HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

KENNETH FRANCIS STANTON APPELLANT

AND

THE QUEEN RESPONDENT

Stanton v The Queen
[2003] HCA 29
29 May 2003
P117/2002

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation:

G A Archer for the appellant (instructed by Legal Aid Western Australia)

S E Stone with C C Porter for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Stanton v The Queen

Criminal Law – Wilful murder – Alternative verdicts of murder and manslaughter available – Directions of trial judge – Whether trial judge reversed onus of proof – Whether trial judge erred in informing the jury about the circumstances in which they could consider alternative verdicts.

The Criminal Code (WA), ss 277, 278, 279, 280, 595, 689(1).
Juries Act 1957 (WA), s 41.

1 GLEESON CJ, McHUGH AND HAYNE JJ. Following a trial in the Supreme Court of Western Australia, before Anderson J and a jury, the appellant was convicted of the wilful murder of Marie Ann Stanton, his estranged wife. This was a second trial. At a previous trial, the jury had been discharged because of an inability to agree upon a verdict.

2 On 11 March 1999, the appellant, armed with a shotgun, and a number of rounds of heavy gauge ammunition, went to the victim's house. It was not in dispute that she died as a result of the discharge of the shotgun. The appellant did not deny that he pulled the trigger and caused the gun to discharge. There was only one substantial issue of fact, which was the intent with which the appellant acted. He denied any intention to kill or harm the victim. He said he took the gun with him in order to frighten her. The two had been quarrelling about Family Court proceedings, and the appellant said he took the weapon to "make her see some sense and negotiate".

3 There was abundant evidence on which a jury could infer an intent to kill. It appeared that the appellant had endeavoured to conceal his arrival at the house. He hired a car for the occasion, and parked it in a location where it could not be seen from the house. He walked up to the house unannounced, apparently surprising his wife before she had a chance to flee. He had equipped himself with a shotgun and ammunition. The evidence was that the shotgun would only discharge when placed in a fully cocked position, which involved exerting approximately three kilograms of pressure. The shotgun was discharged on a level parallel to the floor, and at a very close range to the victim. There was forensic evidence to the effect that the victim had her left forearm in front of her chest in a protective gesture at the time she sustained the fatal wounds. After the appellant shot the victim, he picked up the spent cartridge shell, placed it in his pocket, and walked out of the premises. He did not attempt to assist the victim although she did not die immediately.

4 The indictment charged the appellant with wilful murder. It was common ground that, by reason of the provisions of *The Criminal Code* (WA), there were four verdicts that were technically available: wilful murder; murder; manslaughter; and not guilty. However, it was also common ground, in the Full Court of the Supreme Court of Western Australia, and in this Court, that, for practical purposes, the only verdicts that were realistically open on the evidence were wilful murder and manslaughter.

5 Section 277 of *The Criminal Code* 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 278 defines wilful murder. It provides that a person who unlawfully kills another, intending to cause his or her death or that of some other

person, is guilty of wilful murder. Section 279 defines murder. It provides, relevantly to the present case, that a person who unlawfully kills another is guilty of murder if the offender intends to do some grievous bodily harm to the person killed or to some other person. Section 280 provides that a person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter. In the circumstances of the present case, bearing in mind the nature of the weapon involved, and the range from which it was discharged, if the appellant intended to shoot the victim, then his intent was obviously to kill, rather than merely to cause grievous bodily harm. Furthermore, although defence counsel at trial put an argument to the effect that the shooting was accidental, in the sense that it was not a willed act, the argument had nothing to commend it. The appellant's best hope was that the jury might regard the case as one of manslaughter, based upon a view that he was menacing his wife with a loaded shotgun, but did not actually intend to shoot her.

6 No exception is taken to the directions given by Anderson J to the jury as to the elements of the offences of wilful murder, murder, or manslaughter, or as to the basis upon which they might acquit the appellant. Counsel for the appellant acknowledged that the trial judge's description of the elements of the offences was accurate, and that although there were other possible verdicts available to the jury at law, in light of the evidence and the manner in which the trial was conducted, the evidence only supported verdicts of either wilful murder or manslaughter.

7 In the Full Court of the Supreme Court of Western Australia, the grounds of appeal were as follows:

> "1. The learned Trial Judge directed the jury at T1002 as follows:
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> 'You first consider wilful murder and if you're unanimously of the view that the accused is guilty of wilful murder, that will be your verdict. If you are unanimously of the view that he's not guilty of wilful murder, then you proceed to consider whether you find him guilty of murder. If you are unanimously of the view that he is guilty of murder, then that will be your verdict.
>
> If you are unanimously of the view that he's not guilty of murder, then you will consider manslaughter.'
>
> 2. The learned Trial Judge further directed the jury at T1006 as follows:
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> 'You can't come to consider the alternative verdicts of murder or manslaughter unless you are unanimously of the view that he is not guilty of wilful murder'.

3. The learned Trial Judge erred in law in giving the directions for the following reasons:

A. The jury was directed to consider [its] verdict in a particular order. The [jury] should have been directed that it could consider [its] verdict in any order.

B. The directions, taken together and as a whole, had the effect of precluding individual members of the jury from considering manslaughter at all so long as any one of the jury found that the accused was guilty of wilful murder. The jury should have been directed that it could return any verdict consistent with the evidence."

8 The Full Court of the Supreme Court of Western Australia dismissed the appellant's appeal.[1] Malcolm CJ and Murray J concluded that the directions set out in grounds 1 and 2 both involved error of law, but regarded the case as a proper one for the application of the proviso in s 689 (1) of *The Criminal Code*, on the basis that there was no miscarriage of justice. Owen J, in dissent, considered that the direction in ground 2 (although not the direction in ground 1) involved an error of law, and did not regard the case as a proper one for the application of the proviso. In this Court, the respondent filed a notice of contention, arguing that the directions in grounds 1 and 2 involved no error of law.

9 In order to explain the manner in which the case was approached in the Full Court, it is necessary to make further reference to the directions, and the context in which they were given.

10 At the commencement of the trial, before any evidence was called, the trial judge gave the jury some general instructions about the task ahead of them, and informed them that any verdict which they might ultimately return, whether guilty or not guilty, must be unanimous. (The charge being one of wilful murder, a majority verdict was not open – *Juries Act* 1957 (WA), s 41). In his summing-up to the jury at the end of the trial, the trial judge referred on a number of occasions to the requirement of unanimity. He instructed the jury that it was a fundamental rule that the prosecution bore the onus of proof, and that it was obliged to prove its case beyond reasonable doubt. As was noted above, the trial judge gave the jury accurate instructions as to the elements of the offences of wilful murder, murder, and manslaughter. He said:

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1 *Stanton v The Queen* (2001) 24 WAR 233.

> "Unless you can all agree unanimously and beyond reasonable doubt that this man's intent was an intent to kill, you cannot find him guilty of wilful murder."

11 The trial judge left murder as an alternative verdict, although it was common ground in this Court that it was not a realistic possibility. In that connection, he said:

> "As to murder, you couldn't get to consider the alternative verdict of murder unless you were unanimously of the opinion that the crime of wilful murder had not been committed. You must unanimously come to that conclusion before you move to consider whether the alternative crime of murder has been proved. As to murder, there must of course be a killing by one person of another and the killing must be unlawful, and I have told you about unlawfulness."

12 The possibility that the appellant might have deliberately shot the deceased, not with an intent to kill her, but only with an intent to cause grievous bodily harm, was bordering on the fanciful. The direction just quoted was not that referred to in the grounds of appeal in the Full Court, but in argument in this Court counsel for the appellant pointed out, correctly, that it involves an error. The word "committed" should have been "proved". It will be necessary to return to that matter when considering the argument about the reversal of the onus of proof.

13 The trial judge then said:

> "If you are unanimously of the view that the crime of murder has not been proved, then you can proceed to consider the alternative verdict of manslaughter. Let me talk to you about manslaughter. If you are satisfied that the accused cause[d] his wife's death; that is, that he killed her, he shot her, but you are not satisfied as to his intent, you can bring in a verdict of manslaughter, but before you could do that, you would have to be satisfied that the killing was unlawful. The killing was not unlawful if it was simply an accident."

14 He went on to relate the offence of manslaughter to the circumstances under consideration. He then gave the first of the directions the subject of a ground of appeal, saying:

> "You first consider wilful murder and if you're unanimously of the view that the accused is guilty of wilful murder, that will be your verdict. If you are unanimously of the view that he's not guilty of wilful murder, then you proceed to consider whether you find him guilty of murder. If

you are unanimously of the view that he is guilty of murder, then that will be your verdict.

If you are unanimously of the view that he's not guilty of murder, then you will consider manslaughter. If you are unanimously of the view that he is guilty of manslaughter, then that will be your verdict. If you are unanimously of the view that he is not guilty of manslaughter, then the verdict will be not guilty.

I suggest you start your deliberations by considering whether the killing was unlawful in the sense of whether it was not accidental. Unless you're satisfied of that; that is, unless you're satisfied to the required degree that the shooting was not accidental, then the verdict must be not guilty and that will be that. It's entirely for you, of course, but the circumstances are such that I think you will hardly bring in a verdict of not guilty in this case. I don't think you will have any difficulty in concluding that ... pointing a loaded and cocked shotgun at the chest of another with your finger on the trigger is, at the very least, such a grossly negligent act as to rule out accident.

If you decide that the killing was unlawful in the sense that it was not an accident, then the verdict must be at least manslaughter. If intent to kill is proved, the verdict must be wilful murder. If intent to do grievous bodily harm is proved, the verdict must be guilty of murder."

15 Finally, before sending the jury out to consider their verdict, the trial judge said:

"When you are ready to deliver your verdict you will be asked first whether you find the accused guilty or not guilty as charged and whatever that verdict is, whether guilty or not guilty, it must be unanimous.

If the verdict is not guilty as charged then you will be asked whether the verdict – whether you find the accused guilty or not guilty of murder and so on. On each announcement of your verdict you will be asked whether it is the verdict of you all. They are all the matters that I wish to mention to you."

16 Trial counsel for the appellant raised no complaint about any of the above directions.

17 After the jury had retired for about four hours, they asked a question:

> "If the jury is in conflict, do those who believe he is guilty of wilful murder have to move down to the charge of manslaughter? Do 12 people have to agree to manslaughter?"

18 The trial judge discussed the question with counsel in the absence of the jury. Counsel agreed that the answer to the question was "very straightforward" and that it was that the members of the jury must unanimously agree with respect to the charge brought before they could proceed to consider alternative verdicts. There was some discussion as to whether it was appropriate, at that stage, to give the jury a direction of the kind considered by this Court in *Black v The Queen*[2]. The trial judge indicated that he was not inclined to give a *Black* direction at that stage, but would prefer to "wait a little". The members of the jury were then brought into Court, the question was repeated, and the trial judge said:

> "Yes, the law is quite clear. You can't come to consider the alternative verdicts of murder or manslaughter unless you are unanimously of the view that he is not guilty of wilful murder. So, whatever your verdict is on the first charge of wilful murder, it must be unanimous."

19 That is the direction that was the subject of the second ground of appeal in the Full Court.

20 Before turning to the arguments advanced on behalf of the appellant, it is convenient to refer to some matters of general principle.

21 Anderson J was correct to inform the jury that any verdict they returned, whether of guilty or not guilty, had to be unanimous.

22 Furthermore, the prosecution was entitled to have the trial judge seek a verdict on the charge in the indictment, and if the jury were unable to agree, either on a verdict of guilty of wilful murder or a verdict of not guilty of wilful murder, then the proper course was to discharge the jury. This was acknowledged in argument in this Court by counsel for the appellant, but it appears to have been the subject of some misapprehension in the Full Court. As Anderson J told the jury immediately before they retired, the first question they would be asked when they returned was whether they found the appellant guilty or not guilty of wilful murder. It would not have been a permissible response to that question for the jury to announce that they were unable to agree on that, but were all agreed that, if the appellant was not guilty of wilful murder, he was at least guilty of manslaughter. If they were unable to agree on whether the

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2 (1993) 179 CLR 44.

appellant was guilty or not guilty of wilful murder, then they would be unable to agree on their verdict in relation to the charge in the indictment. They would then be discharged.

23 The corollary of that proposition is that, as Anderson J told the jury, they would only be asked whether they found the appellant guilty or not guilty of murder if they had already found him not guilty of wilful murder; and they would only be asked whether they found the appellant guilty or not guilty of manslaughter if they had already found him not guilty of wilful murder and not guilty of murder. In *Gammage v The Queen*[3], Kitto J said:

> "The common law, authorizing as it did a verdict of guilty of manslaughter on an indictment for murder, always made it a condition of the validity of that verdict that the jury should first have returned a verdict of not guilty of murder."

24 In *R v McCready*[4], the Full Court of the Supreme Court of Victoria, speaking of a case where the indictment charged rape and where there was, by statute, a possible alternative verdict of assault with intent to commit rape, said:

> "The terms of [the statute], in our view, make a verdict of assault with intent to commit rape dependent upon the jury being not satisfied that the accused is guilty of the crime of rape. The question of his guilt of the alternative charge does not arise unless and until the jury is not satisfied of his guilt of rape, and whilst the jury is in a state of disagreement upon the latter, the accused's guilt of the alternative crime remains irrelevant."

25 There is nothing in *The Criminal Code* that warrants a different conclusion in a case such as the present. In the Full Court, this was accepted by Owen J, but Murray J took a different view. If, as appears to be the case, his Honour contemplated that the jury, while still in a state of inability to agree upon a verdict (guilty or not guilty) in relation to the charge in the indictment, might have been invited to return a verdict on an alternative charge, then there is no justification for such a course.

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3 (1969) 122 CLR 444 at 453.

4 [1967] VR 325 at 329.

26 It was not submitted that the trial judge should have given a direction of the kind considered in *Gilson v The Queen*[5], or that the case was one for a special verdict of the kind permitted by statute in some jurisdictions to overcome the problem that arises in relation to alternative charges of theft and receiving. In the Full Court, both Murray J and Owen J agreed that *Gilson* was not in point. That was not contested in this Court.

27 As the direction recommended in *Black* acknowledges, when the jury were considering the charge of wilful murder, it was proper for individual jurors to attach weight to the opinions of others, and if persuaded by those opinions, to modify or alter their own views in response. But if, after full deliberation, and interchange of views, some were of the opinion that the prosecution had established its case beyond reasonable doubt (which, in this case, meant that the prosecution had proved beyond reasonable doubt the appellant's intent to kill his wife), and others were of the opinion that the prosecution had not established its case beyond reasonable doubt (that is to say, if they had a doubt about intent to kill), then there was a state of disagreement. They might seek to resolve that disagreement by further discussion, which could lead some to change their opinions. But so long as they adhered to those opinions, they would be unable to agree on a verdict on the charge in the indictment. On that hypothesis, some jurors would consider that the appellant was guilty of wilful murder and other jurors would consider that the appellant was guilty of manslaughter. If those were their final opinions, then the outcome would be discharge and, potentially, a new trial; not a verdict of manslaughter, much less a "verdict" of "at least manslaughter".

28 Nothing that was said by Anderson J was inconsistent with the above principles. And, as has been noted, nothing that he said was the subject of complaint by trial counsel. However, three criticisms are now advanced on behalf of the appellant. The third criticism was accepted by all three members of the Full Court, although two (Malcolm CJ and Murray J) applied the proviso. The respondent contends that all three criticisms are without substance, and that the Full Court erred in accepting the third. If that contention succeeds, it will be unnecessary to consider the proviso.

29 The appellant's first criticism is that the effect of the directions given to the jury was to reverse the onus of proof. This is a new point, not raised at trial or in the Full Court. It is based principally, not upon the directions referred to in the Notice of Appeal to the Full Court, but upon the trial judge's reference, in

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5 (1991) 172 CLR 353.

relation to the (purely theoretical) alternative of murder, as distinct from wilful murder, that they "couldn't get to consider the alternative verdict of murder unless [they] were unanimously of the opinion that the crime of wilful murder had not been committed". The use of the word "committed" was erroneous, and the error was not repeated when the judge came to refer to the alternative of manslaughter. There he said: "If you are unanimously of the view that the crime of murder has not been *proved*, then you can proceed to consider the alternative verdict of manslaughter." (emphasis added) The trial judge, in other parts of his directions, repeatedly and accurately directed the jury on the onus of proof. At the commencement of his summing-up, he told the jury that it was a fundamental rule that, from start to finish, the onus was on the Crown to prove its case beyond reasonable doubt. When he directed the jury on the elements of wilful murder, and manslaughter, he accurately placed the onus of proof of the elements of each offence on the prosecution.

30 The failure of trial counsel to object, and seek a correction or clarification, may be of considerable importance when it is suggested on appeal that something said by a trial judge would have given rise to a misunderstanding, or would have been taken to have a particular meaning. It never occurred to anybody at this trial that the judge was reversing the onus of proof. A reading of the entire summing-up explains why this was so. This point is not of substance.

31 The second criticism is that the directions of the trial judge erroneously removed what counsel described as "the jury's power to return a 'wrong' verdict". The nature of the power, as distinct from the right, in contemplation was discussed by this Court in *Gammage v The Queen*[6]. The issue normally arises in cases, unlike the present, where an accused is charged with murder, and the trial judge, having formed the view that there is no evidentiary foundation for an alternative verdict of not guilty of murder but guilty of manslaughter, does not leave manslaughter to the jury. Perhaps as a result of a question asked by the jury, or a submission made by counsel, or for some other reason, an issue may arise as to whether the trial judge has misled the members of the jury as to their powers.

32 In the present case, the trial judge formed the view that a verdict of guilty of manslaughter was open to the jury, and directed them, accurately, as to the basis upon which they might reach such a conclusion. He was not required to do more. He explained to them the elements of the offence of wilful murder, and

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6 (1969) 122 CLR 444.

the elements of the offence of manslaughter, relating the explanation to the evidence in the case. Since no request for a re-direction was made at the trial, it is not clear what it is suggested he should have said by way of further direction. In *Gammage*[7], the trial judge did not leave manslaughter to the jury. Having been asked by trial counsel to mention their power to bring in an alternative verdict of manslaughter, he did so, but promptly went on to tell them why they would not be justified in doing so. His directions were upheld. Here, the trial judge told the jury they would be justified in bringing in a verdict of manslaughter if they took a particular view of the facts. He was not obliged to tell them that they had a power to bring in a verdict of manslaughter even if they took a different, and more serious, view of the facts. The appellant has nothing to complain about in that respect. There was neither "a wrong decision of any question of law" nor "on any ground ... a miscarriage of justice"[8].

33 The third criticism is that which, subject to the proviso, was accepted in the Full Court.

34 Owen J saw no error in the direction referred to in ground 1 of the Notice of Appeal to the Full Court. However, he took a different view of the answer given to the jury's question, which was the subject of ground 2, as did the other members of the Full Court. The point of concern was that the answer to the jury's question would have given the jurors to understand that they could not even think about the matter of manslaughter until they had first decided unanimously upon a verdict of not guilty of wilful murder. Owen J considered that the answer dictated to the jury a sequence of deliberation, and impermissibly restricted them in the manner in which they might properly exercise their function.

35 If that were a fair appreciation of the effect of what Anderson J told the jury, then error would be demonstrated. Jurors are free to organize their individual processes of reasoning, or their discussions as a group, in whatever manner appears to them to be convenient. The question is whether Anderson J might reasonably have been understood to convey anything to the contrary, or whether he was merely informing them of the sequence in which, at the point of final decision, they were to deal with the possible verdicts available to them. What he said was: "You can't come to consider the alternative verdicts of murder or manslaughter unless you are unanimously of the view that he is not guilty of wilful murder. So, whatever your verdict is on the first charge of wilful murder, it must be unanimous."

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7 (1969) 122 CLR 444 at 460.

8 *The Criminal Code* (WA), s 689(1).

36 A proper appreciation of what Anderson J said requires attention to three matters: the issues as they emerged at the trial; the other directions that the jury had already been given; and the precise question to which he was giving an answer.

37 As to the first, it was common ground in argument in this Court that, ultimately, this was a single issue case. The critical question was whether the jury were satisfied beyond reasonable doubt of the appellant's intent to kill his wife. As a practical matter, if they were so satisfied, they would find wilful murder, and if they were not so satisfied they would find manslaughter. On the evidence, any other verdict was not a realistic possibility. There being, for practical purposes, only one issue, the answer to which (if agreed upon unanimously) would resolve the matter one way or the other, it is difficult to understand how any possibility of sequential reasoning on that issue could have arisen. In whatever order they examined the evidence, and considered the primary facts, when they came to decide whether the case was one of wilful murder or manslaughter, the jury would necessarily do that by reference to the single issue, of intent, on which the outcome depended.

38 As to the second matter, as the extracts from the directions quoted above show, the trial judge had in fact made a suggestion (as he was entitled to do) as to what the jury might find to be a convenient approach to their deliberations. He suggested that they start by considering whether the killing was unlawful in the sense that it was not accidental. If they were not satisfied of that, the verdict would be not guilty. He pointed out that, although it was entirely a matter for them, it was unlikely that they could bring in a verdict of not guilty, for reasons he explained. He then said that whether the guilty verdict was manslaughter or wilful murder depended on the issue of intent. Thus, having suggested that the jury first consider and dispose of the possibility that the killing was not unlawful, the judge said that would bring the jury directly to the issue of intent, and, depending on their view about that issue, the appellant was either guilty of manslaughter or guilty of wilful murder. No exception was taken, either at trial or in this Court, to what the judge there said. It was one of the last things he said to the jury before they retired. This reinforces the point made in the preceding paragraph.

39 As to the third matter, the question asked by the jury concerned the consequences of disagreement. It postulated that the jurors were "in conflict", that some "believed" the appellant was guilty of wilful murder and, by implication, that others believed he was guilty of manslaughter. It asked whether, in that event, those who were in the former group "have to move down

to the charge of manslaughter". This was clearly a reference back to the judge's direction in which he said: "If you are unanimously of the view that he's not guilty of wilful murder, then you will consider murder ... If you are unanimously of the view that he's not guilty of murder, then you will consider manslaughter". The jurors were responding to that by asking a question as to their responsibilities if some of them were of the view that he was guilty of murder and others were not. They asked whether the former group would then be obliged to "move down". That must have been a reference to the point of final decision; the finding of a verdict. Since the choice between wilful murder and manslaughter turned upon the resolution of the one issue, intent, the question cannot have been directed to a sequence of reasoning, as distinct from the formal act of finding a verdict. It was clearly understood, by the judge and by trial counsel (who agreed with the judge's response), as a question about the formal act of finding a verdict. That was the sense in which he used the word "consider" in the first sentence of his answer, as is further indicated by the terms of the second sentence of the answer. So understood, the answer was consistent with what the judge had earlier told the jury, and it involved no error. The trial judge asked the jury whether he had answered their question and, although the transcript records no verbal response, it is evident that the trial judge considered that the jury agreed that he had done so.

40 The jury's question might have been answered in different ways. The judge thought it too early to give a *Black* direction, and no complaint is made about that. Trial judges are, understandably, often reluctant to embark upon an exercise of explaining to a jury the consequences of disagreement, which might have its own risks. The judge was right to tell the jury that their verdict on the charge of wilful murder, whether of guilty or not guilty, had to be unanimous. He did not go on to tell them that, if they could not agree on a verdict on the charge of wilful murder, he would discharge them. He might properly have done so, but it was open to him to take the view that he would wait before giving a *Black* direction.

41 The interpretation that was placed by the Full Court upon Anderson J's answer to the jury's question, upon analysis, was not correct. The respondent's notice of contention should be upheld.

42 This makes it unnecessary to consider whether the Full Court was right to decide by majority that, in any event, there was no miscarriage of justice. In particular, it is unnecessary to consider whether there were such irregularities at the trial that, even without regard to the effect that they may have had on the verdict, there was a substantial miscarriage of justice[9].

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9 *Wilde v The Queen* (1988) 164 CLR 365 at 372-373.

43 The appeal should be dismissed.

GUMMOW AND CALLINAN JJ.

The facts

44 The facts in outline were these. The appellant was alleged to have intentionally unlawfully killed, that is to say, wilfully murdered his estranged wife on 11 March 1999. He admitted these matters at his trial: the identity of the deceased, the date and place of her death, and that she died as a result of the discharge of a shotgun held by him.

45 The appellant went to his estranged wife's house in Lake Clifton near Mandurah, Western Australia on 11 March 1999. He took with him a shotgun, and, according to him, four or five shells. There was however other evidence that the appellant had armed himself with 20 shells of an especially lethal kind. The other relevant facts are set out in the joint judgment.

46 The appellant gave evidence. He denied that he intended to kill or harm his wife, but maintained that he took the gun only to frighten her. He gave these answers in cross-examination:

> "You were contemplating discharging that gun, weren't you? --- Not really. I thought that if it came to a thing I could discharge it in the roof to frighten Marie Ann. That was all.
>
> I see. You have told the ladies and gentlemen of the jury that you haven't used violence prior to then but you were going to discharge a loaded shotgun into the roof. Is that so? --- That's not violence.
>
> Sorry? --- That's not violence.
>
> For what purpose - - - ? --- To frighten her. That's all.
>
> Just let me - to frighten her; to frighten her. Just on that, to frighten her for what? --- To make her see some sense and negotiate.
>
> To see some sense about what? --- To negotiate.
>
> To negotiate. Is it your case, Mr Stanton, that you were going to conduct a negotiation at gunpoint? --- That wasn't at gunpoint.
>
> Were you going to make your wife an offer she couldn't refuse? --- No. I was - - -
>
> Is that so - - - ? --- I was there to negotiate with her."

47 The appellant did not deny that he pulled the trigger on the gun and caused it to discharge. His evidence was:

> "When she was just there where were you? --- I was coming through the doorway - it's not - to the breakfast room.
>
> What happened then? - - - I said - then I spoke. I said, 'Marie Ann, we have to talk' or something like that, 'I want to talk to you' - I can't remember exactly what I said now, but something in those lines.
>
> What happened then? - - - Well, she was facing away from me. With that, she swung around. I was sort of still moving towards her. She swung around and growled at me. I don't know why.
>
> What was the word you used, growled? - - - Growled, aah aah, something like that, and at the same time she raised her hands - I don't know how - I just said on the video she raised her hands like that, but I just indicate that she raised her hands somehow. I stepped back because she came towards me. I recoiled and the gun went off.
>
> How did the gun go off? - - - Well, I must have pressed the trigger. It's the only way I could make it go off.
>
> Why did you press the trigger? - - - I don't know; didn't think. It happened so quickly. I didn't even realise it was cocked. I can't even recall it.
>
> Let me be more precise and go back for a moment. You said to me, 'I must have pressed the trigger.' Did you press the trigger? - - - I can't - it happened so quickly I can't - it wasn't a conscious effort. I can't recall it.
>
> What happened then? - - - Well, Marie Ann slumped. I saw that and I immediately left. I was only holding it lightly. Eventually I found I had a very deep gash in my webbing of my right hand."

The trial

48 In the Supreme Court of Western Australia, the trial judge (Anderson J) left verdicts of wilful murder, murder, manslaughter and not guilty to the jury. It was accepted by the appellant however that realistically the likely alternatives were wilful murder or manslaughter. And because the charge was wilful murder a unanimous verdict was required pursuant to s 41 of the *Juries Act* 1957 (WA) (the "Juries Act"). There is no challenge to his Honour's directions to the jury with respect to the elements of the offences.

49 In the course of his summing up his Honour gave these six directions:

"Unless you can all agree unanimously and beyond reasonable doubt that this man's intent was an intent to kill, you cannot find him guilty of wilful murder."

50 Later he said this ("the second direction"):

"As to murder, you couldn't get to consider the alternative verdict of murder unless you were unanimously of the opinion that the crime of wilful murder had not been *committed*. You must unanimously come to that conclusion before you move to consider whether the alternative crime of murder has been proved. As to murder, there must of course be a killing by one person of another and the killing must be unlawful, and I have told you about unlawfulness." (emphasis added)

51 A third direction was given in these terms:

"If you are unanimously of the view that the crime of murder has not been *proved*, then you can proceed to consider the alternative verdict of manslaughter." (emphasis added)

52 This further direction was subsequently given:

"You first consider wilful murder and if you're unanimously of the view that the accused is guilty of wilful murder, that will be your verdict. If you are unanimously of the view that he's not guilty of wilful murder, then you proceed to consider whether you find him guilty of murder. If you are unanimously of the view that he is guilty of murder, then that will be your verdict."

53 His Honour continued with a like direction with respect to the alternative verdicts of murder and manslaughter. He added this, the fifth direction:

"I suggest you start your deliberations by considering whether the killing was unlawful in the sense of whether it was not accidental. Unless you're satisfied of that; that is, unless you're satisfied to the required degree that the shooting was not accidental, then the verdict must be not guilty and that will be that. It's entirely for you, of course, but the circumstances are such that I think you will hardly bring in a verdict of not guilty in this case. I don't think you will have any difficulty in concluding that ... pointing a loaded and cocked shotgun at the chest of another with your finger on the trigger is, at the very least, such a grossly negligent act as to rule out accident.

If you decide that the killing was unlawful in the sense that it was not an accident, then the verdict must be at least manslaughter. If intent to

kill is proved, the verdict must be wilful murder. If intent to do grievous bodily harm is proved, the verdict must be guilty of murder."

54 His Honour later told the jury this:

"When you are ready to deliver your verdict you will be asked first whether you find the accused guilty or not guilty as charged and whatever that verdict is, whether guilty or not guilty, it must be unanimous.

If the verdict is not guilty as charged then you will be asked whether the verdict - whether you find the accused guilty or not guilty of murder and so on. On each announcement of your verdict you will be asked whether it is the verdict of you all. They are all the matters that I wish to mention to you."

55 After the jury had been deliberating for about four hours, the foreperson asked this question:

"If the jury is in conflict, do those who believe he is guilty of wilful murder have to move down to the charge of manslaughter? Do 12 people have to agree to move down to manslaughter?"

56 The trial judge answered as follows:

"Yes, the law is quite clear. You can't come to consider the alternative verdicts of murder or manslaughter unless you are unanimously of the view that he is not guilty of wilful murder. So, whatever your verdict is on the first charge of wilful murder, it must be unanimous."

57 No objection to his Honour's directions or to his answer to the question was taken by the appellant at the trial.

58 The appellant was convicted of wilful murder.

The appeal to the Court of Criminal Appeal

59 The appellant appealed to the Court of Criminal Appeal (Malcolm CJ, Murray and Owen JJ)[10]. Their Honours held that the answer given to the jury's question involved an error of law. Malcolm CJ and Murray J also concluded that the second and third directions set out above were erroneous, but Owen J disagreed[11]. Finally, Malcolm CJ and Murray J concluded that the proviso to

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10 (2001) 24 WAR 233.

11 (2001) 24 WAR 233 at 251.

s 689(1) of *The Criminal Code* (WA) ("the Code") applied on the basis that no substantial miscarriage of justice had occurred. Owen J was of a different mind and would have allowed the appeal and ordered a new trial.

The appeal to this Court

60 The appellant makes three submissions in this Court: the first is that the directions effectively reversed the onus of proof, and further that they thereby deprived the jury of their power to return, in effect a "merciful" verdict.[12] The error which this submission identifies we refer to later as the third error. Secondly, the jury were erroneously told that they were under a legal obligation to consider the offences in a particular order. Thirdly, and during the course of argument the appellant took the further point that the directions impermissibly deprived members of the jury of their right to disagree. The appellant also submits that if any of these submissions is made out, the proviso should not be applied.

61 Before dealing with the appellant's submissions it is necessary to set out the provisions of the Code and of the Juries Act which are relevant to this case.

62 Sections 277-280 of the Code provide as follows:

"**277 Unlawful homicide**

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.

278 'Wilful murder', definition of

Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder.

279 'Murder', definition of

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 do to the person killed or to some other person some grievous bodily harm;

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12 See *Gilbert v The Queen* (2000) 201 CLR 414; *MacKenzie v The Queen* (1996) 190 CLR 348; and *Gammage v The Queen* (1969) 122 CLR 444.

(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;

(3) If the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(4) If death is caused by administering any stupefying or overpowering thing for either of the purposes last aforesaid;

(5) If death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of murder.

In the first case it is immaterial that the offender did not intend to hurt the particular person who is killed.

In the second case it is immaterial that the offender did not intend to hurt any person.

In the 3 last cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

280 'Manslaughter', definition of

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

Section 595 of the Code is as follows:

"**Wilful murder, murder, etc; alternative verdicts**

Upon an indictment charging a person with the crime of wilful murder, murder, manslaughter or infanticide, the person charged may be convicted of an offence mentioned opposite that crime in the Table if that offence is established by the evidence.

Table

Wilful murder	Murder, manslaughter, infanticide or an offence under section 283, 290, or 291 of this Code or section 59 of the *Road Traffic Act 1974.*
Murder	Manslaughter, infanticide or an offence under section 290 or 291 of this Code or section 59 of the *Road Traffic Act 1974.*
Manslaughter	An offence under section 290 or 291 of this Code or section 59 of the *Road Traffic Act 1974.*
Infanticide	An offence under section 283, 290, or 291 of this Code."

The proviso is found in s 689 (1) of the Code:

"**Determination of appeals in ordinary cases**

(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

63 Reference to s 41 of the Juries Act is also necessary:

"**Number of jurors required to agree on verdict in criminal trials**

Where a jury in a criminal trial, not being a trial for an offence punishable with strict security life imprisonment or for the offence of murder, has

> retired to consider its verdict and remained in deliberation for at least 3 hours and has not then arrived at a unanimous verdict, the decision of not less than 10 of the jurors shall be taken as the verdict; and if after the jury has deliberated for 3 hours 10 or more of the jurors have not agreed upon their verdict the jury may be discharged from giving a verdict unless in the opinion of the Judge or Chairman it is desirable that the jury should deliberate further, and he so directs."

64 In *R v Saunders*[13] Lord Ackner referred to a passage in *R v Salisbury*[14] which explained the historical basis for the distinction between murder and other unlawful killings[15]:

> "The crime of murder has always been in a special category. As long ago as *R v Salisbury* juries have been entitled to return verdicts of manslaughter on indictments charging murder[16]:
>
> > 'when he was arraigned for killing a man upon malice prepense, the substance of the matter was, whether he killed him or not, and the malice prepense is but matter of form or the circumstance of killing. And although the malice prepense makes the fact more odious, and for this cause the offender shall lose divers advantages, which he should otherwise have, as sanctuary, clergy, and the like, yet it is nothing more than the manner of the fact, and not the substance of the fact, for the substance of the fact is the killing him, and then when the substance of the fact and the manner of the fact are put in issue together, if the jurors find the substance and not the manner, yet judgment shall be given according to the substance.'"

65 The question which arose in *Saunders* was whether, in a murder trial the jury might be informed that they could return a verdict of manslaughter if they were agreed on it, and that if they were, the trial judge could and would then discharge them from returning a verdict on the count of murder. Neither party to this appeal suggests that the course which the trial judge there followed, and which was disapproved by the House of Lords should have been followed here. It is accepted that the prosecution is entitled to, and the jury is bound to return, a verdict on the principal count on the indictment, and for it to be taken first.

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13 [1988] AC 148.

14 (1553) 1 Pl 97.

15 [1988] AC 148 at 160.

16 (1553) 1 Pl 97 at 101 per Bromley CJ KB.

66 The powers of juries are however ample ones. They are as ample in those criminal jurisdictions that are governed by the Code as they are in jurisdictions in which the common law applies. As Dixon J said in *Packett v The King*[17]:

> "If the judge presiding at the trial of an indictment of murder is of opinion that the evidence discloses no matter capable of forming provocation, or that the matter alleged by the prisoner as provocation is not capable of doing so, it is, of course, proper for him to direct the jury to that effect. But, under the code as at common law, it remains within the power of the jury to find a verdict of manslaughter, even although it means disregarding the direction. To tell the jury that they have not such a power is to state what is not correct in law and a prisoner is entitled to complain in a Court of Criminal Appeal of such a direction. There is all the difference between such a direction and a direction that the evidence given upon a trial for murder does not support a verdict of manslaughter. If a judge is of opinion that because such a verdict implies findings of fact that are not reasonably open the jury ought not to return it, he may so direct them without necessarily usurping the functions of the jury, and, if his opinion is correct in law, the verdict may stand. Lawyers have no difficulty in apprehending the distinction between, on the one hand, the impropriety of finding without evidence facts amounting to manslaughter, and, on the other hand, the existence of a right to return a verdict of manslaughter although it be a wrong verdict. But it is easy to believe that a jury would not make the distinction and would treat a direction that they ought not to find manslaughter as meaning that they had not power to do so, unless it was very clearly expressed. Yet the jury must not be led to understand that to find a verdict of manslaughter is actually beyond their power. Further, upon the question whether a finding of manslaughter on the ground of provocation would in a given case be unreasonable, the ruling of the House of Lords in *Woolmington's Case*[18] has, of course, an important bearing. For it may be open to entertain a reasonable doubt of provocation although it would be unreasonable to find affirmatively that provocation existed and was sufficient. These are all considerations showing the need of caution before a judge undertakes to direct a jury against finding manslaughter."

67 The directions to which the appellant now takes exception, being the second, third and fifth of the directions that have been quoted, and his Honour's

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17 (1937) 58 CLR 190 at 213-214.

18 [1935] AC 462.

answer to the jury's question, were, in our opinion capable of misleading the jury. Before saying why this is so we should refer to *Black v The Queen*[19] in which this Court stated a model form of direction that may be given when a jury is having difficulty in reaching agreement on its verdicts. The first paragraph is sufficient to convey the flavour of it[20]:

> "Members of the jury,
>
> I have been told that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence."

68 In this case the jury had been deliberating for four hours. No one now suggests that his Honour was remiss in not giving a direction of the kind referred to in *Black*. His Honour was not however entitled to lead the jury to believe that they were not permitted to do what the question suggested they were inclined to do, and were in substance asking whether they could do:

> "Not having for the present been able to reach agreement on the count of wilful murder, may we, the jury consider, explore, whether there is agreement on manslaughter?"

69 A responsive and better answer to the jury's question than the one his Honour gave would have been to this effect:

> "You may consider the possible verdicts in whatever order you wish. You must keep in mind however that when you have finished your deliberations you will be required to give your verdict first on the count of wilful murder. It will be only if you reach a verdict of not guilty of wilful murder that you will be asked to return another or other verdicts."

70 The fact that the trial judge might understandably have been reluctant to say anything that might be construed as an invitation to the jury to disagree, or to reach a compromise verdict, does not provide a sufficient basis for the erroneous

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19 (1993) 179 CLR 44.

20 (1993) 179 CLR 44 at 51 per Mason CJ, Brennan, Dawson and McHugh JJ.

direction as to the order of consideration of the verdicts. The answer to the question and the directions complained of effectively denied the jury their right to disagree, and their right to consider (but not of course to return) their verdicts in whatever order they choose. The error in the directions was compounded by the use of the word "committed" when "proved" should have been used in the second direction. The respondent accepted that a not improper approach by the jury to their task might have been to consider the lesser counts first, or, after it was apparent to the jury that there might be disagreement as to the most, or more serious of them, and to which they could and should return if they were agreed that the least, or less serious of the counts had certainly been made out. The directions and the answer to the question failed to make the necessary distinction between the jury's freedom to "consider" their verdicts in whatever order they choose, and their obligation to return verdicts in descending order of seriousness if they were not satisfied of the appellant's guilt on the most or more serious of the counts.

71 The third error, the subject of the appellant's first submission, was the expression in the fourth direction of the jury's obligation, as an obligation to consider murder and manslaughter only if the jury were "unanimously of the view that he's not guilty of wilful murder ...", and the similar direction in respect of murder and manslaughter. To put the matter in the negative terms that his Honour did was to suggest that the jury's duty was different from what in law it truly was. The jury could only convict if the prosecution had proved the elements of the respective charges beyond reasonable doubt. It is true that elsewhere the trial judge did emphasize the prosecution's obligations in this regard. But in our judgment even that emphasis was insufficient to cure the erroneous directions which might well have had a tendency to lead the jury to believe that their task was to ascertain unanimously whether the appellant had discharged what was, in effect an onus on him, of establishing that he was not guilty.

72 Owen J in the Court of Criminal Appeal was of the opinion that the one error only that he identified required that there be a retrial. The three errors which we are satisfied were made could well have had a cumulative effect upon the jury's deliberations. In those circumstances there have been "irregularit[ies] ... depart[ing] from the essential requirements of the law ... [going] to the root of the proceedings"[21]. The cumulation of the errors, despite the strength of the prosecution case, means that the appellant might have been denied a chance of a lesser verdict. Our concern that such a chance might have been lost is confirmed to some extent by the information given to the Court, without objection, and

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21 *Wilde v The Queen* (1988) 164 CLR 365 at 372-373 per Brennan, Dawson and Toohey JJ.

therefore to which we may have regard, that a jury in an earlier trial of the appellant on the same count had been unable to agree.

73 We would allow the appeal, quash the verdict and order that there be a retrial.