verdict for a lesser offence is realistically open on the evidence, then a trial judge should be bound to leave it, no matter the attitude or conduct of counsel.

6.37 Even paying due regard to the development of the law concerning the leaving of the manslaughter alternative in trials where murder is charged,[41] there is, it is submitted, no reason in logic or principle why the Court's analysis in *Gilbert* and *Gillard* should not apply more widely to trials other than murder trials. If the evidence raises an alternative verdict as a realistic possibility, so that the jury might convict on it in preference to a more serious offence, justice ought to dictate that the alternative be left.

6.38 The application of principle, if sound, should not depend upon the nature of an offence or the maximum penalty it attracts. In the same way that an accused person cannot be disentitled by the conduct of his or her counsel from having left to the jury a defence

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37 *Gillard* at [26] per Gleeson, CJ and Callinan, J, at [32] per Gummow, J, at [95] per Kirby, J and at [128]-[129] per Hayne, J.

38 *R v Doan* (2001) 3 VR 349; *R v Kane* (2001) 3 VR 542; *R v Saad* (2005) 156 A Crim R 533; *R v Christy* (2007) 16 VR 647; *R v Nous* (2010) 26 VR 96.

39 *R v Saad* 156 A Crim R 533 at [97]-[98], [100]-[102]; *R v Nous* (2010) 26 VR 96 at [33], [48]-[50].

40 Cf *R v Keenan* (2009) 236 CLR 397 at [138] per Kiefel, J citing with apparent approval *R v Willersdorf* [2001] QCA 183 at [20] per Thomas, JA; McPherson, JA and Chesterman, J agreeing.

41 See, eg, *Gilbert* at [17] per Gleeson, CJ and Gummow, J.

which might result in an acquittal or a conviction for a lesser offence, so too an accused person ought not to be disentitled from possible conviction for a lesser alternative because of the forensic choices made by his or her counsel at trial.

6.39 Intermediate appellate Courts in other Australian jurisdictions have agreed.[42]

6.40 In the Court of Appeal, and after a detailed review of the relevant authorities, Priest, JA concluded that 'the confluence of several aspects of general principle'[43] lead to the result that whatever the offence charged, if a lesser alternative verdict is realistically open on the evidence, then – no matter the forensic decisions of counsel – a trial judge is required to leave the lesser alternative.[44] Beyond those matters of general principle, intermediate appellate courts in other states – and, in particular, in *King* and *Tilley* – have applied the principles derived from *Gilbert* and *Gillard* to cases other than in those charging murder as the principal offence.

SECTION 239 OF THE CRIMINAL PROCEDURE ACT 2009

6.41 Finally, s 239 of the *Criminal Procedure Act* 2009 *prima facie* gives a jury an unqualified statutory right or power to find an accused person guilty of a lesser offence if 'the allegations in the indictment amount to or include, whether expressly or impliedly, an allegation of another offence that is within the jurisdiction of the court'. Presumably the jury is only capable of exercising that right or power if properly instructed by the trial judge on how to do so.

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42 *R v King* (2004) 59 NSWLR 515 at [5] per Grove, J and [110]-[111] per Smart, AJ; Davidson, AJ dissenting; *R v Tilley* (2009) 105 SASR 306 at [60] per Bieby, Gray and Layton. JJ; *Blackwell v R* (2011) 81 NSWLR 119 at [49]-[58] and [83] per Beazley, JA and James, J; Hall, J dissenting. Cf. *R v Willersdorf* [2001] QCA 183 at [20] per Thomas, JA; McPherson, JA and Chesterman, J agreeing; *R v MBX* [2013] QCA 214 at [2] per Fraser, JA and at [21]-[50] per Applegarth, J; Jackson, J agreeing.

43 *James* at [205]-[206].

44 *Ibid* at [207]. Priest, JA expressed his conclusion 'subject to two qualifications'; A lesser alternative verdict need not be left, *first*, where there is no dispute that the full offence charged was committed, the only issue being whether the accused committed it; and, *secondly*, where the principal offence is serious, and the alternative offence (though theoretically open) is trivial and distant from the real issues in the case.

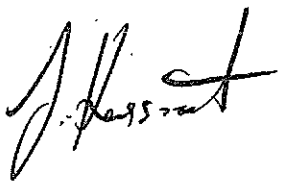
CONCLUSION

6.42 Lesser alternatives having not been left at the Appellant's trial in circumstances where they should have been, the failure resulted in a substantial miscarriage of justice. By failing so to conclude, the Court of Appeal (by majority) erred.

VII

ORDERS SOUGHT

7.1 There be an order that the appeal be allowed and the Appellant granted a re-trial.



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