HIGH COURT OF AUSTRALIA

GLEESON CJ,

McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

WILLIAM LAWRENCE GILBERT APPELLANT

AND

THE QUEEN RESPONDENT

Gilbert v The Queen [2000] HCA 15
23 March 2000
B47/1999

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of Queensland made on 17 February 1998 and in place thereof order that:*

   (a) the appeal to that Court be allowed;

   (b) the conviction be set aside; and

   (c) there be a new trial.

On appeal from the Supreme Court of Queensland

Representation:

A J Glynn SC with A J Rafter for the appellant (instructed by Legal Aid Office (Queensland))

M J Byrne QC with C W Heaton for the respondent (instructed by Director of Public Prosecutions (Queensland))

CATCHWORDS

Gilbert v The Queen

Criminal law – Murder – Appeal against conviction – Misdirection by trial judge – Failure to leave manslaughter to jury – Whether jury properly instructed would necessarily have returned verdict of guilty of murder – Whether no substantial miscarriage of justice actually occurred – Whether failure to leave manslaughter to jury constitutes substantial miscarriage of justice where jury's verdict of guilty of murder consistent only with satisfaction of elements of offence of murder.

Criminal Code (Q), ss 7(1), 8, 668E(1), 668E(1A).

1 GLEESON CJ AND GUMMOW J. Following a trial in the Supreme Court of Queensland, before Mackenzie J and a jury, the appellant was convicted of murder. He appealed against his conviction[1]. It was common ground in the Court of Appeal of Queensland, and in this Court, that there had been a wrong decision on a question of law, within the meaning of s 668E(1) of the *Criminal Code* (Q) ("the Code"), and a consequent misdirection of the jury. The question was whether the case was a proper one for the application of s 668E(1A), which provides that, notwithstanding such an error, an appeal may be dismissed if the Court of Appeal considers that no substantial miscarriage of justice has actually occurred. This is commonly referred to as the proviso. By majority, (Davies and McPherson JJA; Pincus JA dissenting), the Court of Appeal answered the question in the affirmative.

2 The erroneous decision on a question of law, and misdirection, concerned the possibility that, on the view of the facts for which the defence contended, the appellant could be found guilty of manslaughter. This was the subject of a question asked by the jury. In conformity with the law as understood in Queensland at the time of the trial[2], the trial judge instructed the jury that there was no such possibility. Later, this Court gave its decision in *R v Barlow*[3]. It was common ground, in the Court of Appeal and in this Court that, consistently with *Barlow*, manslaughter should have been left to the jury as a possible verdict.

3 In their joint judgment in *Barlow*, Brennan CJ, Dawson and Toohey JJ referred to ss 289-291, 293, 300, 302 and 303 of the Code and said[4]:

> "The scheme of the Code's provisions relating to culpable homicide is to define unlawful killing, to divide the categories of unlawful killing into murder and manslaughter, to define the offence of murder by reference to the specific intent with which the fatal act must be committed or the fatal omission must be made or by reference to the circumstances which must accompany the commission of that act or the making of that omission, and then to define the offence of manslaughter as consisting of the residual cases of unlawful killing." (footnotes omitted)

4 Briefly stated, the facts were as follows. The appellant, the appellant's brother, and another man, were charged with the murder of Whintre Shalon Linsley. The victim died as the result of a brutal assault. The main perpetrator

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1 *R v W Gilbert* unreported, Court of Appeal of Queensland, 17 February 1998.

2 See *Hind and Harwood* (1995) 80 A Crim R 105.

3 (1997) 188 CLR 1.

4 (1997) 188 CLR 1 at 6.

was the appellant's brother. The appellant had driven the victim, the appellant's brother and the other man, to a remote place where the fatal assault occurred. It was the Crown case that the appellant did so for the purpose of enabling or aiding his brother to commit the offence of murder. (It is unnecessary for present purposes to consider the role of the other man). Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit an offence is deemed by s 7(1)(b) of the Code to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it. In deciding the purpose for which the appellant acted, his state of knowledge as to what his brother intended to do to the victim when they arrived at their destination was critical. There was ample evidence upon which the jury, having concluded that the brother acted with intent to kill or inflict grievous bodily harm upon the victim, could also find that the appellant knew that his brother intended at least to inflict grievous bodily harm. On the other hand, the defence case was that all the appellant knew was that his brother intended to assault the victim. The appeal was conducted upon the basis that, subject to other necessary findings, if the state of knowledge for which the prosecution contended existed, the appellant was guilty of murder, but if the lesser state of knowledge existed, the appellant was guilty of manslaughter. (The correctness of that approach was not challenged in argument in this Court, and was not doubted in the Court of Appeal). However, the trial judge, without the authority of *Barlow* available to him, and in line with the previous understanding of the law in Queensland, instructed the jury that manslaughter was not an available conclusion. He told the jury that the prosecution had to establish beyond reasonable doubt that the appellant knew that his brother intended either to kill or to inflict grievous bodily harm upon the victim. He said that if the prosecution established that, and the other necessary facts, the appellant was guilty of murder. If not, (and, in particular, if the jury were not satisfied beyond reasonable doubt that the appellant knew more than that his brother intended to assault the victim), the verdict must be one of not guilty. (There was an alternative charge of assisting the other accused to escape punishment, but that does not bear upon the present problem).

5 In summing-up the facts, and the competing arguments, to the jury, the trial judge directed their attention to the matters relied upon by the defence in support of a conclusion, or at least an acceptance as a reasonable possibility, that the lesser state of knowledge existed. It is common ground, however, that he did this in the context of an erroneous direction of law, informing the jury that the legal consequence of that argument was that the appellant was not guilty of either murder or manslaughter.

6 From one point of view it might appear that such a direction was unduly favourable to the appellant. Such an appearance, however, may be deceptive. Sometimes, when there is a misdirection of law, it is risky to seek to assign the advantage of the misdirection exclusively to one party and the disadvantage

exclusively to another. The reason for that in the present case will be considered below.

7 Even so, the respondent contends, the jury were correctly instructed on the elements of the offence of murder; they convicted the appellant of murder; their verdict demonstrates that they were satisfied of all the elements of murder, including the higher state of knowledge which they were told was necessary to support a conclusion of guilty of murder; hence there was no miscarriage of justice. The respondent relies upon a proposition stated in *R v Evans and Lewis*[5]:

> "If the trial judge correctly instructs the jury on the essential elements of the crime of which the appellant is convicted and fully and fairly puts to the jury the defence set up by the appellant the verdict of guilty amounts to a finding by the jury of every essential element of the crime and if those findings negate a verdict of guilty of a lesser offence then the verdict cannot be disturbed by a suggestion that the jury might have found him guilty of that lesser offence if the judge had informed them they were at liberty to do so."

8 That proposition repeats what was said by the majority in this Court in *Ross v The King*[6]. Two things, however, should be noted. First, the issue in that case arose out of a direction given by the trial judge as to the significance of a confessional statement which was said to have been expressed ambiguously. It was complained, on appeal, that the judge had failed to explain to the jury that, upon one possible interpretation, the statement bore a meaning consistent with manslaughter, not murder. The majority held that the trial judge had directed the jury correctly as to the findings necessary to support a conviction of murder and, there having been no suggestion from trial counsel that there was a view of the facts consistent with manslaughter, it was not necessary for the judge to explain that, upon one possible interpretation of the confessional statement, the accused was confessing to conduct which amounted in law to manslaughter, not murder. Secondly, if the proposition is to be understood literally, and without qualification, it is inconsistent with the later decision of this Court in *Pemble v The Queen*[7].

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5 [1969] VR 858 at 871. See also *R v Iannazzone* [1983] 1 VR 649.

6 (1922) 30 CLR 246 at 254.

7 (1971) 124 CLR 107.

9 In *Elliott and Hitchins*[8], Lee J, with whom Street CJ and Enderby J agreed, examined the Australian authorities, and considered the relationship between *Ross* and *Pemble*. He said[9]:

> "The cases on provocation … exemplify the true basis in law upon which a verdict of murder will be quashed if manslaughter has not been left, and that basis is: where, in addition to the facts upon which the murder verdict can be seen to rest, there are other facts which would permit a verdict in manslaughter, then the verdict of murder cannot stand if manslaughter has not been left."

10 Lee J considered that the principle in *Ross*, qualified as stated above, still had a role to play, and meant that "the giving of a verdict that in fact represents the jury's view as to what is the proper verdict on the evidence put forward can never be regarded as an unfairness to the accused"[10].

11 As will appear, the Supreme Court of Canada has taken a different approach.

12 In the present case, following some apparent confusion in the addresses of counsel, the jury asked a specific question about the availability of a verdict of manslaughter, and were given what is now conceded to be an erroneous answer. They were directed to consider the factual arguments advanced as to the appellant's state of mind in a context which erroneously attributed to those arguments the consequence that, if accepted, they meant that the appellant was not guilty of unlawful homicide. Nevertheless, the respondent contends that it is impermissible to determine the consequence of the misdirection upon the basis that the jury's approach to the facts might have been affected by the legal consequences that were (wrongly) explained to them. It must be assumed, it is said, that the jury decided the facts dispassionately, and then applied, to the facts as found, the law as directed. That being so, the jury must be taken to have found, uninfluenced by any direction of law, that the appellant had the higher state of knowledge as to what his brother intended to do to the victim, and no occasion arose for them to consider the question of manslaughter. Therefore, the misdirection on the subject of manslaughter was immaterial, and there was no miscarriage of justice. The corollary of this argument is that the jury would have been acting contrary to their duty had they permitted their approach to the facts to

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8 (1983) 9 A Crim R 238 at 257-263.

9 (1983) 9 A Crim R 238 at 262.

10 (1983) 9 A Crim R 238 at 263.

have been influenced by the information they were given as to the verdicts that would follow from possible findings they might make.

13 The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.

14 In the days when murder attracted the death penalty, appellate courts were well aware, and took account, of the possibility that juries may be influenced in their deliberations by the presence or absence of manslaughter as a possible verdict. *Mraz v The Queen*[11], a leading case on the proviso, concerned a misdirection to a jury in relation to manslaughter. The Court of Criminal Appeal of New South Wales, relying upon *Ross*, held that there had been no miscarriage of justice, the inevitable inference from the verdict of the jury being that the jury were satisfied of the elements of unlawful homicide, and that it was not a reasonable possibility that, properly directed, they might have acquitted the appellant. That case was one in which manslaughter had been erroneously left to the jury. The majority in this Court, allowing the appeal, took into account the practical significance of the misdirection. Williams, Webb and Taylor JJ referred to a passage in the judgment of Higgins J in *Ross* which observed that "if the only alternatives before a jury are acquittal and sentence of death, there is a strong tendency to shrink from pronouncing a verdict which leads to death"[12]. Referring to the case before them they said[13]:

> "It is, of course, quite possible to say that the same conclusions on these issues of fact must have led the jury to find the appellant guilty of murder if they had been properly instructed. But it would be ignoring the realities of the matter to assume that if they had been required to consider whether they should convict the appellant of murder or acquit him they would have reached the same conclusions."

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11 (1955) 93 CLR 493.

12 (1955) 93 CLR 493 at 507.

13 (1955) 93 CLR 493 at 508.

15 Fullagar J said[14]:

> "A jury which would hesitate to convict of murder may be only too glad to take a middle course which is offered to them."

16 These statements are inconsistent with the notion that an appellate court must assume, on the part of a jury, a mechanistic approach to the task of fact-finding, divorced from a consideration of the consequences. Indeed, juries are ordinarily asked to return a general verdict. They make their findings of fact in the context of instructions as to the consequences of such findings, and for the purpose of returning a verdict which expresses those consequences.

17 When, in *Mraz*, the majority referred to "ignoring the realities of the matter", one of the contemporary realities to which they were referring was the death penalty. That was why, tactically, defence counsel might prefer to conduct a homicide case on a "murder-or-nothing" basis. The death penalty has gone, but there are other, perhaps equally influential, realities. This is an age of concern for the victims of violent crime, and their relatives. To adapt the words of Fullagar J, a jury may hesitate to acquit, and may be glad to take a middle course which is offered to them.

18 The Supreme Court of Canada, in *R v Jackson*[15], a case with factual similarities to the present, declined to apply the proviso where a jury, having been inadequately directed on manslaughter, but correctly instructed on the elements of murder, convicted the accused of murder. McLachlin J, speaking for the majority, said[16]:

> "It is true that the trial judge charged the jury clearly and correctly on the mental state required to find Davy guilty of murder. It is also true that the jury found Davy guilty of murder. Nevertheless, I agree with the Court of Appeal that one cannot be satisfied the verdict is just, given the failure of the trial judge to set out the basis for convicting Davy of manslaughter under ss 21(1) and 21(2)[17] and the absence of any instruction that a party

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14 (1955) 93 CLR 493 at 513.

15 [1993] 4 SCR 573.

16 [1993] 4 SCR 573 at 593.

17 The reference to s 21 is to the aiding and abetting and common purpose provision of the Canadian *Criminal Code*, RSC, 1985, c. C-46. The section, so far as material, states:

> "21. (1) Every one is a party to an offence who

(Footnote continues on next page)

may be guilty of manslaughter even though the perpetrator is guilty of murder. As Lord Tucker stated in *Bullard v The Queen*[18]:

> 'Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.'

I cannot but conclude that Lord Tucker's admonition has not been followed in this case and the issue of manslaughter was not properly left to the jury."

19 McLachlin J said that, in such circumstances, the test for the application of the proviso is whether it is clear that a jury, properly instructed, would necessarily have returned a verdict of murder.

20 We agree that such a question must be asked in order to determine whether there has been a miscarriage of justice. Indeed, all the members of the Court of Appeal of Queensland, correctly, dealt with the matter on that basis, and not on the basis of the *Ross* proposition.

21 The majority in the Court of Appeal did not rest their decision upon the reasoning primarily advanced in this Court by the respondent. Rather, they concluded that, having regard to the whole of the evidence, and, in particular, to certain admissions made by the appellant, a properly instructed jury, acting reasonably, would inevitably have concluded that the appellant well knew that his brother intended, at least, to cause the victim grievous bodily harm. In

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(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

18 [1957] AC 635 at 644.

substance, what they held was that, in the circumstances of this case, the evidence in support of the higher state of knowledge asserted by the prosecution was so strong that proper directions as to the legal consequences of entertaining a doubt about that matter could not have made a difference to the result. On this issue, we agree with the conclusion reached by Pincus JA. The admissions were not unequivocal. They were certainly damaging to the appellant, but a rational jury, properly instructed, could have failed to reach the state of satisfaction necessary for a conviction of murder. The question would be whether they had a doubt about which of two possibilities reflected the appellant's state of mind. To say they could not rationally have entertained any doubt about that appears to us to be going too far.

22 The appeal should be allowed. The order of the Court of Appeal should be set aside and in place thereof the appeal to that court should be allowed, the conviction set aside and a new trial ordered.

23 McHUGH J. The issue in this appeal is whether the Court of Appeal of the Supreme Court of Queensland erred in holding that the appellant's conviction for murder was not a miscarriage of justice within the meaning of s 668E of the *Criminal Code* (Q), notwithstanding that the trial judge had erred in law in directing the jury that a verdict of manslaughter was not open on the evidence. In my opinion, the Court of Appeal did not err, and the appeal must be dismissed.

24 At the trial, the Crown led evidence from which the jury could be satisfied beyond reasonable doubt that the appellant had driven his brother, another man and the deceased, Whintre Shalon Linsley, to an area where the brother and the other man killed Linsley. The Crown also led evidence that the appellant's brother had assaulted Linsley with the intent to kill him or to inflict grievous bodily harm and that the appellant knew that his brother at least intended to inflict grievous bodily harm on him. In reaching its verdict of murder, the jury must have been convinced beyond reasonable doubt of these matters, notwithstanding that the appellant asserted that he knew no more than that his brother intended to assault the victim.

25 Having regard to the appellant's claim that he knew no more than that his brother would assault Linsley, however, the learned trial judge erred in law in not leaving the issue of manslaughter to the jury[19]. If the appellant's claim that he knew no more than that his brother intended to assault Linsley raised a reasonable doubt in the mind of the jury, the jury were required to acquit him of murder and find him guilty of manslaughter unless they acquitted him of both murder and manslaughter on some other ground or grounds arising from the evidence. The issue of manslaughter should therefore have been left to the jury to decide. But the failure of the trial judge to leave manslaughter to the jury does not mean that there has been a miscarriage of justice. The jury's verdict and the findings necessarily implicit in that verdict of murder show that the jury were satisfied beyond reasonable doubt that the appellant at least *knew that his brother intended to cause grievous bodily harm to Linsley.* That finding means that, if the issue of manslaughter had been left to the jury, the jury would have rejected it.

26 Where a trial judge correctly directs the jury as to the essential elements of the crime charged, a verdict of guilty necessarily amounts to a finding of every essential element of the crime, and the verdict cannot be set aside on the ground that the trial judge should have directed the jury that on the evidence they could

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19 *R v Barlow* (1997) 188 CLR 1.

convict the accused of a lesser offence[20]. That proposition is subject to the qualification that, where the evidence, in substance but not necessarily in form, gave rise to a "defence" by way of confession and avoidance which the trial judge failed to put to the jury, the verdict can be set aside. If on a charge of murder, for example, the evidence suggested a defence of provocation, self-defence or lawful excuse which was not put to the jury, a conviction for murder may be set aside. Although the verdict of guilty necessarily amounts to a finding of every element of the charge of murder, the defences of provocation, self-defence and lawful excuse confess those elements but add additional matters which qualify the legal effect of the findings inherent in the verdict of guilty of murder. A jury which finds every element of the charge of murder may return a verdict of manslaughter if it is not satisfied beyond reasonable doubt that the prosecution has negatived provocation or finds that a "defence" of self-defence has failed only because the accused used excessive force in the circumstances.

27 Where the issue that should have been left to the jury is not in substance a matter of confession and avoidance and the factual elements of that issue are negatived by the verdict, however, the general principle applies. That being so, in the present case, the jury could not as a matter of law, fact or conscience find the appellant guilty of manslaughter. The jury's verdict negatives the essential facts that the appellant had to rely on to obtain a verdict of manslaughter. The appellant was guilty of murder because he had driven his brother, the other man and Linsley to the place where Linsley was killed and because the jury found that he knew that his brother intended to inflict at least grievous bodily harm on Linsley. That finding is utterly inconsistent with the appellant's claim that he was only guilty of manslaughter because he believed that his brother only intended to assault Linsley. Once the jury found that he knew that his brother intended to inflict grievous bodily harm on the deceased, the appellant was, as a matter of law, as guilty of the murder of Linsley as if he had struck the blow which killed him and struck it with intent to kill or cause grievous bodily harm. On the findings implicit in the verdict of guilty of murder, manslaughter was not a verdict which the jury could return.

28 Consequently, the error of the learned trial judge – who directed the jury before this Court had given its decision in *Barlow*[21] – had no causal effect on the jury's verdict. Even if the trial judge had directed the jury that they could find manslaughter, they could not have found him guilty of manslaughter given the findings that are *necessarily* implicit in their verdict of murder. The legal error

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20 *Ross v The King* (1922) 30 CLR 246 at 254; *R v Evans and Lewis* [1969] VR 858 at 871; *Spratt* (1982) 8 A Crim R 361 at 370-372; *R v Iannazzone* [1983] 1 VR 649 at 653-654; *Elliott and Hitchins* (1983) 9 A Crim R 238 at 263.

21 (1997) 188 CLR 1.

of the learned trial judge, therefore, did not constitute a miscarriage of justice. The appellant would have been convicted of murder even if the jury had been directed that they could find him guilty of manslaughter and not murder.

29 The argument for the appellant would have it that this is too legalistic a way to look at the case. If manslaughter had been left as an issue, so the argument runs, the jury might have convicted him of manslaughter notwithstanding that their verdict necessarily shows that they were satisfied beyond reasonable doubt that the "facts" upon which the "defence" of manslaughter depended were not true. In my opinion, this argument should be rejected as a matter of legal policy as well as legal principle and established authority.

30 The argument for the appellant is a claim that this Court should proceed on one of two bases, each of which necessarily involves an assumption that, if manslaughter had been left as an issue, the jury might have disregarded their sworn duty to give a verdict in accordance with the evidence. The first assumption is that, if manslaughter had been left, the jury might have convicted of manslaughter even though they knew, because of the trial judge's directions, that the appellant was guilty of murder. The second assumption is that the jurors were not convinced beyond reasonable doubt that the appellant knew that his brother intended to kill or to inflict grievous bodily harm on Linsley, that they knew therefore that he was not guilty of murder, but that they nevertheless convicted him of murder rather than acquit him and see him go free. In my respectful opinion, as a matter of legal policy, no court of justice can entertain either assumption.

31 The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one – accused, trial judge or member of the public – could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials. It is of course true that, if a jury persists in returning a verdict that is contrary to law, the trial judge must accept it[22]. But that only

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22 *Gammage v The Queen* (1969) 122 CLR 444 at 451.

means in Lord Mansfield's words that, although "[i]t is the duty of the Judge ... to tell the jury how to do right ... they have it in their power to do wrong"[23].

32 In my respectful opinion, the fundamental assumption of the criminal jury trial requires us to proceed on the basis that the jury acted in this case on the evidence and in accordance with the trial judge's directions and that they would have done so even if manslaughter had been left as an issue, as it should have been left. In *Spratt*[24], Pidgeon J said, correctly in my opinion, "that an appellate court must proceed on the basis that the jury have understood and applied the law in reaching a true verdict."

33 It is true that there is a passage in *Mraz v The Queen*[25] which might suggest that Fullagar J thought that it is open to appellate courts to take a more cynical view of the deliberations of the criminal jury. His Honour said:

> "In many murder trials the question whether the possibility of a verdict of manslaughter should be raised presents a serious problem to counsel for the accused. Probably in most cases it is regarded as disadvantageous to the accused to suggest the possibility of a verdict of manslaughter. A jury which would hesitate to convict of murder may be only too glad to take a middle course which is offered to them."

34 Read out of context, this passage might suggest that Fullagar J was prepared to act on the basis that, in murder trials in particular, juries do not always act in accordance with the evidence or directions of the judge. The statements in that passage were made, however, in a case where the charge of murder arose out of an alleged rape, the directions on murder and manslaughter were intertwined and the jury had acquitted the accused of murder *but convicted him of manslaughter*. The Court of Criminal Appeal had held that there had been no miscarriage of justice because, although the direction on manslaughter was erroneous, it was too favourable to the accused. That was because the Court of Criminal Appeal thought that, with proper directions, a verdict of murder had to be returned on the facts referred to in the erroneous direction. It was in that context that Fullagar J made the above statements after introducing them with the following words[26]:

> "It is, of course, true that, if the erroneous part of the charge had been omitted, the jury might have convicted the appellant of murder, which is a

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23 *R v Shipley* (1784) 4 Doug 73 at 170 [99 ER 774 at 824].

24 (1982) 8 A Crim R 361 at 372.

25 (1955) 93 CLR 493 at 513.

26 (1955) 93 CLR 493 at 513.

> more serious crime than manslaughter. But it is equally true that a jury not confused by the erroneous matter might have acquitted the appellant on the only charge in the presentment."

35 I do not think that in the first passage his Honour was saying any more than that, properly directed, the jury could have convicted the appellant of murder or acquitted him of murder and that it was no answer to say that, because they had convicted him of manslaughter on an erroneous direction, they would necessarily have convicted him of murder on the same facts with a proper direction concerning murder. The fact that the jury might have been only too glad to take the middle course offered by the wrong direction did not mean that the jury would have convicted of murder on the same facts.

36 It was for the jury, and not for the Court of Criminal Appeal, in *Mraz* to say whether those facts amounted to murder. As Williams, Webb and Taylor JJ said[27] in the same case:

> "[I]t seems quite wrong to attempt to justify the verdict of manslaughter, returned in the circumstances of this case, by the observation that the jury, upon an issue of manslaughter which they were invited to consider, must have reached conclusions on issues of fact which would have required them, if properly instructed, to have returned a verdict of murder."

37 To this statement may be added the comment that, as the case was one where as a matter of law the only verdicts were guilty or not guilty of murder, it is difficult to see how the conviction for manslaughter could have been sustained on any basis.

38 In my opinion, nothing in *Mraz*[28] cuts down the general principle stated in *Ross v The King*[29] that if

> "the Judge correctly instructs the jury on the essential ingredients of the crime charged and fully and fairly puts to the jury the defence set up by the prisoner, a verdict of guilty amounts to a finding by the jury of every essential element of that crime, and cannot be disturbed by a suggestion that the jury on the evidence might have found him guilty of a lesser offence if the Judge had informed them that they were at liberty to do so."

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27 (1955) 93 CLR 493 at 508.

28 (1955) 93 CLR 493.

29 (1922) 30 CLR 246 at 254.

Significantly, although in *Mraz*[30] Fullagar J referred to *Ross v The King*[31], he said nothing that would suggest that he had any doubt about the validity of the general principle for which that case stands.

39 In my opinion, the appeal must be dismissed.

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30 (1955) 93 CLR 493 at 513-514.

31 (1922) 30 CLR 246.

40 HAYNE J. The appellant was tried in the Supreme Court of Queensland together with his brother, Donald Bruce Gilbert, and with Jason David Harding for the murder of Whintre Shalon Linsley. Each was charged, in the alternative, with being an accessory after the fact to murder.

41 The prosecution case against the appellant at trial was that he was a person who had done an act (namely, drive his co-accused and the victim to the scene of the crime) "for the purpose of enabling or aiding another person [one of his co-accused] to commit the offence [of murder]"[32].

42 The case against the appellant was put to the jury (conformably with the then state of authority[33]) as one in which, if either or both of the co-accused were found guilty of murder, they could find the appellant guilty or not guilty of murder but could not find him guilty of manslaughter. The jury were directed that they could find the appellant guilty of murder *only* if satisfied beyond reasonable doubt that:

> "at some time before arrival at the scene Bill Gilbert realised that there was an intention to kill or do grievous bodily harm, and knowing that that was the intention, adhered to the plan by continuing to drive them out to the remote spot so that that intention might be carried out.
>
> If you are not satisfied beyond reasonable doubt that he realised before they got to the scene that the intention of anyone was to kill or do grievous bodily harm, then you could not convict of murder on that basis."

43 Each of the three accused was convicted of murder; each was sentenced to life imprisonment.

44 The appellant and his co-accused were tried in 1995. In 1997, this Court published its reasons for decision in *R v Barlow*[34]. In that case, the Court

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32 *Criminal Code* (Q), s 7(1)(b), which provides:

> "7(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -
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> …
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence".

33 *Hind and Harwood* (1995) 80 A Crim R 105.

34 (1997) 188 CLR 1.

considered the operation of another provision of the *Criminal Code* (Q) dealing with parties to offences. The section with which the Court was then concerned (s 8) deals with offences committed in prosecution of a common purpose. In the joint majority judgment of the Court in *Barlow* it was said[35]:

> "[Section 8] sheets home to the secondary offender such conduct (act or omission) of the principal offender as (1) renders the principal offender liable to punishment but (2) only to the extent that that conduct (the doing of the act or the making of the omission) was a probable consequence of prosecuting a common unlawful purpose. The secondary party is deemed to have done an act or made an omission but only to the extent that the act was done or the omission was made in such circumstances or with such a result or with such a state of mind (which may include a specific intent) as was a probable consequence of prosecuting the common unlawful purpose."

45 The present appeal was conducted by both parties on the basis that:

(i) it follows from *Barlow* that a person (the "secondary offender") who does an act for the purpose of enabling or aiding another person (the "principal offender") to commit a homicide may (by operation of s 7(1)(b)) be guilty of manslaughter even if the principal offender is guilty of murder;

(ii) it also follows from *Barlow* that, in a case in which it is alleged that s 7(1)(b) applies, a jury should be instructed to consider whether the secondary offender knew that the principal offender intended to kill or do grievous bodily harm, or knew no more than that the principal offender intended to commit an assault short of inflicting grievous bodily harm (in the former case, the secondary offender would be guilty of murder, in the latter, manslaughter);

(iii) the jury at the appellant's trial were not given the instructions just described and there was, therefore, a wrong decision of a question of law within the meaning of s 668E(1) of the *Criminal Code*[36]; and

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35 (1997) 188 CLR 1 at 10 per Brennan CJ, Dawson and Toohey JJ.

36 Section 668E(1) provides:

> "The Court on any such appeal against conviction shall allow the appeal if it is of opinion 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 of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

(iv) the only question in the appeal is whether, as the majority of the Court of Appeal of Queensland held[37], no substantial miscarriage of justice has actually occurred[38].

I am content to deal with the matter on these bases, without pausing to examine their correctness in any detail. The propositions about the operation of s 7(1)(b) that I have set out appear to depend upon identifying the "offence" that is first referred to in the introductory words of s 7(1) as the offence of homicide[39]. The liability of the secondary offender is then, presumably, said to depend upon the operation of the sections defining murder and manslaughter[40] and the secondary offender's knowledge of what the principal offender intended. Given that argument proceeded, both in this Court and in the Court of Appeal, without detailed attention being given to these aspects of the matter, I say no more about them.

46 The issue that lies behind the question the parties identified is, however, fundamental: whether an appellate court can conclude that there may have been a miscarriage of justice because the jury *might* have disobeyed the instructions they were given in reaching the verdict they did. In the language of the cases dealing with the proviso in criminal appeal statutes[41], can it be said that, because the jury *might* have disobeyed what the judge told them, the accused lost a chance of acquittal that was fairly open to him?

47 The essence of the appellant's contention in this Court was that the jury should have been told to consider whether the appellant may not have known that his co-accused intended to kill or do grievous bodily harm to the victim (but, mistakenly, thought some lesser assault was intended). It was suggested

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37 *R v W Gilbert* unreported, 17 February 1998.

38 Section 668E(1A) which provides:

> "However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

39 *Criminal Code*, s 300, which provides:

> "Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case."

40 ss 302 and 303.

41 *Mraz v The Queen* (1955) 93 CLR 493; *Wilde v The Queen* (1988) 164 CLR 365; *Glennon v The Queen* (1994) 179 CLR 1.

that, had the jury been given such a direction, they might have felt able to choose a middle course between convicting the appellant of murder and acquitting him of any responsibility for what was done to the victim. This suggestion paid little or no attention to the fact that the appellant also faced an alternative charge of being an accessory after the fact. It was a suggestion that assumed that the jury faced a choice between finding the appellant guilty of murder and acquitting him of *any* criminal responsibility for what happened.

48 Even leaving this complication aside, it is of the first importance to understand that, consistent with the trial judge's directions, the jury could not have returned the verdict they did without being satisfied to the requisite standard that "at some time before arrival at the scene [the appellant] realised that there was an intention to kill or do grievous bodily harm, and knowing that that was the intention, adhered to the plan by continuing to drive [his co-accused to their destination] … so that that intention might be carried out". If not satisfied of that beyond reasonable doubt, the judge directed the jury to return a verdict of not guilty of murder. By their verdict, then, the jury necessarily rejected the possibility that the appellant held the mistaken belief that underpinned the appellant's argument in this Court. Had they concluded that there was a reasonable possibility that the appellant held that belief, the judge's directions obliged them to acquit the appellant of murder.

49 It follows that the contention that the appellant lost a chance of acquittal of murder that was fairly open to him because the jury were *not* told that they should consider whether he had some different and less precise knowledge of the intentions of his co-accused must be rejected. It is a contention that assumes that the jury disregarded the judge's direction that the appellant could be convicted of murder *only* if the jury were satisfied to the requisite standard that the appellant knew of the murderous intent of one or both of his co-accused.

50 The conclusion I have reached does not depend upon (or suggest the existence of) some general rule about the application of the proviso in homicide cases. The fact that a jury has been properly instructed about the specific intent that must be proved to establish murder does not mean that a verdict of guilty must be sustained no matter what misdirection has occurred. It is enough to point to cases in which provocation or self-defence should have been, but was not, left to the jury to demonstrate that there is no such general rule. It seems very unlikely that there would be any basis for applying the proviso on an appeal against conviction for murder in such a case, even if the jury were given an apparently regular direction about specific intent.

51 Nor does the conclusion which I have reached depend upon some judicial assessment of what was acknowledged to be a strong case against the appellant. It is a conclusion which depends entirely upon giving due weight to the verdict of the jury in light of what they were told by the judge and assuming (there being no basis for suggesting otherwise) that they did their duty conscientiously.

52 The trial to which the appellant was entitled was a trial according to law. There were two questions for the Court of Appeal. First, was there a trial according to law (and all agreed that there was not). Second, and no less important, was the question whether a substantial miscarriage of justice had actually occurred. That second question is not concluded by pointing to the fact that there was a misdirection and that there was, therefore, not a trial according to law. The existence of the proviso denies that the fact of misdirection will, in every case, require an order for retrial. Nor can this second question be answered by making an assumption that the jury *might* have chosen to disregard what they were told by the judge. Such an assumption is unwarranted. It is an assumption which suggests that emotion (whether induced by the eloquence of counsel or otherwise) might have supplanted the collective common sense and careful reasoning that jurors bring to bear upon a difficult task. It is an assumption which, if effect is given to it, turns the judge's charge to a jury into a ritual incantation which appellate courts must examine for formal correctness but which appellate courts are free (if not bound) to assume a jury may have disregarded.

53 The appeal should be dismissed.

54 CALLINAN J. The appellant, his brother, Donald Gilbert and Jason Harding, were indicted in the Supreme Court of Queensland at Brisbane on 20 November 1995 on counts of murder of Whintre Shalon Linsley on or about 14 July 1994, or, alternatively, that on or about the same day, each of them assisted the others to escape punishment. After a trial which lasted three weeks, all three were convicted of the offence of murder and sentenced to life imprisonment.

55 The appeals of each accused to the Court of Appeal of Queensland were heard together. Donald Gilbert's appeal was dismissed. Harding's was unanimously upheld, and this appellant's appeal was dismissed by a majority (Davies and McPherson JJA; Pincus JA dissenting).

56 There was no dispute that the appellant drove his brother, Harding and Linsley to a remote place where Linsley was so violently assaulted that he died, probably immediately at the conclusion of the assault or very shortly afterwards. The appellant, in an interview which was conducted by an investigating police officer, claimed that he had not been present at the time of the assault but that he had returned to the place of the assault after it had occurred and had driven his brother and Harding to various other places, at one of which Donald Gilbert took steps to remove blood from his body and to conceal or destroy the clothing that he had been wearing at the time of the assault. The role of Harding at the time and place of the assault was not, as will appear, clearly established.

57 The principal evidence against the appellant at the trial consisted of the video tape of an interview conducted by an investigating police officer, and oral evidence from two women, Ms Rebecca McGrath and Ms Catherine Ford. Ms McGrath had, from time to time, lived with Donald Gilbert. She said that Donald Gilbert had said in her presence and in the presence of the appellant "We're taking Whinter [sic] for a drive" and "We're going to do some serious damage", "We're going to deal with him". She asked if they were going to bash him, and then, "What kill him?". She said that Donald Gilbert had quietly replied "What do you think?".

58 In cross-examination Ms McGrath conceded that the discussion with Donald Gilbert was conducted in a whisper and that she did not think the appellant would have heard what was said. Ms McGrath gave evidence that the Gilbert brothers, Harding and Linsley left the house at about sunset. The Gilbert brothers and Harding returned later and Donald Gilbert told her that Linsley had gone "to a shallow grave". Further, she testified that the Gilbert brothers had prevailed upon her to assert a fictitious version of events and there was "a lot of talk about leaving town".

59 The second important witness for the prosecution was Ms Catherine Ford. She gave evidence that on the night of Linsley's death she saw Donald Gilbert with blood on his face, hands and chest and that he had asked her for bleach.

60 The jury were shown the videotape of the interview of the appellant. In the course of it, he admitted that he had driven Linsley, his brother and Harding to the place of the slaying. He said that his brother who was quite drunk had said that he was going to scare Linsley and that he, the appellant, was the only one who could "normally talk sense into him" and "I didn't know what was gonna happen".

61 Later the appellant said this:

> "Well Don was really wild up and like when he's really drunk especially on wine he can't remember a lot of things he does and that and um I don't know there was just the look in his eye or something and I knew I couldn't stop him if he started. You know if I had to try to stop him, I could have ended up that way too, I don't know."

62 With respect to what happened on arrival at the place of the assault, the appellant said this in his interview:

> "Yeah and ah Jason and Whintre got out the car and ah I said I'm just going for a drive up the road and ah I just took off and ah I was just not far from the bitumen I don't think and ah had a couple of cigarettes and when I came back Jason was pretty well standing in the same position where I left him and um he jumped in the car then ah about 5 minutes or so later Don come out and jumped in the car and I didn't ask any questions about anything and I just drove off."

63 During a further exchange in the course of the interview the appellant acknowledged that his brother Donald had trained in martial arts and that he was difficult to stop "once he gets wild up". He also admitted that he knew, and had known well before the killing that the victim "had chalky bones".

64 At another point the appellant said that he knew his brother intended to, "shake him up, give him [Linsley] a couple of clips underneath the ear hole and tell him to get his shit together and or get the hell out type of thing" … "Ohh just one or two couple of punches, you know. Couple of punches."

65 One other reference should be made to the interview. The appellant was asked what he thought might have happened had he stopped the car before he was told to do so by his brother. He replied:

> "Ohh caved me head in. Ohh what I mean by that you know beat me up pretty bad, maybe broken a few bones in my jaw or something like that. I don't know or broke me hands which he knows are my living and um because I'm a tatooist by trade and um you know I don't know I just I've been in one fight with Don and I I got hurt pretty bad in that, that's going back many years ago and ah because I'm a passifist [sic], I don't believe in

violence um like I've done martial arts and that more the meditation side and ah I just don't like violence and Don sometimes like I said snaps and that's only when he's on alcohol a lot of alcohol."

66 The appellant said that his brother had been drinking wine, beer and some spirits heavily before the assault and that their consumption would have increased his propensity for violence.

67 As counsel for the appellant in this Court conceded, the evidence to which I have referred, together with other evidence in the case, would be sufficient, if accepted in preference to exculpatory and equivocal statements made elsewhere during the interview, to sustain a verdict of guilty of murder.

68 Mackenzie J, who presided at the trial, in conformity with the decision of the Queensland Court of Appeal in *Hind and Harwood*[42], directed the jury that manslaughter would only be open if the jury found neither Donald Gilbert nor Harding guilty of murder but found a verdict of manslaughter against one or both of them: that manslaughter would be open on the basis that the appellant formed an intention with Donald Gilbert and Harding or either of them to prosecute an unlawful purpose, the purpose being to bash the victim but neither to kill nor to do grievous bodily harm to him. His Honour repeated that if the jury were satisfied that the appellant was a party to a common intention to assault the victim, that there was a real likelihood that such force would be used in the prosecution of that unlawful purpose that the victim would be killed, even though there was no intent to kill him or to do any grievous bodily harm to him, he would be guilty of manslaughter. His Honour then said: "But as I've said, that really depends on a situation where you found a verdict of manslaughter only in respect of Don Gilbert and/or Harding."

69 His Honour put the case to the jury on the basis that the requisite purposes had to be proved beyond reasonable doubt, that is, of each of either Donald Gilbert or Harding and of the appellant. If they were, and the other elements of murder were made out, then the appellant could be convicted of the charge of murder: if they were not he was entitled to an acquittal.

70 It is common ground that the directions to which I have referred and next refer were the conventional directions given in Queensland before the decision of this Court in *R v Barlow*[43], but must now, in the light of that decision, be regarded as erroneous:

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42 (1995) 80 A Crim R 105.

43 (1997) 188 CLR 1.

> "I should say also that to come to that conclusion, [of manslaughter] or to consider that issue of manslaughter on that basis, it presupposes that you have found only a verdict of manslaughter in respect of the other person or persons with whom you find he had the common intention. If you find a verdict of murder against one or other of Harding or Don Gilbert, then you don't get to consider manslaughter in relation to Bill Gilbert."

71 No complaint is made, or could be made about the way in which the trial judge put the defence case to the jury which was, effectively, that the appellant neither knew nor had any sufficient reason to believe, when he drove the others to the place at which the killing occurred, that Donald Gilbert and Harding intended to kill or inflict grievous bodily harm upon the victim.

72 After a very short retirement the jury returned to ask two questions:

> "If either Jason or Don is convicted of murder, no charge of manslaughter is available against Bill; is that correct?"
>
> "If either Jason or Don is convicted of murder is the other available for the charge of manslaughter?"

73 There was no serious argument on the current understanding of counsel and his Honour that the questions could be answered other than the way in which his Honour did: by telling the jury that if a verdict of murder were found in respect of Harding or Gilbert or both, a verdict of manslaughter would not be open against the appellant: if a verdict of murder were open against one person the possible verdicts against the other or others would be guilty of murder, or not guilty of murder; and, if the jury found the second person not guilty of murder they should then go on to consider whether that person was guilty as an accessory after the fact, or not guilty of being an accessory after the fact.

74 The appeals by the three accused were heard by the Court of Appeal (Davies, McPherson and Pincus JJA) after the decision by this Court in *Barlow* was pronounced.

75 Before discussing the reasons of the Court of Appeal in the appellant's case some reference should be made to the way in which that court resolved Harding's appeal[44]. The principal judgment was given by Pincus JA with whom the other members of the court agreed. After noting this Court's decision and reasoning in *Barlow* his Honour analysed the evidence against Harding. Pincus JA then went on to conclude that in contrast with the case against Donald Gilbert there was no evidence of any admission by Harding on the day of the murder, and that had the

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44 See *R v Harding* unreported, Court of Appeal of Queensland, 17 February 1998.

trial judge directed the jury in accordance with the explanation of the operation of s 8 of the *Criminal Code* (Q) given by the High Court in *Barlow*, that direction would have given rise to the possibility that, Donald Gilbert being held guilty of murder, Harding could still have been guilty of manslaughter only.

76 It is convenient to go now to the reasons of Pincus JA in dissent in this appellant's appeal to the Court of Appeal[45]. His Honour said that it had become clear since the High Court's decision in *Barlow* that the jury should have been told that if one or both of Donald Gilbert or Harding murdered Linsley, the appellant might be held guilty of either murder under s 8 of the *Criminal Code* or of manslaughter only under the same section. His Honour then referred to and rejected the argument of the respondent that if a jury has brought in a verdict of guilty of murder, after proper directions with respect to that count the jury must be taken to have found all of the elements and facts sufficient to constitute that offence, and that necessarily such findings negatived the lesser verdict of manslaughter. The Crown had submitted to the Court of Appeal (as here) that the reasoning in *R v Evans and Lewis*[46] should be applied, that on their proper application it could not be said that a miscarriage of justice had occurred, and that there was no basis for a new trial.

77 Davies JA agreed with Pincus JA that there had been a misdirection of the kind that his Honour identified but was of the opinion that a verdict of guilty of murder would have been inevitable in any event under s 7 of the *Criminal Code*. His Honour said that the question was whether the appellant, when he drove the others to the scene of the crime, knew that his brother intended to give the victim a severe beating of such seriousness as to do him grievous bodily harm, having regard to the fragility of the victim's bones, Donald Gilbert's uncontrollable aggression and the force with which he was capable of striking. Otherwise, his Honour said, there could be no explanation for the appellant's panicking and driving away as he agreed he did. It was upon this basis that his Honour concluded that the appellant drove the vehicle to its destination knowing that it was his brother's intention to inflict grievous bodily harm upon the victim and that a verdict of guilty of murder was inevitable.

78 McPherson JA was of a similar opinion. He said the only question for the jury was whether the appellant had driven to the scene of the killing knowing that the intention of either of the other co-accused was to inflict death or grievous bodily harm on the victim. His Honour thought that the evidence against the appellant in this respect was of an unusually compelling kind: that it was "not often that the prosecution has an explicit, or indeed any, direct admission from

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45 *R v W Gilbert* unreported, Court of Appeal of Queensland, 17 February 1998.

46 [1969] VR 858.

the accused himself about his guilty state of mind at the relevant time. In that respect, the present case is exceptional."

The Appeal to this Court

79 In this Court, the respondent having conceded that the directions were contrary to what *Barlow* required, the appellant's sole ground of appeal was that the majority of the Court of Appeal erred in law in dismissing the appellant's appeal against conviction by applying the proviso (s 668E(1A)) of the *Criminal Code*[47].

80 In *Barlow*, Brennan CJ, Dawson and Toohey JJ said of the operation of s 8 of the *Criminal Code*[48]:

> "The criminal liability of the principal offender for the act done or omission made by him determines the 'nature' of the act which the secondary party is deemed to have done or the omission which the secondary party is deemed to have made *only in so far as* the act done or omission made by the principal offender, when taken in combination with (i) the attendant circumstances, (ii) the result of the act or omission, and (iii) the principal offender's state of mind, was a probable consequence of prosecuting the common unlawful purpose."

81 In response to the appellant's submissions, the Crown advances two contentions: effectively that the case was such a strong case (as Davies and McPherson JJA held) that no occasion arose to do otherwise than apply the proviso; that, in any event, the case was governed by the reasoning in *Evans and Lewis*[49], and, by their verdict of guilty of murder, the jury, who had been fully and properly instructed as to what they needed to find before they could reach such a verdict, must have found all of the elements of murder: and that they therefore had clearly negatived any other verdict including a lesser verdict of manslaughter.

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47 The sub-section provides:

> " … the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

48 (1997) 188 CLR 1 at 11. McHugh J dissented, Kirby J espoused similar opinions to those of the majority: at 43-44.

49 [1969] VR 858.

82 If the first contention of the Crown is correct it will be unnecessary to consider any others.

83 I am in agreement with Pincus JA, that, although the evidence of the admissions that the appellant made, might have made it difficult for the jury to arrive at any other conclusion, it did not preclude them from doing so. In my opinion those of the facts that were uncontested, and the passages in the record of interview to which the majority in the Court of Appeal, and to which I have referred, were capable, as was the case with Harding's statements, of being treated by a properly instructed jury as at least equivocal with respect to the appellant's state of mind and knowledge before, and during, the journey to the scene of the killing: that is to say that all of these were such that a properly instructed jury might have found themselves unable to be satisfied beyond reasonable doubt that the appellant was guilty of murder.

84 There were other passages in the appellant's responses during the interview which would suggest that he neither knew nor expected that violence of the kind which did occur would occur. At one point the appellant said that he thought his brother "was only just going to scare him I didn't know what was gonna happen". Words to a similar effect were repeated, and according to the appellant he knew of no discussions concerning what was intended to be done to the victim before they set out on the journey. A jury could well have formed the view that these remarks which were made during the interview were to be preferred to others of a more inculpatory kind made at other times during the interview.

85 In *Wilde v The Queen*, Brennan, Dawson and Toohey JJ said[50]:

> "Unless it can be said that, had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would *inevitably* have convicted the accused, the conviction must be set aside[51]. Unless that can be said, the accused may have lost a fair chance of acquittal by the failure to afford him the trial to which he was entitled, that is to say, the trial in which the relevant law was correctly explained to the jury and the rules of procedure and evidence were strictly followed[52]." (emphasis added)

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50 (1988) 164 CLR 365 at 372.

51 See *Driscoll v The Queen* (1977) 137 CLR 517 at 524; *R v Storey* (1978) 140 CLR 364 at 376; *Gallagher v The Queen* (1986) 160 CLR 392 at 412-413.

52 See *Mraz v The Queen* (1955) 93 CLR 493 at 514.

86 This was not a case in which, on the evidence a verdict of guilty was inevitable. I agree with what was said by Gleeson CJ, Kirby P and Grove J in *Whittaker*[53] that it is "fair to say that there is a diminished inclination in recent times to invoke the proviso (even in otherwise very strong Crown cases) where misdirection has been shown upon an important ingredient of the law applicable to the trial: see, eg, *Domican*[54]".

87 It becomes necessary therefore to consider a second contention of the Crown, the starting point for which is that the liability of the appellant was litigated solely upon the basis that he was a party to the offence pursuant to s 7 of the *Criminal Code*: and that such liability required the jury to be satisfied to the criminal standard of the appellant's actual knowledge of his co-accused's intentions[55]. By finding the appellant guilty of murder the jury demonstrated, the Crown submitted, that they were so satisfied.

88 Accordingly, the Crown argues that it necessarily follows that this Court is in a position to know that the jury must have found that the appellant knew that there was an intention on the part of the co-accused to murder or cause grievous bodily harm when he aided his brother by driving the victim and him to the scene of the crime. The Crown did concede that the position may have been different if liability for murder against the appellant had been left to the jury not only under s 7 but also s 8 of the *Criminal Code*. In putting this argument, the Crown relied upon *Evans and Lewis*[56] and *R v Iannazzone*[57].

89 Both of these cases apply a statement made by Knox CJ, Gavan Duffy and Starke JJ in *Ross v The King*[58]:

> "if on a trial the Judge correctly instructs the jury on the essential ingredients of the crime charged and fully and fairly puts to the jury the defence set up by the prisoner, a verdict of guilty amounts to a finding by the jury of every essential element of that crime, and cannot be disturbed by a suggestion that the jury on the evidence might have found him guilty of a

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53 (1993) 68 A Crim R 476 at 484.

54 *Domican v The Queen* (1992) 173 CLR 555 at 570-571.

55 See *R v Barlow* (1997) 188 CLR 1 at 5; *R v Beck* (1990) 1 Qd R 30 at 36; *Giorgianni v The Queen* (1985) 156 CLR 473.

56 [1969] VR 858.

57 [1983] 1 VR 649.

58 (1922) 30 CLR 246 at 254.

lesser offence if the Judge had informed them that they were at liberty to do so."

90 In the Court of Appeal in this case, Pincus JA said this:

> "The only argument which has been advanced by the Crown against what seems to be a necessity for a new trial is a principle said to be derived from a series of decisions beginning with *Ross*[59]. I have discussed these cases in *Donald*[60], *Jeffrey*[61] and *Pascoe*[62]. It is not correct, in my view, that a failure to leave manslaughter to the jury, in a case where it convicts of murder, must always be held not to constitute an injustice. If there were decisions to the contrary, I would not follow them: I refer particularly, in this connection, to the passage from *Evans and Lewis*[63] applied in *Iannazzone*[64]. I would add only that the decision in *Spratt*[65] does not adopt, as a universal proposition, that the fact of conviction of a greater offence is always a good answer to a complaint of failure to direct the jury that a verdict of a lesser offence is available[66]."

91 I agree with these observations of his Honour and that the contentions of the Crown should be rejected.

92 As the Western Australian Court of Criminal Appeal (Wickham, Kennedy and Pidgeon JJ) in *Spratt* recognised[67], there may be some cases in which a conviction may be set aside even though at first sight it might appear that the verdict which has been given negatives the commission of a lesser offence.

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59 (1922) 30 CLR 246.

60 Unreported, Court of Appeal of Queensland, 19 December 1997.

61 Unreported, Court of Appeal of Queensland, 19 December 1997.

62 Unreported, Court of Appeal of Queensland, 19 December 1997.

63 [1969] VR 858 at 871.

64 [1983] 1 VR 649 at 653, 654.

65 (1982) 8 A Crim R 361.

66 *Anthony Thomas Spratt* (1982) 8 A Crim R 361 at 362.

67 (1982) 8 A Crim R 361 at 362.

93 With respect to the Crown's proposition that the position might have been different had the application or otherwise of s 8 of the *Criminal Code* been put in issue by the appellant's defence, the answer is that the trial was conducted in circumstances in which it was thought by all concerned that the law was as it had been stated to be by the Court of Appeal in *Hind and Harwood*[68]. It is quite impossible to say that emphasis would not have been laid upon the way in which s 8 of the *Criminal Code* might have affected the outcome of the trial as stated by this Court in *Barlow* had that decision been by then pronounced.

94 In *Gammage v The Queen* this Court considered a direction by the trial judge in these terms[69]:

> "You must not, as it were, say to yourselves, 'We are satisfied it is murder but we have the right to bring in manslaughter and although we think it is murder we are going to be merciful to this man and find him guilty of the lesser offence'".

Of this direction Barwick CJ said[70]:

> "Out of the circumstance that, though not charged, manslaughter if made out may be found on an indictment of murder, there naturally arises the obligation to tell the jury if they ask, or if the accused requires it, that this alternative verdict is open to them if that is their view of the facts. Failure to so advise them will give rise to a justifiable complaint on the part of the prisoner. But, part of that advice should, in my opinion, be a clear statement of the occasion on which the jury might properly return a verdict of manslaughter."

95 The Chief Justice added[71]:

> "They have no right, in my opinion, to return a verdict of manslaughter where they are satisfied of murder. But, as I have said, persistence by them in returning another verdict must ultimately result in the acceptance of that verdict. In that sense, but in no other sense, it is both within their power and, if you will, their privilege to return a wrong verdict."

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68 (1995) 80 A Crim R 105.

69 (1969) 122 CLR 444 at 445 as quoted by Barwick CJ.

70 (1969) 122 CLR 444 at 450.

71 (1969) 122 CLR 444 at 451.

96 This is to recognise the reality that a jury room might not be a place of undeviating intellectual and logical rigour. It is not to say that a jury should not perform their sworn duty to determine a case before them according to the evidence[72].

97 Other views have however been expressed. In *MacKenzie v The Queen*, Gaudron, Gummow and Kirby JJ said[73]:

> "the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries[74]."

98 Their Honours referred with approval to the "practical and sensible" remarks of King CJ in *R v Kirkman*[75] which contained this sentence:

> "Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law."

99 What the decisions in *Evans and Lewis*, *R v Iannazzone*, *Spratt* and *R v Pascoe* have in common is that the appellate courts there formed views that the cases against the appellants were overwhelming, and effectively that verdicts of guilty on the greater charge were inevitable[76].

100 *Ross* is also distinguishable from this case. It was one in which competent counsel made an informed decision to abstain from seeking a direction on an alternative verdict of manslaughter for reasons described by Knox CJ, Gavan Duffy and Starke JJ as potent ones[77]. Higgins J agreed with the reasoning of their Honours[78] but in doing so seems to have been affected by a reticence in

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72 See *Gammage v The Queen* (1969) 122 CLR 444 at 463 per Windeyer J.

73 (1996) 190 CLR 348 at 367.

74 *R v Hunt* [1968] 2 QB 433 at 436.

75 (1987) 44 SASR 591 at 593.

76 *Evans and Lewis* [1969] VR 858 at 867; *R v Iannazzone* [1983] 1 VR 649 at 652; *Anthony Thomas Spratt* (1982) 8 A Crim R 361 at 369, 372 and *R v Pascoe* unreported, Court of Appeal of Queensland, 19 December 1997. See also *Ross v The King* (1922) 30 CLR 246 at 254.

77 (1922) 30 CLR 246 at 253.

78 (1922) 30 CLR 246 at 270-271.

applying only relatively recently enacted legislation to permit such an appeal, a reticence that in terms neither that nor later legislation demands[79]. Their Honours were also of the view that the case was one in which no reasonable jury could have found a verdict of manslaughter[80]. But on this issue, as in the Court of Appeal here, the Court was not unanimous. Isaacs J[81] (in dissent) was of the opinion that manslaughter may have been open on the evidence and a direction accordingly was required notwithstanding counsel's considered election not to seek it.

101 The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.

102 I would agree with the statement that was made by Pincus JA in *R v Donald*[82] in these terms:

> "Circumstances can well be imagined in which failure to direct the jury of the possibility of a verdict of guilty of a lesser offence than that of which an offender has been convicted may cause injustice. That will surely be so, in general, if the lesser verdict is open on the evidence and has been raised as a possibility by the defence. In the present cases, the defence did not ask that the jury be directed that, even if they found that Mr Timms had been murdered, s 8 might justify a verdict, against persons other than the actual perpetrator, of manslaughter only; but that might have well been because of the decision in *Hind and Harwood*[83]. I agree with McPherson JA and with Davies JA that the *Ross* line of authority does not conclude this point in favour of the Crown. The real question is whether, in all the circumstances, the failure to direct in accordance with what has been held by the High Court to be the true interpretation of s 8 caused either of the trials in question to miscarry."

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79 (1922) 30 CLR 246 at 273-274.

80 (1922) 30 CLR 246 at 254.

81 (1922) 30 CLR 246 at 256.

82 Unreported, Court of Appeal of Queensland, 19 December 1997.

83 (1995) 80 A Crim R 105.

103 The question which his Honour posed is the right question and in this case it should have been answered in the affirmative.

104 I would allow the appeal, set aside the verdict of guilty and order that there be a new trial.