HIGH COURT OF AUSTRALIA

GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MITCHELL JAMES UGLE APPELLANT

AND

THE QUEEN RESPONDENT

Ugle v The Queen [2002] HCA 25
20 June 2002
P61/2001

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of Western Australia dated 15 March 2001 and, in lieu thereof, order that:*

   (a) the appellant's appeal to that Court be allowed;

   (b) the appellant's conviction be quashed and a new trial be had.

On appeal from the Supreme Court of Western Australia

Representation:

A G Braddock SC with R W Richardson for the appellant (instructed by Aboriginal Legal Services of Western Australia)

K P Bates with S A Vandongen for the respondent (instructed by the Director of Public Prosecutions (Western Australia))

CATCHWORDS

Ugle v The Queen

Criminal law – Homicide – Unlawful killing – Murder – Deceased died from knife wound to chest – Whether stabbing was an unwilled act – Whether trial judge erred in failing to direct jury about unwilled acts – Whether trial judge's failure to direct jury gave rise to a substantial miscarriage of justice so that a new trial should be ordered – Whether "event" arguably occurred "by accident".

Words and phrases – "accident" – "act" – "event" – "unwilled act".

The Criminal Code (WA), s 23.

1 GAUDRON J. The facts, the issues presented at the appellant's trial and the relevant provisions of *The Criminal Code* (WA) are set out in the joint judgment of Gummow and Hayne JJ and need not be repeated. And subject to what appears below, I agree with their Honours, for the reasons they give, that this appeal should be allowed.

2 On the question of willed act, a majority of the Court of Criminal Appeal of Western Australia (Parker and Wheeler JJ, Wallwork J dissenting) took the view that the trial judge "effectively ... resolve[d] the issue whether or not on the [appellant's] account his act in using the knife to wound the deceased occurred independently of the exercise of his will in the [appellant's] favour, by directing the jury to return verdicts of not guilty if they accepted [his] account or were left in reasonable doubt by it"[1]. Were I of the view that the jury must have understood the trial judge's direction in that way, I would be of the further view that there was no miscarriage of justice and that the appeal should be dismissed. However, I do not think that the trial judge's directions can be so understood.

3 In his summing up, the trial judge summarised the appellant's version of events and said that the defence case was that "[the appellant] had no choice but to defend himself". His Honour instructed the jury that, if that were so, they "would be entitled to take the view ... [the appellant] ... was acting lawfully in self-defence". It was in that context that his Honour directed the jury that, if they accepted the appellant's version or were left with a reasonable doubt, they should find him and his co-accused not guilty. Subsequently, his Honour directed the jury in these terms:

> " Ask in particular whether he was acting in self-defence and, if so, whether he went further than the law permits. If you are satisfied beyond reasonable doubt that self-defence has no application in this case, you would find the killing ... to be unlawful."

4 The appellant's version of events was not confined to the proposition that he "did not use the knife as a weapon". Rather, it was a version in which he had been attacked and struck by the deceased with a cricket bat on the side of his head and in which he tried to fend off the assailant but "did not use the knife as a weapon". There was nothing in the trial judge's directions to suggest to the jury that they should do other than consider the entire version given by the appellant, not merely whether or not "he used the knife as a weapon". That being so, it is impossible to conclude that the question of willed act was effectively determined by the trial judge in favour of the appellant.

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1 *Ugle v The Queen* [2000] WASCA 381 at [65] per Parker J.

5 As Gummow and Hayne JJ point out, the question of willed act was logically anterior to the questions whether, by reason of self-defence, the killing in question was lawful and, if not, whether it was done with the intention to kill or do grievous bodily harm. That anterior question should have been left to the jury. It was not.

6 The appeal should be allowed, the order of the Court of Criminal Appeal dismissing the appeal to that Court should be set aside and, in lieu thereof, the appeal to that Court should be allowed, the conviction quashed and a new trial ordered.

7 GUMMOW AND HAYNE JJ. The appellant and another man (Aaron James Haworth) were charged with the wilful murder of James Leonard Byrne. After a trial in the Supreme Court of Western Australia the appellant was convicted of murder, as distinct from wilful murder. Under *The Criminal Code* (WA) the offence of wilful murder requires proof of an intention to kill the victim or some other person[2]. By contrast, the offence of murder is committed by a person who unlawfully kills another under any of several different circumstances, including if the offender intends to do to the victim or some other person some grievous bodily harm[3].

8 The appellant appealed to the Court of Criminal Appeal against his conviction. By majority (Parker and Wheeler JJ; Wallwork J dissenting), the Court of Criminal Appeal dismissed his appeal[4].

9 The issue in the appeal to this Court is whether the Court of Criminal Appeal should have held that, the trial judge having not directed the jury about unwilled acts and events occurring by accident, there had been a wrong decision of a question of law or a miscarriage of justice[5]. For the reasons that follow, the appeal should be allowed, the order of the Court of Criminal Appeal set aside and in lieu there should be orders allowing the appeal to that Court and directing that a new trial be had.

The facts

10 The deceased died from a knife wound to the chest. There was no dispute at trial that the appellant was holding the knife when the deceased sustained that wound. On the evening that the death occurred the appellant's co-accused, Mr Haworth, and a companion had gone to a block of flats at which the deceased lived. There was a disturbance and Mr Haworth said at the trial that the deceased, armed with a cricket bat, had chased after him and his companion. According to Mr Haworth, the deceased struck him with the bat. Mr Haworth returned to a friend's house nearby where he, the appellant and others had spent much of the day.

11 A short time later, Mr Haworth and the appellant went back to the vicinity of the flats. The appellant took with him a kitchen knife he had picked up from

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2 *The Criminal Code* (WA), s 278.

3 s 279(1).

4 *Ugle v The Queen* [2000] WASCA 381.

5 s 689(1).

the kitchen of the house at which he had spent the day. Mr Haworth said at the trial that he had armed himself with a brick and, perhaps, later a piece of wood. They encountered the deceased who was, so they said, still armed with the cricket bat.

12 The appellant's evidence in chief was that the deceased attacked and struck him with the cricket bat, causing the appellant to lose balance. As the deceased went to hit him again he put his hand up to push the deceased off. Having done so, and seeing the deceased about to strike him again, the appellant said he ran away. On returning to the friend's house he washed the knife because it had blood on it and he washed his hands. Neither in evidence in chief nor in cross-examination did he say when he first saw blood on the knife. In cross-examination the appellant reiterated that he had sought to fend off the deceased, and said that he did not realise that he stabbed him at that time. He denied using the knife to stab the deceased.

13 As was rightly recognised in the Court of Criminal Appeal[6], this evidence was open to at least three constructions. We would, however, state those different constructions of the evidence in rather different terms from those used in the Court of Criminal Appeal, if only to recognise the burden of proof which the prosecution bore.

14 First, it was open to the jury to conclude that, to fend off a blow by the deceased, the appellant had raised the arm and the hand in which he was carrying the knife and had pushed or hit the deceased, but that the prosecution had not established beyond reasonable doubt that the appellant had consciously used the knife to attack or wound the deceased. Secondly, it was open to the jury to conclude that, despite what the appellant said, the prosecution had not established beyond reasonable doubt that the appellant had not acted in self-defence. Thirdly, it was open to the jury to conclude that the prosecution had established that the appellant had deliberately attacked the deceased with the knife. In that last event the question would then have been whether the deceased was proved to have done so intending to kill (and thus was guilty of wilful murder) or had done so intending only to do grievous bodily harm (and thus was not guilty of wilful murder but guilty of murder).

The trial judge's direction

15 At trial, the appellant's principal argument focused upon self-defence. Nonetheless, it was recognised that, the appellant having said in cross-examination that he was not aware that he had stabbed the deceased, there

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6 *Ugle v The Queen* [2000] WASCA 381 at [63] per Parker J.

may be some question about the operation of the provision of *The Criminal Code*[7] dealing with an act or omission which occurs independently of the exercise of the will of an accused person and an event which occurs by accident. Counsel appearing for the appellant at trial mentioned these matters in the course of her final address to the jury. The address not being transcribed, there is no record of how they were put to the jury.

16 Before the trial judge began his charge to the jury, he asked counsel how questions of unwilled act or accident were open, and what should be said to the jury about them. Trial counsel for the appellant pointed to the evidence that the appellant had given in cross-examination. The exchanges between the trial judge and trial counsel that followed could be understood as counsel asking for a direction about unwilled acts and the trial judge deciding not to do so. On the question of accident, trial counsel said that "I certainly don't suggest it was accident, no".

17 In his directions to the jury, the trial judge said that "[t]he version of [the appellant] is that the fatal wound must have been inflicted when he was trying to defend himself against a life-threatening attack". His Honour went on:

> "Ugle told you that he pushed the other man, he tried to fend him off, and he told you that as far as he was aware he had hit the other man's arm, so on his version – although it's quite clear that he had the knife in his hand at the time, on his version Ugle did not use the knife as a weapon."

18 A little later in his directions the trial judge said that a question which he suggested that the jury needed to ask, and an approach that "probably, inevitably" they would find it necessary to take, was to ask whether the fatal injury had happened as the appellant said, or must it have been caused by the deliberate stabbing of the deceased. In concluding his directions, his Honour said to the jury: "What was in the mind of each of the accused when the fatal blow was struck? …. Are you satisfied beyond reasonable doubt that when [the appellant] inflicted the fatal wound, he intended to kill the other man?"

The appeal to the Court of Criminal Appeal

19 The Court of Criminal Appeal divided on the sufficiency of the directions given by the trial judge in relation to self-defence. That issue does not arise in the appeal to this Court. On the questions of unwilled act and accident, Parker J, with whose reasons Wheeler J agreed, concluded that the instructions given to the jury by the trial judge had sufficiently directed the jury's attention to the real

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7 s 23.

issues in the trial[8] and that the effect of the charge had been to favour the appellant and disadvantage the prosecution[9]. In his Honour's view, the trial judge had, in effect, resolved any question about unwilled act in favour of the appellant by directing the jury to return verdicts of not guilty "if they accepted [the appellant's] account or were left in reasonable doubt by it"[10].

The Criminal Code and homicide

20 To understand the way in which the provisions of s 23 were engaged in this case, it is necessary to begin by saying something further about the provisions of *The Criminal Code* which deal with homicide. Chapter XXVIII in Pt V of the Code, which deals with "Homicide: Suicide: Concealment of birth", begins with s 268 providing that "[i]t is unlawful to kill any person unless such killing is authorised or justified or excused by law".

21 Section 277 provides that:

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

Section 270 provides that "[a]ny person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person."

22 Each of the offences referred to in s 277 is dealt with separately. Section 278 defines "wilful murder"; s 279 defines "murder"; s 280 provides that "[a] person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter". All of ss 277, 278, 279 and 280 speak of a person "who unlawfully kills another" and thus each can be taken to refer back to s 268 and its provisions that it is unlawful to kill another unless the killing is authorised or justified or excused by law. Further, both ss 278 and 279 begin by saying that "[e]xcept as hereinafter set forth, a person who unlawfully kills another" under the circumstances mentioned in the section is guilty of the offence with which the section deals. The subsequent provisions contemplated by this exception include s 281 and its provisions about killing on provocation. They do not include provisions dealing with self-defence. Those provisions appear earlier in the Code (ss 248, 249, 260).

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8 [2000] WASCA 381 at [64].

9 [2000] WASCA 381 at [108].

10 [2000] WASCA 381 at [65].

The Criminal Code, s 23

23 Overarching all these provisions, there are the several provisions found in Ch V in Pt 1 of the Code, about criminal responsibility, including, in particular, the provisions of s 23. That section provides:

> "Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.
>
> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
>
> Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

Section 23 therefore provides for circumstances in which the killing of another is excused by law.

24 The opening words of the section, "[s]ubject to the express provisions of this Code relating to negligent acts and omissions" have particular work to do in some cases of homicide. If it is alleged that the accused caused the death of another by some unlawful and dangerous act, or by criminal negligence, it might be supposed, but for this opening qualification to s 23, that the provisions of s 23 might be engaged with the result that the accused is not to be held criminally responsible. What the opening qualification makes clear, however, is that in such a case reference must be made to those provisions of the Code which relate to negligent acts or omissions. In particular, it would be necessary to take account of provisions like s 265 concerning the duty of persons doing dangerous acts, s 266 concerning the duty of persons in charge of dangerous things, and s 267 concerning the duty to do certain acts[11]. On a new trial of the appellant, such issues may arise, but for the moment they can be put to one side and attention directed to the other elements of s 23.

25 Section 23 deals with two subjects, unwilled acts and events occurring by accident. It is convenient to deal first with the accident limb. As has been noted earlier, trial counsel disavowed reliance on the limb of s 23 which deals with events occurring by accident. She was right to do so. The evidence led at the

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11 *Callaghan v The Queen* (1952) 87 CLR 115.

appellant's trial did not raise an issue about an *event* that occurred by accident. There was, however, an issue about whether there may have been an unwilled *act*.

26 The distinction which is made in s 23 between "acts" and "events" is not without difficulty. In the joint reasons of three Justices in *R v Falconer*[12] it was said of s 23 of *The Criminal Code* that:

> "[t]he first limb of s 23 requires the act to be willed; the second limb relates to events consequent upon the act: it excludes from criminal responsibility consequences of the act which are not only unintended but unlikely and unforeseen".

At least a majority of the members of the Court held in *Falconer* that the "act" of which s 23 speaks is, in a context like the present, the "death-causing act … not the death itself"[13]. It is not necessary to consider whether that formulation of the meaning to be given to "act" in s 23 leaves some unanswered questions. For present purposes, it is enough to notice that a distinction is to be drawn between the "act", with which the first or unwilled act limb of s 23 deals, and the "event", with which the second or accident limb deals.

27 It appears not to have been disputed in the Court of Criminal Appeal, or in this Court, that in the present case the relevant "event" against which the accident limb of s 23 had to be considered was the death of the deceased. There was, however, no issue raised at the trial about whether the consequences of the knife entering the body of the deceased were unlikely or unforeseen. That being so, the accident limb of s 23 was not engaged. What was in issue, however, was whether the insertion of the knife in the body of the deceased was a voluntary act – an act "willed" by the appellant. One view of the evidence that the jury might have taken was that the prosecution had not proved that it was. And that was a question for the jury, not a question to be decided by the judge. It follows that the jury should have been directed to consider this issue.

28 In this Court, the respondent did not dispute that the jury should have been directed to consider whether the act of inserting the knife in the body of the deceased was an act willed by the appellant. It was submitted that, nonetheless,

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12 (1990) 171 CLR 30 at 38 per Mason CJ, Brennan and McHugh JJ.

13 *R v Falconer* (1990) 171 CLR 30 at 38 per Mason CJ, Brennan and McHugh JJ, 81 per Gaudron J. See also *Vallance v The Queen* (1961) 108 CLR 56; *Mamote-Kulang v The Queen* (1964) 111 CLR 62; *Timbu Kolian v The Queen* (1968) 119 CLR 47; *Kaporonovski v The Queen* (1973) 133 CLR 209.

there had been no miscarriage of justice or, if there had been a miscarriage, the proviso to s 689(1) applied, no substantial miscarriage of justice having actually occurred.

29 As Parker J pointed out[14], the trial judge told the jury, in effect, that if they were not persuaded beyond reasonable doubt that the appellant's version of events (that he "did not use the knife as a weapon") was false, they should return a verdict of acquittal. This direction, however, did not cure the difficulty presented by there being no direction about whether the act of inserting the knife was an act that occurred independently of the exercise of the appellant's will.

30 Similarly, in the circumstances of this case, requiring the jury to consider what was the intention with which the "fatal blow was struck" did not cure the difficulty. Lying behind both the question of use of the knife "as a weapon", and the question of a fatal blow being "struck", was the logically prior question whether the knife had entered the body of the deceased independently of the exercise of the will of the appellant. Did the appellant put the knife in the body of the deceased, or did the deceased impale himself on the knife the appellant was holding? Once it is recognised that the evidence at trial could have been understood by the jury as not proving the former beyond reasonable doubt, that was an issue to which the jury's attention should have been, but was not, directed. Both the direction about using the knife as a weapon and the direction about the intention with which the fatal blow was struck assumed that the act had been done in the exercise of the appellant's will.

31 This is not a case in which the proviso to s 689(1) applies. It is not necessary in this case to consider the relationship between the requirement in s 689(1) that the Court of Criminal Appeal allow an appeal against conviction if "on any ground there was a miscarriage of justice" and the proviso's reference to "substantial miscarriage of justice"[15]. The jury's verdict having been taken without their attention being directed to the question of willed act, it is not possible to say that the appellant did not lose a chance of acquittal fairly open to him[16]. It was for the jury to assess the evidence given by the appellant and this Court is not able to say that a jury, properly instructed, would necessarily have decided beyond reasonable doubt that the act of inserting the knife in the body of the deceased was an act willed by the appellant. Of course the conclusion that there was a willed act by the appellant was consistent with the principal way in

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14 [2000] WASCA 381 at [64]-[65].

15 *Festa v The Queen* (2001) 76 ALJR 291; 185 ALR 394; *Grey v The Queen* (2001) 75 ALJR 1708; 184 ALR 593; *R v Gallagher* [1998] 2 VR 671.

16 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

which he put his case (that he acted in self-defence), but it was for the jury to evaluate *all* the evidence that he gave.

32 The appeal should be allowed and the consequential orders referred to earlier should be made.

33 KIRBY J. This appeal from the Court of Criminal Appeal of Western Australia[17] concerns the meaning of s 23 of the *Criminal Code* of that State ("the Code").

34 The appeal was argued together with an appeal from the Court of Appeal of Queensland in *Murray v The Queen*[18]. That course was taken to protect the appellants, should a common point prove determinative and to permit this Court to have contrasting facts with which to test the parties' respective legal propositions. Relevantly, the provisions of s 23 of the Code are the same as those of the *Criminal Code* (Q), considered in *Murray*[19].

35 Whereas, ultimately, *Murray* could be disposed of by a majority of this Court by reference to an error found in relation to the directions given to the jury concerning the burden of proof of contested facts, no such complication intrudes in this appeal. Here, it is necessary for all members of this Court to decide the point raised concerning s 23. Necessarily, the views expressed on that provision in *Murray* apply equally to this appeal. However, having regard to the way in which the cases were respectively presented at trial, different questions arise concerning the "proviso"[20].

The facts and legislation

36 *The evidence and conviction of the appellant*: The relevant facts leading to the charge brought against Mr Mitchell Ugle ("the appellant") arising out of the death of Mr James Byrne ("the deceased") are set out in the reasons of the other members of this Court[21]. So are the applicable details of the conduct of the trial[22] and of the trial judge's directions to the jury[23]. So also are the applicable provisions of the Code.

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17 *Ugle v The Queen* [2000] WASCA 381.

18 [2002] HCA 26.

19 The provisions of the Queensland *Criminal Code* s 23(1) have been broken into paragraphs. The Western Australian Code appears in the form of the unbroken text proposed by Sir Samuel Griffith and initially enacted in Queensland: *R v Van Den Bemd* (1994) 179 CLR 137 at 140.

20 *Criminal Code* (WA), s 689(1).

21 Reasons of Gummow and Hayne JJ at [10]-[14]; reasons of Callinan J at [58]-[65].

22 Reasons of Callinan J at [66]-[67].

37 The appellant was charged with "wilful murder", a distinct offence against the Code that requires proof of an intention to kill the victim or some other person[24]. He was acquitted of that charge but convicted of murder, an offence of homicide requiring proof of an intent to do the victim or some other person grievous bodily harm[25].

38 *A strong prosecution case*: As in *Murray*, on the evidence adduced at the trial, the prosecution case was strong. The appellant accompanied a friend to intrude in a fight between the friend and the deceased. The appellant took with him a kitchen knife. Such a knife was self-evidently a dangerous weapon. It was not suggested that the appellant did not realise that he had the knife in his right hand; that he was holding the knife when confronting the deceased; or that he had pushed the deceased in the course of a struggle with him. The medical evidence showed that, in order to penetrate the vital organs of the deceased, it was necessary for considerable force to be exerted so as to cut a rib and reach the deceased's lungs and heart. After the confrontation, the appellant and his friend ran from the scene to the adjacent house where they had spent the day. By the time of his return to that house, the appellant knew that something very serious had happened. He had to wash blood from the knife and from his hands.

39 The appellant's friend stood trial with him. He was convicted of manslaughter. His case does not concern this Court. On the face of things upon the foregoing evidence, after a trial properly conducted, it would have been open to a jury to conclude, to the requisite standard, that carrying a kitchen knife deliberately into an altercation and wielding it in the course of a close struggle that concluded in the death of the deceased, involved an intention to do the victim some grievous bodily harm. Under the Code, where death ensued, that could amount to murder.

40 *The appellant's defence*: However, there were facts proved in evidence led before the jury that constituted the appellant's defence to the charge. Those facts required classification in terms of the provisions of the Code. Their accurate classification was, ultimately, the duty of a jury, guided by directions on the applicable law given by the trial judge.

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23 Reasons of Gaudron J at [3]; reasons of Gummow and Hayne JJ at [15]-[18]; reasons of Callinan J at [68].

24 *Criminal Code* (WA), s 278.

25 *Criminal Code* (WA), s 279(1).

41 The relevant facts were that the appellant swore that he had not wanted to fight the deceased and certainly not to stab him. Indeed, he gave evidence that, during the struggle, he did not realise that he had stabbed the deceased. He denied using the knife for that purpose. As the trial judge (Heenan J) explained to the jury that, by reason of the fracas, there was no significant evidence on the point save that of the appellant himself. The jury might disbelieve that evidence as self-serving. They might prefer to regard as determinative the objective fact that the appellant had deliberately bought into an argument of no direct concern to him, wielding a potentially dangerous knife. Nevertheless, there was the appellant's sworn evidence. One might add that the appellant was entitled to rely on the suggested unlikelihood that a person, easily traced to a neighbouring home, would deliberately set out to kill or stab someone with whom he had no personal quarrel.

42 Inevitably perhaps, the actual evidence of the physical interaction between the appellant and the deceased was somewhat confusing. The blows occurred within a very short interval of time. But as Gummow and Hayne JJ have expressed it, the ultimate factual question posed by the evidence was whether the prosecution had proved that the appellant had struck the deceased with the knife. Or whether, after considering the appellant's testimony, the jury might conclude that this was not a case where stabbing was proved but, rather, that the prosecution had not excluded the possibility that the deceased had impaled himself on the appellant's knife independently of the exercise of the will of the latter[26].

The adequacy of the directions on unwilled acts

43 *Distinguishing self-defence*: The Court of Criminal Appeal concluded that, as the evidence stood at the end of the trial, the case was open to at least three constructions. In summary form, these were (1) proof by the prosecution of intentional killing of the deceased by the appellant; (2) a failure of the prosecution to exclude self-defence; and (3) a failure of the prosecution to exclude the hypothesis that the act had occurred independently of the exercise of the accused's will[27]. It follows from my opinion in *Murray* that there was a fourth construction upon which the jury required directions, namely (4) a failure of the prosecution to exclude accident[28]. In this case, the fourth construction is

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26 Reasons of Gummow and Hayne JJ at [31].

27 *Ugle v The Queen* [2000] WASCA 381 at [63]; see reasons of Gummow and Hayne JJ at [19].

28 *Murray v The Queen* [2002] HCA 26 at [99]-[101].

complicated by a concession made by the appellant's counsel at the trial. It only needs to be dealt with to meet the requirement for guidance in a retrial[29].

44 For the moment I will postpone consideration of the excuse of accident. As it was not argued in this Court, is negatived by the jury's verdict and is inconsistent with the principal point argued for the appellant, I shall likewise ignore the justification of self-defence.

45 This leaves the question of directions to the jury on the subject of unwilled acts, being the first of the excuses from criminal responsibility acknowledged in the first paragraph of s 23 as it appears in the Code.

46 On this point, it is enough to say that, in this Court, the prosecutor did not dispute the contention that the jury ought to have been directed to consider whether the "act" of inserting the knife into the body of the deceased was one that had occurred independently of the exercise of the appellant's will. That concession was rightly made. The exchange between the trial judge and trial counsel for the appellant indicates, clearly enough, that the latter maintained her request for such a direction. The trial judge obviously considered that it was sufficient to encapsulate the issue presented by the evidence in terms of the way in which the appellant had principally advanced the matter at trial, namely self-defence. The trial judge accurately directed the jury upon that issue. He did so as favourably to the appellant as the law and the facts allowed.

47 However, the appellant always faced serious problems with self-defence given that he had deliberately entered into the altercation and brought with him a dangerous kitchen knife. Furthermore, as the structure of the Code makes plain, there are various exculpations for what would otherwise be an unlawful killing[30]. The failure of the prosecution to negative self-defence is but one of them. The considerations mentioned in s 23 (unwilled acts and accidents) constitute other and separate excuses. They may separately excuse the accused from criminal responsibility whatever view the decision-maker takes about self-defence.

48 Once this is accepted, it was necessary for the trial judge, particularly in the face of the request of counsel, to provide instructions addressing the mind of the jury to the issue of unwilled acts as provided by s 23. The failure to do so was not waived at the trial. It was not irrelevant to the evidence. Contrary to the opinion of the majority of the Court of Criminal Appeal, it was not excused by

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29 cf *Jones v The Queen* (1989) 166 CLR 409 at 411, 415; *R v Chong Mun Chai* (2002) 76 ALJR 628 at 629 [3]; 187 ALR 436 at 437.

30 *Criminal Code* (WA), s 268.

other directions given by the trial judge. In this regard, I agree with the analysis of Gummow and Hayne JJ[31].

49 *Inapplicability of the proviso*: Nor was this omission one that would attract the application of the proviso[32]. A jury, properly instructed, might well reject the suggestion that the prosecution had failed to negative self-defence yet conclude that the prosecution had not excluded the real possibility that the act causing death had occurred independently of the exercise of the appellant's will. That view of the evidence would be open if the jury concluded that, as he asserted, the appellant had only brought the knife with him as a "scare tactic" and the act of insertion of the knife in the body of the deceased had only occurred when the deceased, in effect, rushed at the appellant, thereby impaling himself on the knife.

50 It cannot be said that such a conclusion is unavailable or that the appellant's conviction by a jury, properly instructed, was inevitable[33]. Thus, it cannot be said that the appellant has not lost a chance fairly open to him of acquittal that might follow a trial conducted with proper legal directions[34]. These conclusions require that the conviction be quashed and a new trial ordered.

Directions on accident were also available

51 *Availability of the excuse of accident*: Because a retrial must be had, it is appropriate for me to say something about accident. For present purposes I am prepared to assume that the express and informed waiver of that ground of excuse by experienced trial counsel rendered that issue unavailable to the appellant in the Court of Criminal Appeal or in this Court. Because the appeal must be allowed on other grounds, it is unnecessary finally to decide whether that is so. However, as the issue may arise in the retrial, the applicable law should be clarified.

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31 Reasons of Gummow and Hayne JJ at [27]-[29].

32 *Criminal Code* (WA), s 689.

33 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Festa v The Queen* (2001) 76 ALJR 291 at 326 [203]-[205]; 185 ALR 394 at 442.

34 *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Glennon v The Queen* (1994) 179 CLR 1 at 8; *Green v The Queen* (1997) 191 CLR 334 at 346-347, 358, 374; cf 387, 414-416.

52 My own opinion on that law is stated in *Murray*[35]. There is no relevant point of distinction between the Western Australian and Queensland Codes in this respect.

53 I agree that the juxtaposition of the words "act" and "event" in s 23 suggests that the successive excuses of unwilled acts or omissions and accidents do not refer to precisely the same constituents of the evidence. The "act", relevantly, appears more particular; the "event" more general. Thus I am prepared to accept that the "act" concerned is the "death-causing act"[36] whereas the "event" refers to the death of the deceased viewed in the circumstances of its happening.

54 But could the death of the deceased, on the evidence so viewed, reasonably be classified by the jury as having "occur[red] by accident"? Posed in terms of such generality, it is not an unarguable conclusion on the facts[37]. If, for example, the jury concluded that the appellant indeed went to the vicinity of the deceased's premises with the knife to scare him and to protect himself from the approach of the deceased wielding a heavy bat and to remonstrate against his earlier allegedly violent conduct and that, in the course of furthering such conduct, the deceased effectively impaled himself on the knife, it would, in my opinion, be open to the jury to conclude that the prosecution had not negatived the proposition that the deceased's death was an "event" that had occurred "by accident". Obviously it was not an "accident" that the appellant was carrying a knife. Nor was it an "accident" that he became involved in a physical struggle with the deceased. Each of those features of the "event" was reasonably foreseen to a reasonable person[38]. But if the jury accepted that the prosecution had not negatived the appellant's sworn testimony, it would, in my view, be open to them to conclude that the "event" (being the death of the deceased in the circumstances) had occurred "by accident". The death was, in this sense, unlikely and unforeseen. It was the product, in effect, of a sudden lunge by the deceased onto the knife held by the appellant in a position assumed in response to the deceased's attack on him. It was an accidental event. Upon these questions the appellant would be entitled to have the verdict of his jury.

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35 [2002] HCA 26 at [97]-[100].

36 *R v Falconer* (1990) 171 CLR 30 at 38; see also *Vallance v The Queen* (1961) 108 CLR 56 at 59; *Mamote-Kulang v The Queen* (1964) 111 CLR 62 at 69, 72, 85; *Timbu Kolian v The Queen* (1968) 119 CLR 47 at 52-53.

37 cf *R v Van Den Bemd* (1994) 179 CLR 137 at 153.

38 *Kaporonovski v The Queen* (1973) 133 CLR 209 at 232.

55 *Requirement of instruction on accident*: In the circumstances, bringing to bear their commonsense, the jury might well reject such contentions as unrealistic, given the risks of the situation into which the appellant had intruded and the special risks of carrying knives into such angry confrontations. Alternatively, once s 23 of the Code was enlivened, the jury would have to be instructed on the "express provisions of [the] Code relating to negligent acts and omissions". So instructed, the jury might conclude that those "express provisions" applied. However, because there was evidence to which, in my view, the "accident" excuse in s 23 of the Code applied, it would be the duty of the judge in like circumstances, with no waiver of counsel at a second trial, to instruct the jury on that provision of the Code. The identification of the "event" and its classification as "accidental" or otherwise were questions for the jury, properly instructed. Not for the judge. In the circumstances of this case, it is unnecessary to say anything further on that point. It lies in the future.

Orders

56 I agree in the orders proposed by Gaudron J.

57 CALLINAN J. This appeal was argued on the same day as, and raises similar questions with respect to the directions required in relation to unwilled acts and accident, to those raised in *Murray v The Queen*[39].

The facts

58 The appellant's co-accused, Haworth, and another person were involved in a disturbance in a building in Perth. The building contained a number of flats in one of which the victim, Mr Byrne, lived. Haworth and his companion were chased from the building by Mr Byrne who was wielding a cricket bat. Haworth said that he was hit on the elbow with the bat by Mr Byrne on that occasion. There was evidence that he called out that he would return and kill Mr Byrne.

59 Haworth, accompanied this time by the appellant, who had armed himself with a kitchen knife, did return to the vicinity of the building. Haworth took with him a brick and perhaps a piece of wood. The appellant's explanation for the knife was that he took it as a "scare tactic" to show the man with the bat that "he had something there".

60 The appellant said that he followed Haworth, who approached two men, one of whom proved to be Mr Byrne still holding the cricket bat. The appellant said that he called out "Why did you hit the boy for?" The man with the cricket bat, he said, "just bull-rushed me", swinging the bat at the same time.

61 It was the appellant's evidence that he raised his arm to fend off the bat as it was swung at him. He said that the bat struck his forearm and the side of his temple. He lost his balance. Then, he said, the man with the bat tried to hit him again and he put his [right] hand up "to push him off". He was holding the knife in his right hand. He said he did this "just to defend – just to push him back". He believed that he hit the man in the arm.

62 The appellant was asked what he thought would happen if he had not hit the man as he did. His answer was "I thought he was going to kill me. Because of the brute force that he hit me first off." He described the second swing with the bat as being aimed at "my head again". He claimed that he had not wanted to fight Mr Byrne.

63 Mr Byrne then moved, the appellant said, to hit him for a third time, at which point the appellant "spun around and took off". Haworth, who claimed he had been engaged with the fourth man, ran away with the appellant. They ran to their friend's house. There, on the appellant's evidence, he walked into the

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39 [2002] HCA 26.

bathroom and washed the knife "because it had blood on it". He returned the knife to the kitchen drawer and washed his hands.

64 In cross-examination at his subsequent trial the appellant reiterated that he had tried to fend Mr Byrne off. He said "Well, I hit him in the arm. I didn't realise that I stabbed him at that time." He denied that he had used the knife to stab the man. He did not suggest, however, that he did not realise that he was holding the knife in his hand as he sought to push Mr Byrne away from him.

65 The knife cut through a rib and penetrated Mr Byrne's lung and heart. The medical evidence was that a considerable degree of force would have been necessary to penetrate these organs. Mr Byrne collapsed in the street and died within a very short time.

The trial

66 The appellant and Haworth were charged with wilful murder. They were tried by Heenan J and a jury. Haworth was convicted of manslaughter, and the appellant of murder, alternative verdicts on a charge of wilful murder.

67 After counsel at the trial had addressed the jury the trial judge discussed the directions which he proposed to give. An exchange occurred which culminated in a concession by the appellant's counsel.

> "HEENAN J: Thinking about the matter over the weekend, it seemed to me that it would be appropriate for me to direct the jury that in relation to self-defence the jury should look at the situation from the point of view of your client. If they find that he was assaulted and there's evidence upon which they could find that he was assaulted, or at least sufficient evidence to raise a reasonable doubt as to that, how then did Ugle react? What force did he use? It seemed to me that it might well be appropriate for the jury to be told, 'You would need to consider what he did. Did he merely push or fend off the other man without necessarily deliberately stabbing him?'
>
> Ugle told the jury that he did not know that he stabbed the other man. He pushed. He fended off. I had thought that I would put to the jury, 'Was it a case of a deliberate stabbing,' as the prosecution, as I understand it, will say, 'or was it a case of fending, pushing, with a knife in Ugle's hand?' It seemed to me that that could be covered by reference solely to self-defence, but you mentioned accident and an unwilled act when you were speaking to the jury. If you are arguing that it might have been the case of an unwilled act, it might have been the case of accident, I wonder how that is open on the evidence and how it would be of assistance, or perhaps the appropriate question is, should I direct the jury as to accident and unwilled act? I see problems with that.

MS WAGER: Yes. Your Honour, the whole matter of unwilled act, in my submission, really arises from cross-examination and there was a very brief bit of evidence-in-chief in relation to that.

HEENAN J: You have referred the jury to that.

MS WAGER: To page 252.

HEENAN J: Yes. I have looked at page 252.

MS WAGER: There's a brief passage, and if your Honour will just bear with me, I will find it, in relation to examination.

HEENAN J: The passage you read began about halfway down.

MS WAGER: That's correct.

HEENAN J: 'I went to fend him off. I hit him in the arm.'

MS WAGER: In the arm, yes.

HEENAN J: 'I didn't realise that I stabbed him at that time.'

MS WAGER: Yes. That's page 237 which your Honour is referring to, yes.

HEENAN J: Yes.

MS WAGER: Yes.

HEENAN J: He didn't realise that he had stabbed him but how does that support an unwilled act?

MS WAGER: Your Honour, the evidence, in my submission, would indicate that he is talking about a push as opposed to a stabbing motion.

HEENAN J: Yes.

MS WAGER: So indicating that he, therefore, is unaware that he has the knife in his hand; that he is using the knife in that way.

HEENAN J: Then again at page 237 in his evidence-in-chief in the last third of the page.

MS WAGER: Yes.

HEENAN J: 'When the man had that bat up for the second time what happened? – I pushed – put my hand back up again and then I went to push him off.'

MS WAGER: Yes.

HEENAN J: 'You are indicating your left hand, up over your face and to push him off. And what happened? What were you trying to do? – Push him off … in the arm. I hit him in the arm.'

So you have your client saying that he had the knife in his hand; he tried to push the other man off, but the act was the act of pushing. That was willed. Isn't it appropriate to direct the jury, 'That's what the accused says. His defence is that by way of self-defence he pushed the other man off. He tried to fend him off. If that's what he was trying to do, you might well think that that was not excessive force or that it was no more force than was reasonably necessary.' Leaving it as a question of fact in relation to self-defence, why is it necessary to direct the jury in relation to the provisions of section 23 as to an unwilled act?

MS WAGER: Yes. It is my submission that reading page 252, the answers in cross-examination, together with those on 237 the push indicated that he wasn't aware that he had stabbed him, meaning he wasn't aware that he had the knife at that time. I certainly –

HEENAN J: I don't know that that's open to the jury. He has told the jury he set off with the knife.

MS WAGER: Yes.

HEENAN J: He told the jury in his evidence-in-chief he had the knife in his right hand. There's no evidence from him that he forgot he had the knife. As I understand it, there's no suggestion that he didn't realise he had the knife in his hand. That's the problem I see.

MS WAGER: Yes.

HEENAN J: It's a matter for me, Miss Wager, but that's the only basis upon which you say it's an unwilled act, is it?

MS WAGER: It is, your Honour, yes.

HEENAN J: I'm inclined not to direct the jury specifically as to that.

MS WAGER: Very well.

HEENAN J: Now, you mentioned accident.

MS WAGER: Yes, I did. That was –

HEENAN J: Do you say –

MS WAGER: No, that was by way of illustration of lawful acts, your Honour. I don't think I followed up with any further comments about that.

HEENAN J: You don't suggest that this was a case of accident.

MS WAGER: I certainly don't suggest it was accident, no."

68 During his summing up the trial judge gave a direction to the effect that there was a basis for concluding that the prosecution had not negatived self-defence.

"I suggest to you that your focus will have to be upon the final incident; that is, when the deceased man James Byrne was stabbed. That happened, obviously, fairly quickly and you have heard a good deal of evidence. That is what the case is all about. The main difficulty in this case, I suppose, is that the only direct evidence about what happened at that time is the evidence of the accused man Ugle. No-one else has told you that he or she saw a stabbing.

The version of the accused Ugle is that the fatal wound must have been inflicted when he was trying to defend himself against a life-threatening attack by a man wielding a cricket bat. He told you that that man, clearly the deceased, had bull-rushed him, had hit him once, landing a blow to his arm when he held it up to defend himself, and going so far as to hit the side of his head.

Ugle told you that the man was about to land a second blow aimed at his head and in those circumstances it is put to you on his behalf that Ugle had no choice but to do what he did. He had no choice but to defend himself. What did he do to defend himself? Ugle told you that he pushed the other man, he tried to fend him off, and he told you that as far as he was aware he had hit the other man's arm, so on his version – although it's quite clear that he had the knife in his hand at the time, on his version Ugle did not use the knife as a weapon.

If that were so, you would be entitled to take the view that the force which he used was not likely to cause death or even serious harm and was more than reasonable in the circumstances, so what Ugle was doing was acting lawfully in self-defence. So members of the jury, if you accept that version you will find that the killing was not unlawful and you will find not only Ugle but also the co-accused, Haworth, not guilty."

The appeal to the Court of Criminal Appeal

69 An appeal to the Court of Criminal Appeal of Western Australia (Parker and Wheeler JJ; Wallwork J dissenting) was dismissed. Parker J, writing for the majority, was of the view that it was not erroneous for the trial judge not to direct

the jury with respect to s 23 of the *Criminal Code* (WA) ("the Code") for a number of reasons:

(a) that the appellant's experienced counsel specifically disavowed any reliance on "accident";

(b) the appellant had not lost a chance of acquittal because the trial judge's directions with respect to intention effectively required the jury to reject a defence under both limbs of s 23 of the Code;

(c) because, by its verdict of murder the jury necessarily implicitly rejected "accident" or absence of will.

70 In his reasons for judgment Parker J (with whom Wheeler J agreed) said this[40]:

> "What his Honour did, effectively, was to resolve the issue whether or not on the applicant's account his act in using the knife to wound the deceased occurred independently of the exercise of his will in the applicant's favour, by directing the jury to return verdicts of not guilty if they accepted the applicant's account or were left in reasonable doubt by it. It is not the case, therefore, that by failing to direct as to the first limb of s 23 the applicant has lost a chance of an acquittal founded on his own evidence of what occurred. By directing as he did his Honour has given the applicant the full benefit of the first limb of s 23 even though, if it were truly open on the facts, it is not at all clear that the jury would have been persuaded or left with a reasonable doubt that the applicant ought to be excused from criminal responsibility by virtue of it.
>
> It is in this context that criminal negligence would have its relevance. Negligence to a criminal degree in the care and or use of a dangerous thing such as a knife is an exception from s 23. Hence, had his Honour directed the jury as to s 23, he would have needed to go on to direct the jury to consider criminal negligence. This is not another basis on which the accused might be excused from criminal responsibility for the death, which is the way the argument for the appellant sought to treat it. Rather, it is another basis on which the applicant might have been convicted even if the use of the knife in the circumstances was an unwilled act within the meaning of the first limb of s 23. The approach taken by his Honour also had the effect, therefore, that it entirely sheltered the applicant from any risk that the jury might have been persuaded, had first they accepted his account or been left with a reasonable doubt as to

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40 *Ugle v The Queen* [2000] WASCA 381 at [65]-[68].

its veracity, that the applicant was guilty of unlawful killing by virtue of criminal negligence in his handling or use of the knife at the time.

The second limb of s 23 excludes from criminal responsibility an event that occurs by accident, ie the consequence of the act of an accused which is not only unintended but unlikely and unforeseen[41]. … In this case the event is clearly the death of Mr Byrne.

The relevant operation of the second limb of s 23, in the circumstances of this case, turns on whether there was a deliberate blow with a knife, or whether the applicant merely sought to fend off the attack on him with the cricket bat by raising or pushing off or hitting with his hand while holding a knife, but not consciously adverting to that fact. Any direction which sought to deal with this would, in the end, have required the Judge to direct the jury that in order to be satisfied that accident had been excluded they would have to be satisfied that the applicant had deliberately struck the deceased with the knife, rather than merely raising or pushing or hitting out with his hand to fend off the cricket bat or the assailant."

71 Wallwork J in his reasons set out the following passage from the summing-up of the trial judge[42]:

"'It is important for you, members of the jury, to keep in mind that the real questions for you to decide are: was the killing of Mr Byrne unlawful and if it was unlawful, what was the role of each of the accused in that unlawful killing? What was in the mind of each of the accused when the fatal blow was struck?'"

Wallwork J then said this of it[43]:

"That last passage is inconsistent with any question of accident and assumes that a 'fatal blow was struck'. Additionally, s 23 of the Code is a significant section … concerning criminal responsibility. It also brings in the question of criminal negligence."

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41 See *Vallance v The Queen* (1961) 108 CLR 56; *Mamote-Kulang v The Queen* (1964) 111 CLR 62; *R v Falconer* (1991) 71 CLR 30 at 38.

42 *Ugle v The Queen* [2000] WASCA 381 at [40].

43 *Ugle v The Queen* [2000] WASCA 381 at [41].

72 It was for this reason, and his Honour's view that the directions with respect to self-defence were deficient, that he would have upheld the appeal and ordered a retrial.

The appeal to this Court

73 The only ground of appeal in this Court adopts the reasoning of Wallwork J, the dissenting judge in the Court of Criminal Appeal with respect to s 23 of the Code.

74 The relevant provisions of the Code are summarized, and set out to the extent necessary in the reasons for judgment of other members of the Court. As I point out in *Murray*[44], s 23 distinguishes between acts and events. And, as with that case, it is with the first limb of s 23 that this Court is concerned here: on the evidence is there a basis for saying that the Crown may have failed to prove that penetration by the knife clutched in the appellant's hand as he raised his arm, was an unwilled act?

75 In my opinion that question has to be answered in the affirmative. The directions of the trial judge did not give effect to the possibility of an unwilled act within the meaning of s 23 of the Code. The jury should have been directed that the Crown was obliged to negative that possibility. The fact that on one version of the appellant's defence, self-defence, his act of "fending off" may have been intentional, that is, intentionally defensive, did not relieve the trial judge of the necessity to direct in accordance with s 23. It remained for the jury to assess all of the evidence in the case, including any apparently conflicting versions given by the appellant. Indeed, it may be, having regard to the flurry of events at the time of the penetration of the knife, a person might be excused for being unable to say with certitude whether a particular movement was instinctively self-protective or otherwise unaccompanied by a will to inflict harm. However, as I point out in *Murray*[45], the sequence of acts leading up to the penetration such as the choice of a knife and the appellant's voluntary participation in accosting Mr Byrne may have much to say about the nature of the movement of the arm and hand with the knife in it.

76 I cannot, in the circumstances however, conclude that the appellant has not lost a chance of an acquittal that was fairly open to him. He was entitled to a trial, including directions, according to law and that is what he should have on the quashing of the conviction and a retrial which I would order.

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44 [2002] HCA 26 at [146]-[151].

45 [2002] HCA 26 at [148], [149].