

# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
GAUDRON, McHUGH, HAYNE AND CALLINAN JJ

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TODD ANDREW HARWOOD

APPELLANT

AND

THE QUEEN

RESPONDENT

*Harwood v The Queen*  
[2002] HCA 20  
23 May 2002  
B49/2001

## ORDER

*Appeal dismissed.*

On appeal from the Supreme Court of Queensland

### **Representation:**

A J Rafter for the appellant (instructed by Legal Aid Queensland)

L J Clare for the respondent (instructed by Director of Public Prosecutions (Queensland))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Harwood v The Queen**

Criminal Law – Homicide – Unlawful killing – Appellant and co-accused engaged in armed robbery – Co-accused shot and killed victim – Appellant and co-accused tried jointly – Whether common intention to prosecute an unlawful purpose – Whether, if co-accused convicted of murder, appellant could be convicted of manslaughter.

Criminal Law – Directions to the jury – Failure to direct the jury to possibility, if co-accused convicted of murder, of finding appellant guilty of manslaughter – Whether absence of direction gave rise to a miscarriage of justice.

*Criminal Code (Q)*, ss 8, 289, 291, 293, 300, 302, 303.



1 GLEESON CJ, GAUDRON, McHUGH, HAYNE AND CALLINAN JJ.  
Following a trial in the Supreme Court of Queensland, the appellant, Todd Andrew Harwood, and a co-accused, Gary Hind, were convicted of the murder of Raymond Bowering. Both appealed unsuccessfully to the Court of Appeal. The appellant now appeals to this Court.

### The facts

2 The deceased, Raymond Bowering, was shot dead outside the cafeteria at the Bundaberg coach terminal on 16 February 1994. The appellant and Hind had gone to the coach terminal to rob the cafeteria. Hind walked over to the deceased who was sitting in front of the cafeteria and told him to move. When he refused, Hind shot him at close range with a "cut down 22".

3 The appellant knew that Hind was armed, stating in a record of interview with investigating police that the rifle had been taken "as a sort of persuader". He also knew that there were shells in the car, but said he "didn't know there was one ... actually in the chamber".

### The case against the appellant

4 The case against the appellant was based on his and Hind's having had a common intention to prosecute an unlawful purpose, namely, to commit armed robbery. In this regard, s 8 of the *Criminal Code* (Q) ("the Code") provided<sup>1</sup>, as at the date of the events in question, that:

" When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

5 The case against Hind was left to the jury on the basis that he could be convicted of murder either if he voluntarily discharged the firearm with the intention of causing death or grievous bodily harm or if the presentation of the loaded gun was an act likely to endanger human life and was done in the

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1 Section 8 was subsequently amended, but not in any material respect, in accordance with s 29 of the *Reprints Act* 1992 (Q).

Gleeson CJ  
Gaudron J  
McHugh J  
Hayne J  
Callinan J

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prosecution of an unlawful purpose<sup>2</sup>. The jury was also instructed that, if not satisfied as to murder, Hind could be convicted of manslaughter on the basis that he was criminally negligent in his handling of the firearm<sup>3</sup>.

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2 Sections 302(1) and (2) respectively. At the relevant time s 302 provided:

" Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say,-

- (1) If the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous [sic] bodily harm;
- (2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

...

is guilty of murder."

3 Sections 289, 291, 293, 300 and 303 of the Code.

At the relevant time s 289 provided:

" It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger: and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

Section 291 provided that:

" It is unlawful to kill any person unless such killing is authorised or justified or excused by law."

Section 293 provided that:

"any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person."

(Footnote continues on next page)

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6        So far as is presently relevant, the jury was instructed that the appellant could be convicted of murder either if the killing of Bowering by Hind's discharge of the gun with intent to cause death or grievous bodily harm was a probable consequence of the prosecution of their common unlawful purpose to commit armed robbery or if the presentation of the loaded gun was an act likely to endanger human life which caused the death of Bowering and was a probable consequence of the prosecution of their unlawful purpose. The jury was further instructed that, if not satisfied that the appellant was guilty of murder, he could be convicted of manslaughter if death as the result of the negligent handling of the firearm was a probable consequence of the prosecution of his and Hind's unlawful purpose of armed robbery.

7        Although it had initially proposed so to do, the prosecution declined to advance any argument to the effect that the appellant might be guilty of manslaughter on any basis other than the negligent handling of the firearm. In this regard, prosecuting counsel noted, prior to final addresses, that there was a "theoretical possibility" that Hind had deliberately shot at the deceased "but without intention [to cause death or grievous bodily harm] and not in the course of the prosecution" of his and the appellant's unlawful purpose. However, he specifically stated that he was not relying on that possibility.

8        Notwithstanding his earlier decision not to advance a case of manslaughter against the appellant based on Hind's deliberate firing of the gun without intending to cause death or grievous bodily harm, prosecuting counsel suggested, after the jury retired, that it be directed that the appellant could be convicted of murder on that very basis. Such a case had earlier been foreshadowed and then abandoned. Defence counsel objected to the jury being directed on this "totally new basis" and, as events happened, the jury returned guilty verdicts before the trial judge decided whether further directions would be given.

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Section 300 provided that:

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

Section 303 provided that:

"        A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter."

9           It follows from the way in which the matter was left to the jury that, subject to its satisfaction as to the requirements of s 8 of the Code with respect to common purpose, the appellant could be convicted of murder only if Hind were convicted of murder and only on the same basis. That is because the case against the appellant which was left to the jury was the exact counterpart of the case made against Hind. In particular, it did not take account of the possibility that Hind might have discharged the firearm with the intention of causing death or grievous bodily harm although the probable consequences of their common purpose did not include that intention but extended only to the discharge of the gun.

10           Because the case advanced by the prosecution against the appellant was the exact counterpart of the case against Hind, it also follows that the appellant could be convicted of manslaughter only if Hind were convicted of manslaughter and only on the same basis. Moreover and, presumably, because of the counterpart nature of the cases against Hind and the appellant, no instruction was given to the jury on the question whether, if Hind were convicted of murder, Harwood could be convicted of the lesser offence of manslaughter. And no such direction was requested by the appellant's counsel.

#### The decision of the Court of Appeal

11           The question whether, if Hind were convicted of murder, the appellant could be convicted of manslaughter arose in the Court of Appeal. It was held, by majority (Fitzgerald P and Pincus JA, McPherson JA not deciding), that s 8 of the Code precluded that possibility<sup>4</sup>. In this regard, the Court of Appeal declined to follow its earlier decision in *R v Jervis*<sup>5</sup>.

12           Subsequent to the Court of Appeal's decision in this matter, this Court held in *R v Barlow*<sup>6</sup> that *Jervis* was correctly decided and that s 8 does not preclude a person deemed guilty by reason of common unlawful purpose from being convicted of a lesser offence than the principal offender. Further, it was

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4   *Hind and Harwood* (1995) 80 A Crim R 105 at 136 per Fitzgerald P, 141 per Pincus JA.

5   [1993] 1 Qd R 643.

6   (1997) 188 CLR 1.



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expressly said in *Barlow* that the view taken by the Court of Appeal in the present matter was wrong<sup>7</sup>. Following that decision, the appellant sought and obtained special leave to appeal out of time to this Court.

### The issues

13        The first question that arises in this appeal is whether the jury should have been instructed that, if Hind were to be convicted of murder, the appellant could, nonetheless, be convicted of manslaughter. If that question is answered in the affirmative, the further question arises whether, in the circumstances, the failure to instruct the jury in that way resulted in a miscarriage of justice.

14        In this Court, the only basis upon which it was put that Hind might have been convicted of murder and the appellant convicted of manslaughter was that, although Hind had deliberately fired the gun, the probable consequence of the prosecution of his and the appellant's unlawful purpose did not include an intention to cause death or grievous bodily harm. That, of course, is the factual basis which, the prosecution suggested after the jury retired, would permit of a finding that the appellant was guilty of murder.

15        At the relevant time the Code defined murder to include "death ... caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life"<sup>8</sup>. The deliberate discharge of a gun at or near a place such as that which was the target of the planned armed robbery is an act which the jury might well have found "likely to endanger human life" – a finding which would have exposed the appellant to conviction for murder on a basis additional to those already left to the jury, as prosecuting counsel suggested after the jury retired. Only if the jury failed to be satisfied that the discharge of the gun was an act likely to endanger human life could the appellant have been convicted of manslaughter.

16        Because it would have been open to the jury to find that the intentional discharge of the firearm was an act "likely to endanger human life", it would not have been correct for the trial judge simply to instruct the jury that, in the event that the probable consequences of the prosecution of the common unlawful purpose extended only to an intentional discharge of the gun, the appellant could

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7    (1997) 188 CLR 1 at 11 per Brennan CJ, Dawson and Toohey JJ.

8    Section 302(2).

be convicted of manslaughter notwithstanding Hind's conviction for murder. Rather, it would have been necessary to instruct the jury that he could be convicted of murder if the intentional discharge of the gun was an act likely to endanger human life and could be convicted of manslaughter if the jury was not satisfied that it was an act of that kind. The failure to direct the jury in that way was, in a strict sense, an error of law. That is not to say, however, that the appellant's conviction involved a miscarriage of justice.

17 In *Gilbert v The Queen*<sup>9</sup> this Court held that a miscarriage of justice was occasioned by a positive direction to the jury that Gilbert, who had been charged with murder pursuant to the enabling or aiding provisions of s 7 of the Code<sup>10</sup>, was not guilty of either murder or manslaughter if he did not know that the principal offender intended to cause death or grievous bodily harm but knew only that he intended to assault the victim. It was held in that case that because, on the evidence, Gilbert's conviction for murder was not inevitable, the positive instruction had deprived him of a chance of being acquitted on that charge and being convicted, instead, of manslaughter.

18 The present is a very different case from that considered in *Gilbert*. First, there was no positive direction of the kind considered in that case. Additionally, the failure to direct with respect to the issues that would fall for consideration if the jury were satisfied that the probable consequences of the prosecution of the common unlawful purpose extended to the firing of the weapon but not to an intention to cause death or grievous bodily harm limited the bases upon which the appellant might be convicted of murder and, also, of manslaughter.

19 The case against the appellant for murder proceeded on mutually exclusive bases, namely, the firing of the weapon with the intent to cause death or grievous bodily harm and the mere presentation of a loaded gun. This had the

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9 (2000) 201 CLR 414.

10 Section 7(1) of the Code relevantly provides:

" 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-

...

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence".

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consequence that a finding by the jury that Hind fired the weapon intending to cause death or grievous bodily harm but that the probable consequence of the prosecution of his and the appellant's unlawful purpose did not include any such intention would, in the circumstances, have resulted in the appellant's acquittal of murder entirely, leaving him to be convicted, if at all, of manslaughter and only on the basis of Hind's negligent handling of the weapon.

20           It follows that the trial judge's failure to direct the jury resulted in a considerable forensic advantage to the appellant. Accordingly, there was, in the circumstances, no miscarriage of justice.

Order

21           The appeal should be dismissed.



