HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

KEVIN WAYNE GILLARD APPELLANT

AND

THE QUEEN RESPONDENT

Gillard v The Queen [2003] HCA 64
12 November 2003
A200/2002

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 21 December 2000 dismissing the appellant's appeal and, in lieu thereof, order that:*

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

(b) the appellant's convictions be quashed; and

(c) there be a new trial.

On appeal from the Supreme Court of South Australia

Representation:

D H Peek QC with J A Richards for the appellant (instructed by Lipson Street Chambers)

S A Millsteed QC with A P Kimber for the respondent (instructed by Director of Public Prosecutions (South Australia))

CATCHWORDS

Gillard v The Queen

Criminal law – Murder – Joint criminal enterprise – Appeal against conviction – Misdirection by trial judge – Failure to leave manslaughter to jury – Whether jury properly instructed would necessarily have returned verdict of guilty of murder – Whether failure to leave manslaughter to jury occasioned substantial miscarriage of justice.

Criminal Law Consolidation Act 1935 (SA), s 353(1).

1 GLEESON CJ AND CALLINAN J. The appellant, and a co-accused Gerald David Preston, were convicted of the murder of two men and the attempted murder of another. The appellant contends that the trial judge failed to leave manslaughter to the jury as a possible verdict in relation to each of the two men who were killed, and that this constituted a wrong decision on a question of law. That contention (which was rejected by the Full Court of the Supreme Court of South Australia[1]) is supported by the respondent. The difference between the parties to the appeal is whether the case is a proper one for the application of the proviso to s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA). The principal questions for decision are whether, on the facts, there was a viable case of manslaughter to be left to the jury and, as it was put in *Gilbert v The Queen*[2], whether it is clear that a jury, properly instructed, would necessarily have returned a verdict of murder. Those two questions address the problem by reference to different stages of the proceeding, but they turn upon substantially the same considerations of law and fact. The trial judge left the case to the jury as murder (and attempted murder) or nothing. If there was no viable case of manslaughter to be considered, then there was no wrong decision on a question of law. If, on the other hand, there was such a case (as has been contended consistently by the prosecution) then the proviso will apply only if it is clear that a jury, properly instructed, would necessarily have convicted the appellant of murder (and attempted murder).

2 The essential facts may be summarised as follows. It is convenient (save for the purpose of dealing with one argument in relation to the proviso) to concentrate attention upon one only of the victims, Les Knowles. It is also convenient first to explain the case against Preston, who did the killing.

3 The prosecution case, accepted by the jury, was that Preston, a man of well-known violent propensities, was hired to kill Knowles. There was evidence that Knowles was the subject of police investigations in relation to drug dealing. He conducted a car repair workshop. There was evidence that he kept large amounts of cash there. The prosecution alleged that a man named Tognolini, and/or a group named the Hells Angels, wanted Knowles killed, and agreed to pay Preston to kill him. The appellant had a long association with Preston, but in a subservient role. The prosecutor put to Preston in cross-examination that the appellant was his "errand boy". There was evidence that the appellant had a history of psychological problems and alcoholism. Preston told the police that the appellant was "thick and simple".

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1 *R v Gillard and Preston (No 3)* (2000) 78 SASR 279.

2 (2000) 201 CLR 414 at 422 [19].

4 At Preston's request, the appellant stole a van, and used it to drive Preston to the repair shop. Also at Preston's request, shortly before the pair arrived at the repair shop, the appellant made a telephone call to the shop to check that Knowles was there. Both men were disguised. Preston was armed with a loaded gun. He walked from the van into the repair shop, shot and killed Knowles and another man, and fired at a third. He then rejoined the appellant in the van and they drove off together. The appellant later destroyed the van.

5 The case against Preston was straightforward. So also was the case against the appellant, as it was left to the jury. The prosecution alleged that the appellant was a party to the plan to kill Knowles and that he was well aware of the intention with which Preston acted. In support of that case, the prosecution invited the jury to accept that the appellant must have known that Preston was armed with a loaded gun. There was evidence as to the process involved in loading and cocking the weapon, intended to show that it was very unlikely that Preston, who began shooting almost as soon as he entered the repair shop, could have put himself in a position to do that without the appellant's knowledge.

6 The appellant, who gave no evidence at the trial, made admissions to the police that he had stolen the van, driven Preston to and from the repair shop, made the telephone call to establish that Knowles was there, worn a hood to disguise his appearance, and later destroyed the van. He asserted, however, that he had no knowledge of Preston's intention to kill Knowles, and that he thought that what was involved was a robbery. He denied knowing that Preston was armed with a gun.

7 The proposition that the appellant did not know that Preston was armed was implausible. On his own admissions, the appellant knew that Preston, wearing a mask or hood over his face, was entering the car repair shop, where Knowles and a number of employees were present, for a hostile and criminal purpose. Even if that purpose was robbery, rather than murder, it would have required considerable audacity on the part of Preston to attempt the task unarmed. The appellant did not explain how he thought Preston might have carried out the robbery without a weapon. The man he was supposedly intending to rob was not a person to be trifled with; he was not alone; and car repair shops usually contain items which might be used to beat off an unarmed intruder. It was well open to the jury to reject the suggestion that the appellant did not know that Preston was carrying a loaded gun, and to conclude that, insofar as they were considering the hypothesis that the appellant believed that he was assisting a robbery, what was involved, to the appellant's knowledge, was an armed robbery.

8 The robbery hypothesis was evidently taken seriously by the jury. They asked questions directed to the possibility that Preston was carrying out a contract killing, but the appellant believed he was carrying out a robbery. Ultimately, they took several days to consider their verdict. The trial judge

directed the jury that, in order to convict the appellant, the prosecution had to prove that Preston and the appellant shared a common purpose to kill Knowles, and had to exclude as a reasonable possibility that the appellant was acting with the purpose of participating in robbery.

9 The prosecution argued at trial, and on appeal, that such a direction was erroneous in two respects: first, the jury should have been told that, even on the robbery hypothesis, there was a view of the facts consistent with the appellant's guilt of murder; and secondly, that the jury should also have been told that, on the robbery hypothesis, they could convict the appellant of manslaughter. Counsel for the appellant now accepts, and asserts, that at least the second part of that argument is correct. The essence of the appellant's complaint is that, the case against him having been put to the jury as murder or nothing, there was a miscarriage of justice because the jury were deprived of the opportunity of considering an intermediate possibility, manslaughter.

10 Hayne J, in his reasons for judgment, has summarised the principles as to criminal complicity based upon participation in a common enterprise, as stated in *McAuliffe v The Queen*[3]. The Full Court considered those principles, but they rejected the alternative case of murder, or manslaughter, based upon an acceptance of the robbery hypothesis. Duggan and Bleby JJ, with whom Lander J agreed, said:

> "The prosecution also submitted to the trial judge that the alternative verdict of manslaughter should be left to the jury. It was said that if the jury found that Preston intended to commit the crime of murder, but Gillard contemplated that a robbery only might be committed and if Gillard was aware of the fact that Preston was carrying a gun, then there would be a sufficient basis for a finding that Gillard committed the offence of manslaughter. According to the submission, Gillard would be guilty of manslaughter in these circumstances if he was a party to the commission of an unlawful and dangerous act, namely, the presentation of the gun."

11 They then turned to *McAuliffe*, and said that there had to be a meeting of minds in relation to the criminal design. If Preston had murder in mind, and Gillard contemplated a robbery only, it was difficult to identify a relevant common purpose. They said that they did "not think that the jury could find an agreement or understanding which would satisfy the requirement of a defined and common criminal purpose".

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3 (1995) 183 CLR 108.

12 The prosecution submission, in its reference to robbery, plainly meant armed robbery with a loaded gun as the weapon. For reasons already stated, it was clearly open to the jury to consider that, even if the appellant only contemplated robbery, that was the kind of robbery in question. Such a robbery is an act of serious violence. The presentation of a loaded weapon in the course of such a robbery involves an assault in circumstances which clearly expose the victim to an appreciable risk of serious injury[4].

13 On the prosecution case, there was a common purpose between Preston and the appellant that at least involved the stealing of a van, driving Preston, disguised, and armed with a loaded gun, to the repair shop to confront Knowles, driving Preston away from the repair shop, and destroying the van in order to evade detection. That the purpose was for Preston to confront Knowles is evident from the telephone call made to the premises by the appellant shortly before he and Preston arrived. There was a common criminal design, and it included the hostile use of a loaded gun. The appellant and Preston both had the purpose of engaging in an act of criminal violence. The level of violence contemplated by one exceeded that contemplated by the other, but that does not necessarily mean that the other is exonerated.

14 In the present context, we are concerned with the culpability of the appellant by reason of his complicity in the conduct of Preston. The Full Court said that, upon the robbery hypothesis, "Gillard had been duped by Preston". But the case is not about the vitiating effect of misrepresentation upon a contractual agreement. The question is whether, if the appellant thought he was participating in an armed hold-up, and Preston intended from the outset to kill Knowles, the appellant can be liable for culpable homicide by reason of such common purpose as they entertained. To say that Preston's purpose was different from that of the appellant does not answer the question. There was a substantial commonality of purpose, and the question is as to the legal significance of the difference.

15 It is established that, consistently with the principles stated in *McAuliffe* (or statutory provisions to similar effect), where death results from a joint enterprise involving violence, and the level of violence contemplated by one participant exceeds that contemplated by another, one may be guilty of murder and the other guilty of manslaughter. *Gilbert* was such a case. Examples from various jurisdictions were examined in *R v Barlow*[5].

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4 *Wilson v The Queen* (1992) 174 CLR 313 at 332-335.

5 (1997) 188 CLR 1.

16 In *Markby v The Queen*[6], Gibbs ACJ said (omitting references):

> "If ... two men attack another without any intention to cause death or grievous bodily harm, and during the course of the attack one man forms an intention to kill the victim, and strikes the fatal blow with that intention, he may be convicted of murder while the other participant in the plan may be convicted of manslaughter. The reason why the principal assailant is guilty of murder and the other participant only of manslaughter in such a case is that the former had an actual intention to kill whereas the latter never intended that death or grievous bodily harm be caused to the victim, and if there had not been a departure from the common purpose the death of the victim would have rendered the two participants guilty of manslaughter only. In some cases the inactive participant in the common design may escape liability either for murder or manslaughter. If the principal assailant has gone completely beyond the scope of the common design, and for example 'has used a weapon and acted in a way which no party to that common design could suspect', the inactive participant is not guilty of either murder or manslaughter. If however the use of the weapon, even if its existence was unknown to the other party, is rightly regarded as no more than an unexpected incident in carrying out the common design the inactive participant may be convicted of manslaughter."[7]

17 The concluding sentence of that passage, raises what, as it appears to us, is the potential significance of the supposition that Preston "duped" the appellant, although the reference to the possibility that the existence of the weapon was unknown to the other party is not presently material.

18 In *R v Collie*[8], the deceased was abducted by a number of men, including L. According to L, the abduction was for the purpose of interrogation, and a firearm was to be used only as a threat in order to keep the deceased under restraint. Unknown to L, his companions intended from the outset to kill the victim, and they did so. The Full Court of the Supreme Court of South Australia rejected a contention that, on that version of events, L was guilty of manslaughter. King CJ, with whom Cox J and Debelle J agreed, said[9]:

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6 (1978) 140 CLR 108 at 112-113.

7 See also *Reid* (1975) 62 Cr App R 109 at 112.

8 (1991) 56 SASR 302.

9 (1991) 56 SASR 302 at 315-316.

> "The question of law is whether the statement, so construed, amounts to a confession to the crime of manslaughter. There can be no doubt that it was a confession to engaging in an unlawful act consisting of a false imprisonment of and an assault upon the deceased in common with the other two men, and an act which was dangerous by reason of the carrying of the loaded firearm. The statement also conveys that murder was not within [L's] contemplation. In those circumstances, if the death of the deceased resulted from the unlawful and dangerous act, [L] would be guilty of manslaughter .... But not all deaths occurring in the course of an unlawful and dangerous enterprise which does not include murder in its scope result in criminal liability for manslaughter on the part of the participants. Questions of causation arise.
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> ...
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> In the present case I feel no doubt that if the death had resulted from the accidental discharge of the loaded firearm [L] would be guilty of manslaughter. If one of the participants had formed, through panic or anger, a sudden intention to wound or kill the deceased, I think ... that that would be regarded as a result of the dangerous act of carrying a loaded firearm as part of the joint enterprise and that [L] would be guilty of manslaughter. That, however, is not what [L's] statement conveys. It conveys that the death of the deceased was the result of a deliberate act which could only have been premeditated and which indicated that his companions had entertained the intention to kill from the beginning. In those circumstances, it seems to me that the death cannot be regarded as having been caused by the dangerous nature of the enterprise into which [L] had entered. The cause of the deceased's death was unrelated to any danger created by imprisonment of the deceased or the carrying of the loaded firearm for the purpose of restraining him. The cause was the murderous intention entertained, unknown to [L], by the other two participants. In those circumstances I do not think that a verdict of manslaughter was open upon [L's] statement and there is no basis in the evidence upon which manslaughter could have been left to the jury as a possible verdict."

19 The distinction, drawn by King CJ, between the case where a co-participant forms an intention to kill during the event, and a case where such an intention existed from the outset, may be factually significant in some circumstances, but it cannot be determinative in all cases as a matter of principle. In the present case, on the robbery hypothesis, the appellant was a party to a common design which involved the hostile confrontation of Knowles with a loaded gun. According to the principles stated in *McAuliffe*, the culpability of the appellant in the event that Preston shot and killed Knowles would depend upon the scope of their common design, and what he foresaw as a possible incident of

the design. If he foresaw, as a possible incident of carrying out the common design, that Preston might shoot Knowles with intent to kill or cause grievous bodily harm, then he would be guilty of murder[10]. If he foresaw, as a possible incident, that Knowles might shoot Preston but without foreseeing such intent, then he would be guilty of manslaughter. That need not depend upon whether Preston decided on the spur of the moment to kill Knowles, or whether the killing was premeditated. Furthermore, there is a difficulty in treating intention as a cause of death. The cause of death is the act that brought it about. The issue is the accused's criminal responsibility for that act.

20 A question that arose was whether the death of Knowles was causally related to an act for which the appellant was criminally responsible. The act causing his death was the presentation and discharge of the weapon by Preston. The issue is whether, and to what extent, the appellant was criminally responsible for that act. The resolution of that issue depends upon the scope of the common criminal design, and the foresight of the appellant.

21 *Collie* was not followed in a recent decision of the Full Court of the Supreme Court of South Australia. In *R v Zappia*[11], a case decided after the Full Court's decision in the present case, the appellant was convicted of manslaughter. The appellant and a co-offender went to the deceased's apartment. The appellant's case was that he knew the co-offender intended to threaten the deceased with a gun. There was evidence that the appellant knew the gun was or might be loaded. The co-accused shot and killed the deceased. The appellant said he did not expect this to happen. The conviction was upheld. Doyle CJ, with whom Lander J and Martin J agreed, referred to counsel's submission that if, unknown to the appellant, the co-offender intended to kill the victim from the outset, and then killed the victim deliberately, the jury could not convict of manslaughter unless satisfied that the deliberate killing of the victim "was not an unexpected event completely outside the scope of the joint enterprise"[12]. The submission was put alternatively in terms of causation. Reliance was placed upon *Collie*. Doyle CJ distinguished that case as turning on its own facts and preferred to follow the statement of principle made by Gibbs ACJ in *Markby*[13].

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10 *McAuliffe v The Queen* (1995) 183 CLR 108 at 117-118.

11 (2002) 84 SASR 206.

12 (2002) 84 SASR 206 at 221 [66].

13 (2002) 84 SASR 206 at 227 [80].

22 He said[14]:

> "As I observed earlier, the relevant direction was given on the basis that the jury was satisfied that Mr Zappia knew Mr Kamleh was carrying a loaded gun and intended to use it to threaten Mr Rasti. That is an important point. Mr Zappia knew that a dangerous weapon was being taken to the scene. Having regard to the nature of the joint enterprise ... an inevitable conclusion was that if, in the course of the confrontation, Mr Kamleh formed an intention to kill, that was no more than an unexpected incident in the carrying out of the common design ... .
>
> Would it make any difference if it were a reasonable possibility that Mr Kamleh formed the intention to kill relatively early in the piece, perhaps shortly before, or as the men entered the apartment? My view is that in the circumstances of this case it would not. The joint enterprise that is posited was, all along, to confront Mr Rasti, and to use the loaded pistol to threaten him. I do not consider that it makes any difference when Mr Kamleh formed the intention to kill."

23 We agree with that approach. The present case illustrates the artificiality of a distinction, in the circumstances under consideration, based upon when an intention to kill was formed by a primary offender. The appellant stole a van and used it to deliver Preston to Knowles' premises, having first checked to make sure that Knowles was present. On the assumed facts, he knew that Preston was armed with a loaded gun. He waited outside the premises to assist Preston to escape. Preston shot Knowles with intent to kill. There is no reason why the existence and degree of the responsibility of the appellant for the killing of Knowles should depend upon whether Preston decided to kill him on the spur of the moment, or shortly before they arrived at the premises, or whether that was his intention from the time when he arranged for the appellant to assist him.

24 In *McAuliffe*[15], the Court said:

> "There was no occasion [in *Johns v The Queen*[16]] for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when

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14 (2002) 84 SASR 206 at 227 [82], [83].

15 (1995) 183 CLR 108 at 117-118.

16 (1980) 143 CLR 108 at 130-131.

> the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind ... As Sir Robin Cooke observed, the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight ... That is in accordance with the general principle of the criminal law that a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it."

25 The general principle there referred to extends to the possibility that a person who intentionally assists in homicide may be guilty of manslaughter even though the principal offender is guilty of murder. The existence of that possibility assumes a difference in the intentions of the two parties. The secondary party may not know of, or foresee, the principal offender's murderous intention, but may foresee the possibility of the act causing death as an incident of the common design. The essence of the reasoning in the above passage is that, when the secondary party continues to participate in the venture without having agreed to, but foreseeing as a possibility, the act causing death, that party is regarded as intentionally assisting in the commission of a crime. In the present case, if a jury decided that the appellant foresaw as a possibility that Preston would fire the loaded gun at Knowles, and continued to participate with that foresight, then he would be intentionally assisting in the commission of culpable homicide. The level of his own culpability would depend upon whether he foresaw that Preston might act with intent to kill or cause grievous bodily harm.

26 In our view, there was a viable case of manslaughter to be left to the jury, and the refusal to leave that case was a wrong decision on a question of law.

27 This raises the question of the proviso. *Gilbert* decides that it is not an answer to the appellant's argument to point out that, since the jury were properly (albeit conservatively) instructed on the elements of murder, and since they convicted the appellant of murder, there is, on that account alone, no miscarriage of justice. It is unnecessary to repeat the reasons for that. The jury were wrongly deprived of an opportunity to consider an intermediate position. The respondent sought to distinguish *Gilbert* on the following ground. One of the counts on which the jury convicted the appellant was one of attempted murder. In relation to that count, there was no intermediate possibility of manslaughter. That is so, but the distinction does not answer the problem to which *Gilbert* was addressed. If, in relation to the two counts of murder, the jury were (by hypothesis) not properly instructed in the law of culpable homicide, then that could have affected the outcome of the whole trial. Although the error related directly only to the first and second counts, once it is accepted that the nature of the error is such as to affect the verdicts on those two counts it is impossible to dismiss the possibility that it also affected the verdict on the third count.

28 The substantial question to be considered in relation to the proviso is that which was considered by the Court of Appeal of Queensland in *Gilbert*, and upon which that Court divided. It is whether a jury, properly instructed, would necessarily have returned a verdict of murder. The facts of *Gilbert* were, in a number of respects, similar to those of the present case. The accused drove the victim and a co-offender to a lonely place, where the co-offender bashed and killed the victim. The accused said that all he knew was that the co-offender intended to assault the victim. The accused was convicted of murder. It was agreed on all sides that the trial judge had erred in not leaving manslaughter to the jury. A majority in the Court of Appeal decided there was no miscarriage of justice because, having regard to his knowledge of the co-offender's violent propensities and the victim's physical weakness, a jury would inevitably have concluded that the accused foresaw that the co-offender would act with intent to cause grievous bodily harm. The dissentient disagreed, for factual reasons that are presently irrelevant, as did a majority in this Court.

29 In the present case, while it was well open to a jury to find that the appellant foresaw that Preston might shoot Knowles, or others in the repair shop, it was not inevitable that, properly instructed, and given manslaughter as an alternative to consider, they would find that he foresaw that Preston would act with intent to kill or cause grievous bodily harm. It is difficult for this Court to know what the jury would have made of the appellant. There was evidence as to his personality and background that indicates strongly that he is not a clear and capable thinker. He did not give evidence, but the jury saw him over a long period, and heard acquaintances describe his capabilities. They had his interview with the police. Much would depend upon their assessment of him. That is quintessentially a jury question. A loaded gun used in the course of an armed robbery is obviously dangerous, and it is easy to foresee that it might be discharged. But it is not inevitable that a jury would find that the appellant subjectively foresaw that Preston would shoot with intent to kill or cause grievous bodily harm. When an appellate court is concerned with an issue about the subjective foresight of a person who may be regarded by a jury as being of limited capacity, there is a danger in concluding too readily that a jury inevitably would reach a certain finding, especially where that conclusion is based on logic, and on a rational assessment of objective circumstances which the person involved might not have made.

30 We would allow the appeal, set aside the orders of the Full Court of the Supreme Court of South Australia, order that the appeal to that Court be allowed, that the convictions be quashed, and that there be a new trial.

31 GUMMOW J. I agree with the statement by Hayne J of the principles respecting joint criminal enterprise and with what his Honour says as to the formulation and application of those principles by the Full Court. I agree also with what Hayne J says under the heading "Reconsideration of *McAuliffe* neither sought nor required".

32 In the present case there was, as Hayne J explains, a wrong decision by the trial judge on a question of law in not directing the jury that a verdict of manslaughter was an available outcome.

33 The issue then is whether the proviso to s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) should have been applied. In *Gilbert v The Queen*[17], Callinan J, one of the majority, said:

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

34 The other members of the majority, Gleeson CJ and Gummow J, spoke to similar effect[18], with particular reference to the judgment of McLachlin J in *R v Jackson*[19]. That reasoning applies to the circumstances of the trial in the present case.

35 The appeal should be allowed and consequential orders made as proposed by Hayne J.

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17 (2000) 201 CLR 414 at 441 [101].

18 (2000) 201 CLR 414 at 421-422 [16]-[20].

19 [1993] 4 SCR 573 at 593.

36 KIRBY J. Mr Kevin Gillard ("the appellant") appeals from a judgment of the Full Court of the Supreme Court of South Australia (sitting as the Court of Criminal Appeal)[20]. His appeal raises two questions.

37 The first is whether, contrary to the ruling of the primary judge, and of the Full Court affirming that ruling[21], the jury should have been instructed that it was open to them to return verdicts of guilty of manslaughter in answer to the counts of the indictment charging the appellant with murder. The second issue arises if the first is decided in the affirmative. It is whether the appeal should nonetheless be dismissed by the application of the "proviso"[22]. The propounded ground is that the jury's verdicts of guilty of murder followed correct instructions about that offence and were open, indeed inevitable, when considered in the context of the evidence. Upon that footing, it is suggested that any misdirection resulted in no substantial miscarriage of justice.

38 A basic quandary is raised by the first question. To the extent that courts expand joint criminal liability for offences, by enlarging the scope of the doctrine of common purpose, they expose accessories to full liability for *acts* which they did not perform and may not actually have *intended*. Because manslaughter is an offence that permits a differentiation of culpability for homicide, it has a potential, in circumstances where it applies, to allow a jury to ameliorate the operation of the doctrine of common purpose. But given the way that the doctrine has been developed by this Court, it is difficult to find a clear point of differentiation that would permit a principled distinction to be made between guilt of murder and guilt of manslaughter. Such differentiation must be clear because, in Australia, decisions on such questions are usually made by juries.

An unsatisfactory appeal

39 *Earlier disclaimer of manslaughter*: To say the least, there are features of this appeal that are less than satisfactory. They make the provision of answers to the two questions that it raises more than usually difficult.

40 Not only did the representatives of the appellant fail at the trial to reserve the point now argued. They resisted an attempt of the prosecution to persuade the trial judge to instruct the jury that verdicts of manslaughter were available. They convinced the judge to confine the jury to a choice between "murder and nothing". That choice presented certain forensic advantages to the appellant. He

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20 *R v Gillard and Preston (No 3)* (2000) 78 SASR 279.

21 (2000) 78 SASR 279 at 291 [346].

22 *Criminal Law Consolidation Act* 1935 (SA), s 353(1), "proviso".

fully exploited them. However, in the event, the strategy did not result in the verdicts of acquittal for which he hoped. Instead, the jury returned verdicts of guilty of murder about which the appellant now complains.

41 Having secured, but lost, the advantages of the dichotomy which he urged at his trial, the appellant now wants another trial with a further chance to contest the indictment under new rules. It is easy to feel a sense of distaste about allowing such a course to succeed. The joint trial of the appellant and his co-accused, Mr Gerald Preston, lasted four and a half months. At the time, it was the longest criminal trial in South Australian history. Any retrial would be a little shorter because of the termination of the proceedings against Mr Preston. But it would still be very long. It would involve great public expense. There would be substantial inconvenience to witnesses and to a second jury that would have to be summoned.

42 *Absence of argumentative contradiction*: The appeal raises important questions concerned with the law of manslaughter as an offence of unlawful homicide short of murder[23]. In the context, the appellant's complaint about the directions given to the jury cannot be resolved without consideration of the law of common purpose, variously so described as "common design, concert [or] joint criminal enterprise"[24]. That subject arises here in the context of the rules of the common law not in elaboration of a statutory provision, such as s 8 of the *Criminal Code* (Q) considered in *R v Barlow*[25]. In South Australia, no statute defines the scope of criminal liability in a case involving joint involvement in a crime with an alleged common purpose. Judges must therefore state the extent of the criminal liability by reference to common law doctrine. In recent years the contours of that doctrine have expanded significantly. This has attracted critics and proposals for law reform. It has produced serious difficulties for judicial exposition of the law in ways apt for accurate jury decision-making[26].

43 It follows that the determination of the questions to be decided in this appeal requires this Court to embark once again upon an area of the law that has been criticised for its lack of precision. It is especially in such a case that this Court must expound the law not simply for the parties but for other cases presenting similar problems, including under statutory provisions to the extent that these contain statements of criminal liability similar to those upheld by the

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23 cf *Stanton v The Queen* (2003) 77 ALJR 1151 at 1162 [64]-[66]; 198 ALR 41 at 56-57.

24 *McAuliffe v The Queen* (1995) 183 CLR 108 at 113.

25 (1997) 188 CLR 1.

26 *R v Barlow* (1997) 188 CLR 1 at 23 per McHugh J.

common law[27]. Simply reaching for another verbal formula is scarcely a proper response.

44 The performance of the Court's function in the present appeal was impeded by the fact that, as in the Full Court (but not at trial), the appellant and the prosecution were in agreement that the primary judge had erred in failing to give the jury instruction about the availability of verdicts of manslaughter. So far as the parties to the appeal were concerned, it involved the applicability of the proviso and nothing else. This Court did not therefore have the advantage of competing contentions about the law of manslaughter, and of joint criminal liability, that might have sharpened the consideration of the suggested errors of law that had occurred in the trial judge's directions. In consequence, the arguments of the parties afford a less than perfect platform from which to embark upon an examination of the correctness of the reasoning of the Full Court on the central issue of the appellant's joint criminal liability.

45 No party before this Court supported the Full Court's reasons. The best that we could therefore do was to consider that Court's decision for ourselves against the backdrop of recent opinions in this Court on common unlawful purpose[28], the reasoning on the point in successive decisions of the South Australian Full Court[29], and authority elsewhere grappling with the same problems.

46 The disadvantage that I have described is more than theoretical. Where criminal liability is imposed on the basis of a common unlawful purpose, one person (the secondary offender) is rendered liable for the acts of another person (the principal offender) although the secondary offender has not actually performed the acts in question and may not have agreed to, or specifically intended, that such acts take place. To this extent, the doctrine of common purpose imposes criminal liability upon secondary offenders in a way that sometimes appears to offend fundamental principles of our criminal law. By those principles (limited exceptions apart) criminal liability ordinarily attaches only to the doing of criminal *acts* with a requisite criminal *intention*.

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27 *Barlow* (1997) 188 CLR 1 at 44.

28 Such as *Markby v The Queen* (1978) 140 CLR 108; *Johns (TS) v The Queen* (1980) 143 CLR 108; *Royall v The Queen* (1991) 172 CLR 378; *McAuliffe v The Queen* (1995) 183 CLR 108 and *Barlow* (1997) 188 CLR 1; cf *Chan Wing-Siu v The Queen* [1985] AC 168; *Hui Chi-Ming v The Queen* [1992] 1 AC 34.

29 *R v Collie* (1991) 56 SASR 302 at 315-316; *R v Zappia* (2002) 84 SASR 206 at 221 [66], 227 [80], [83]. See reasons of Gleeson CJ and Callinan J ("joint reasons") at [18]-[22].

47 Where a joint criminal enterprise results in homicide, it may be understandable that the prosecution would wish to include an option for the jury to return a verdict of guilty of manslaughter. In a particular case, this could make it more acceptable to a jury to apply the legal fiction involved in the law of common purpose, rather than to focus attention exclusively on the accused's involvement in the criminal acts and whether a necessary intention on the part of the accused was proved. It was a demand for such focus (and a resistance to the temptation for jury compromise) that sustained the appellant's objection at trial to the judge's giving instructions to the jury that they could return verdicts of manslaughter. Arguably, the basic legal principle lying behind the reasoning of King CJ in *R v Collie*[30] (and of the Full Court in the present case[31]) rests upon an insistence on what those judges saw as the fundamental principle of criminal liability. According to that principle, criminal actions and intentions must normally coincide. Liability for what are said to be acts done pursuant to an unlawful common purpose should therefore be confined to liability for acts performed within a proved common intention and not otherwise.

48 Because of the way this appeal developed, no party sought to support such a theory of liability for common purpose, as expressed by the Full Court in this case. No party attempted to reconcile that Court's reasoning with this Court's pronouncements on the subject. Although it would have been in the prosecution's immediate interest to do so, in order to save the verdicts in the appellant's long trial, before this Court the prosecution persisted with its submission at trial and in the Full Court that verdicts of manslaughter were available.

49 From a functional point of view, that submission was understandable. But the result was that the argument of this appeal was lop-sided. Faced with an appeal in which neither of the contesting parties had any desire to support the reasoning of the Full Court, I must approach the issue of principle without the assistance normally derived from competing submissions. To the usual disadvantages felt in such a case must be added an intuitive feeling that there could be larger reasons of principle and policy to support the approach taken by the Full Court in *Collie* and in this case than appear on the face of those decisions or than this Court was able to extract from the reluctant parties.

50 *Confinement of the argument and materials*: There is another difficulty. The appeal was argued on the basis that the law of common purpose liability was

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30 (1991) 56 SASR 302. See joint reasons at [18].

31 Duggan and Bleby JJ; Lander J concurring. See joint reasons at [10]-[11].

that stated in recent decisions of this Court, especially *McAuliffe v The Queen*[32]. Such an approach was understandable, given that *McAuliffe*, in particular, was a recent, unanimous decision of this Court. Nevertheless, it is an opinion that has been criticised as incompatible with the fundamental norms of criminal liability[33]; as inconsistent with other authority[34]; and in need of reconsideration, not least to derive principles that can be clearly and simply explained to juries in the place of the present "potentially confusing" state of the law[35].

51 Although it is unusual for recent authority to be reconsidered, the Court will sometimes do so where it is convinced that the authority is seriously wrong and productive of injustice or confusion. It will sometimes do so even in respect of recent decisions that involved all, or nearly all, members of the Court[36].

52 In the present case the parties did not advance submissions to assist this Court to re-express what it had said in recent cases, in the light of subsequent doctrinal and practical criticisms. On the contrary, when during argument counsel were asked whether there had been academic or professional writing about the problem before the Court, we were told by counsel for the appellant that he had been unable to find anything that was in point. Subsequent inquiry has disclosed that there is extensive literature about unlawful joint enterprises where death results[37] and about the decisions on the doctrine of common purpose

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32 (1995) 183 CLR 108.

33 Gray, "'I Didn't Know, I Wasn't There': Common Purpose and the Liability of Accessories to Crime", (1999) 23 *Criminal Law Journal* 201 at 209-210 ("Gray") referring to *R v Powell* [1997] 3 WLR 959 at 963 per Lord Mustill, 981 per Lord Hutton (Lord Goff of Chieveley and Lord Jauncey of Tullichettle concurring); [1997] 4 All ER 545 at 548, 566.

34 eg *Giorgianni* (1985) 156 CLR 473 at 506.

35 Gray (1999) 23 *Criminal Law Journal* 201 at 217.

36 eg *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, an earlier decision reached by six Justices of the Court in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 was overruled.

37 Cato, "Foresight of Murder and Complicity in Unlawful Joint Enterprises Where Death Results", (1990) 2 *Bond Law Review* 182; Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, 3rd ed (2001) at 1362.

in Australia[38], England[39], the United States[40], Canada[41] and elsewhere. Law reform bodies have also recently addressed the problem of accessorial liability. They have done so at the national level in Australia[42], and in South Australia[43], England[44], Canada[45] and elsewhere. Such materials have analysed the history,

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38 Odgers, "Criminal Cases in the High Court of Australia – McAuliffe and McAuliffe", (1996) 20 *Criminal Law Journal* 43 at 45 ("Odgers"); Gray (1999) 23 *Criminal Law Journal* 201 at 205.

39 K J M Smith, *A Modern Treatise on the Law of Criminal Complicity*, (1991) at 214-222; J C Smith, "Criminal Liability of Accessories: Law and Law Reform", (1997) 113 *Law Quarterly Review* 453 at 454-456; Law Commission, Consultation Paper No 131, *Assisting and Encouraging Crime*, (1993) at 58-62.

40 Stark, "The natural and probable consequences doctrine is not a natural result for New Mexico – State v Carrasco", (1998) 28 *New Mexico Law Review* 505; Chism, "State v Carson: A misguided attempt to retain the natural and probable consequence doctrine of accomplice liability under the current Tennessee code", (1998) 29 *University of Memphis Law Review* 273; Mueller, "The Mens Rea of Accomplice Liability", (1988) 61 *Southern California Law Review* 2169. See also New York Penal Law §20.00 and the *Model Penal Code* §2.06. See also LaFave, *Criminal Law*, 3rd ed (2000) at 636 and *People v Prettyman* 926 P 2d 1013 at 1015, 1019 (Cal 1996) endorsing liability of the confederate for crimes committed as a "natural and probable consequence" of the crime originally aided and abetted.

41 Stuart, *Canadian Criminal Law: A Treatise*, 4th ed (2001) at 617-618 citing *R v Logan* [1990] 2 SCR 731 and *R v Jackson* [1993] 4 SCR 573; cf the Canadian *Criminal Code* s 21(2) referred to in *Barlow* (1997) 188 CLR 1 at 37-39.

42 Australia, Review of Commonwealth Criminal Law, *Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) at 205-208.

43 South Australia, Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, 4th Report (1977) at 300-309. The Committee proposed a redefinition of the common law doctrine by reference to the principle of recklessness. It recommended that an accomplice should be liable for a collateral offence if a substantial risk had been adverted to. The report was written before *Johns* (1980) and *McAuliffe* (1995). It has not been implemented.

44 Law Commission, Consultation Paper No 131, *Assisting and Encouraging Crime*, (1993) at 57-64. The Law Commission's Website states that the final report on this subject will be issued in 2004.

45 Law Reform Commission of Canada, *Secondary Liability: Participation in Crime and Inchoate Offences*, Working Paper 45, (1985) at 28.

current state and defects of the law on this subject in ways useful to the functions of this Court as the final appellate court of the nation.

53 *A missed opportunity*: It should be said once again that this Court is not simply a second court of criminal appeal. To receive a grant of special leave there must be something special about the case. Research in, and reference to, professional and academic writing is imperative to assist the Court to fulfil its constitutional function. Although in other respects the argument of this appeal was thorough and careful, an acquaintance with the literature to which I have referred would have revealed significant doctrinal problems in the state of current authority. It would have identified considerations of legal principle and legal policy that should have been addressed, or at least called to the Court's notice.

54 As it is, by the way it was argued, we are virtually forced to resolve this appeal on a footing that I, at least, find quite unsatisfactory. It misses an opportunity to clarify and simplify the task of trial judges and the juries they instruct. In such matters, these are important functions of this Court[46]. Yet I must answer the questions argued within the inherent limitations that I have mentioned.

The evidence supporting exculpation and inculpation

55 *Reflecting different culpabilities*: Most of the facts, relevant to my analysis, are set out in other reasons[47]. A consideration of them indicates that the jury had a critical decision to make concerning the culpability of the appellant in the acts performed by Mr Preston (the primary offender), in murdering Mr Les Knowles, another employee in Mr Knowles' workshop and wounding a third person. A rational system of criminal law would present such a question of potentially differential culpability for decision by the tribunal of fact (here a jury).

56 *Evidence supporting exculpation*: I will not go over all of the evidence that would tend to exculpate the appellant from guilt of Mr Preston's murders. However, the relevant features of the evidence would certainly include: (1) The clear evidence that Mr Preston alone fired the shots at the victims and did so pursuant to a pre-existing plan which he had made to kill Mr Knowles for a fee that he alone subsequently collected; (2) The discharge of the firearm occurred out of sight of the appellant who remained in the van which he was driving as a get-away vehicle, consistent with his shared purpose of participating only in a robbery; (3) The appellant's background as a person with mental problems, who

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46 cf *Zoneff v The Queen* (2000) 200 CLR 234 at 260-262 [64]-[68].

47 Joint reasons at [1]-[8]; reasons of Hayne J at [99]-[102].

had only recently been discharged from a psychiatric hospital to resume his itinerant life; (4) The appellant was dominated by Mr Preston, to whom he looked up, who was the "ringmaster" of their joint enterprise and who, for his part, regarded the appellant as an "idiot", not an equal player; (5) The appellant's lack of past convictions for acts of violence or the use of firearms and his reputation and identity as a small-time thief with severe alcohol problems and few friends; (6) The appellant's omission to change his name or identity in Brisbane where he went after the offences and his immediate declaration to the police who apprehended him that the purpose of the enterprise was "nicking", ie stealing or robbery, not homicide; (7) The consistency of that stated purpose with the proved reputation of Mr Knowles as being involved in drug dealing, with the foreseeable possibility of his having cash on his premises so as to support a motive of robbery (a fact confirmed by the subsequent police investigation); and (8) The then recent residence of the appellant in the same suburb as Mr Knowles, with the available inference that he was aware of the likelihood of the presence of cash on the Knowles premises.

57 *Evidence supporting inculpation*: As against these evidentiary considerations, favourable to the appellant, others lent support to the prosecution case. This was that the appellant was an active participant in a joint enterprise to kill Mr Knowles, or that such an outcome (or the infliction of grievous bodily harm) was within the contemplation of the appellant and Mr Preston, foreseen as a possible incident of the execution of their joint activity or contemplated as a possibility, despite which the appellant persisted with his involvement.

58 The chief elements in the evidence that supported this case were that (1) The appellant stole a van, then hid it and then drove Mr Preston to the crime scene and later away from it: such actions being necessary to the performance of what Mr Preston intended to do; (2) The appellant, at the request of Mr Preston, telephoned Mr Knowles before their arrival at his premises to check that he was present, found and reported that he was; (3) Mr Preston was carrying a firearm. On the evidence, it would have been open to the jury to infer that he loaded and cocked it in or near the van and then proceeded into Mr Knowles' premises; (4) Although the appellant denied that he had knowledge that Mr Preston entered the workshop with a loaded firearm, common sense would have suggested that it was unlikely that Mr Preston would have confronted Mr Knowles and other persons in the workshop with a criminal purpose without a weapon of some kind; (5) The appellant knew that a fast departure was essential after whatever was to occur in the Knowles workshop between Mr Preston and Mr Knowles; and (6) He waited outside to facilitate their joint departure. Having effected it, he took steps to hide and then destroy the van so as to remove evidence inculpating Mr Preston and himself in what had taken place.

Traditional and extended common purpose liability

59 *Two bases of common purpose liability*: Upon the basis of these competing elements in the evidence, it was open to the jury, particularly in the absence of oral evidence from the appellant himself[48], to infer that, if not actually sharing the contract killer's intention to shoot and kill Mr Knowles or the other victims, the appellant remained present at the scene; joined in the performance of serious criminal acts; knew that homicide (or the infliction of grievous bodily harm) was within contemplation of Mr Preston; or foresaw it as a possible incident of carrying out their criminal activity together. (Traditional common purpose). Alternatively, it would have been open to the jury to conclude that, even if homicide (or the infliction of grievous bodily harm) was outside the scope of the common purpose to be imputed between the appellant and Mr Preston, it was contemplated by the appellant as a possibility in the carrying out of the enterprise in which the appellant continued to participate on such a basis and with such knowledge[49]. (Extended common purpose)[50].

60 If to the requisite standard, the jury were to conclude that the evidence established either the *traditional* or *extended* doctrine of common purpose, the appellant would be guilty of the murder of Mr Knowles and of the other employee shot at the same time, as well as of attempted murder of the third employee. This would be so despite the fact that the appellant had fired none of the shots, was not party to the contract killing, had not expressly agreed to the use of the firearm in the way that Mr Preston was found to have intended, did not personally intend the death of, or grievous bodily harm to, any of the victims and thought that the real reason for his participation was an aggravated form of "nicking", ie participation in the criminal act of an armed robbery as a get-away driver.

61 *The first error of the Full Court*: In the foregoing circumstances, the doctrine of common purpose, as it has been expounded by this Court, especially in McAuliffe, would throw its net over the appellant. By a legal fiction, it would uphold the conclusion of the jury that the appellant was equally liable with Mr Preston for the murders and attempted murder.

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48 The appellant's case in this regard relied on the recorded interview with police that was received in evidence before the jury.

49 *McAuliffe* (1995) 183 CLR 108 at 114.

50 This is why extended common purpose has been described as "reckless accessoryship": Odgers (1996) 20 *Criminal Law Journal* 43 at 45.

62 To the complaint that joint liability for the proved common purpose was thereby cast too widely, so as to catch a co-offender who did not perform the critical *acts* and shared no *intention* concerning the consequences caused by those acts, the law's answer, as stated by this Court, is as follows: Those who participate in activities highly dangerous to life and limb share equal responsibility for the consequences of the acts that ensue. This is because, as the law's experience shows, particularly when dangerous weapons are involved in a crime scene, whatever the actual and earlier intentions of the secondary offender, the possibility exists that the primary offender will use the weapons, occasioning death or grievous bodily harm to others. The law then tells the secondary offender not to participate because doing so risks equal inculpation in such serious crimes as ensue.

63 There are legitimate criticisms of the law of common purpose so stated. However, those criticisms were not argued in this appeal. It follows that they cannot be addressed by this Court. Within the extended law of common purpose, particularly in *McAuliffe*, the fact that the acts of Mr Preston lay outside the scope of the common purposes agreed, expressly or tacitly, between the appellant and Mr Preston was not conclusive of the appellant's joint criminal liability for the acts that Mr Preston performed. Perhaps that should be the common law. But it is not the Australian common law as stated by this Court.

64 To the extent that the Full Court in the present case, and earlier in *Collie*, suggested otherwise (as I think it did) it erred. On this basis, a first error of law has been shown on the part of the Full Court. It warrants the intervention of, and correction by, this Court.

Common purpose homicide: The scope for manslaughter

65 *The problem and its solution*: This conclusion brings me to the central point in the appeal. It concerns the availability of manslaughter as an alternative verdict in a case of the present kind. Unlike the scope of the law of common purpose, the availability of manslaughter in such a case is not the subject of legal authority that affords a ready solution to the question. Accordingly, this Court must approach the problem by seeking its solution on the basis of the adaptation of existing authority by logical and analogical reasoning as enlivened by any consideration of any pertinent matters of legal principle and legal policy[51].

66 *Against the availability of manslaughter*: There are several arguments against requiring a judge, in a case of this character, to inform the jury that they may return a verdict of manslaughter.

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51 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

67 The most important is that the scope of criminal liability, on the footing of common purpose for the acts of the principal offender, is now stated so broadly as to leave little apparent room for an intermediate culpability for an unlawful homicide that does not amount to murder. Finding a clear point of differentiation that would separate murder from manslaughter in such a case (except as an act of mercy on the part of the jury[52]) is not an easy task. If a person, who did not perform the acts causing the homicide and did not actually intend the death of, or grievous bodily harm to the victim, can still be liable for murder on the basis of the "traditional" or "extended" common purpose doctrine[53], it is difficult to identify the case that will somehow fall outside such joint liability, authorising the jury to return a verdict of manslaughter. If, within current doctrine, such a difficulty appears for this Court, it will also present itself to legal advisers, counsel at trial and trial judges in explaining the point of differentiation to the jury which has the responsibility of deciding the issue.

68 I will illustrate this point by reference to the present case. If the appellant falls within the ambit of the crime of murder, because of the common criminal purpose which the law discerns between himself and Mr Preston, the scope for an intermediate liability for the crime of manslaughter by unlawful dangerous acts causing death is contracted. It shrinks as the scope of the legally imputed liability for murder expands[54].

69 Even more so, if the appellant only ever contemplated robbery or armed robbery and Mr Preston at all times intended a contract killing (so that, in this sense, the murder by Mr Preston lay outside the scope of any true common purpose shared by the co-offenders) but it was independently contemplated by the appellant as a *possibility* that in the carrying out of the enterprise someone might get killed or seriously injured and yet he continued to participate in it with that knowledge, where is the space for manslaughter, being an unlawful killing that is not murder? How, apart from a reference to indeterminate notions such as "lesser responsibility" or "diminished culpability" could a person, such as the appellant be found not guilty of the joint liability offence of murder but guilty instead of manslaughter? How could a jury, faithful to their duty, draw a logical and principled distinction in such a case so as to sustain a verdict of not guilty of murder but guilty of manslaughter? Most importantly how, otherwise than as an

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52 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367-368, referring to *R v Kirkman* (1987) 44 SASR 591 at 593 per King CJ.

53 The "traditional" statement appearing in *Johns* (1980) 143 CLR 108 at 130-131; the "extended" rule being stated in *McAuliffe* (1995) 183 CLR 108 at 114.

54 This is the application of *Johns* (1980) 143 CLR 108 at 130-131.

act of mercy, not the application of a legal rule, could the distinction be explained to a jury by a judge by reference to a discernible principle of law?

70 Secondly, upon one view, the introduction of any such differentiation could divert the jury from their duty to give effect honestly to the policy of the law that has been held to sustain common purpose criminal liability for murder on the part of secondary offenders. If that policy is socially justified and legally required, it must be applied. It obliges clear judicial instruction to the jury concerning the rules that the law has laid down, seemingly to discourage, in cases of this kind, accessorial participation in crimes in which firearms and other dangerous weapons are present. True, availability of a conviction of manslaughter might encourage pleas of guilty and convictions of co-offenders in borderline cases. But it might do so at a price of diminishing the attainment of the objective of the law of common purpose liability. Because of the broad ambit of that law as presently declared by this Court, the alternative might present a jury with a temptation to return a verdict that amounts to a compromise, not one according to law.

71 Thirdly, the same point can be made from the point of view of the secondary offender. This I take to have been the reasoning behind the decisions of the primary judge and of the Full Court both in *Collie* and in the present case. By obliging the jury to consider, and to consider only, the charge of murder by joint liability for a common purpose, a clear decision is required of them. It is reflected in a verdict of guilty or not guilty of murder.

72 It would have been open to the prosecution to charge the appellant with other substantive criminal offences arising out of his activities with Mr Preston. For example, of being an accessory before the fact or after the fact of murder; of stealing the get-away van; of the wilful destruction of the van; perhaps of conspiracy with Mr Preston to commit a robbery and the other crimes to which the appellant admitted in his interview with police. But instead, the prosecution, as was its perfect right, proceeded to charge the appellant with two murders by common purpose. The lengthy deliberation of the jury and their recorded questions suggest the problem which those charges presented in the case of the appellant.

73 Equally, acquittal of the appellant might have seemed an inappropriate response by the jury to the serious conduct disclosed by the evidence and even admitted by him. It is in such circumstances that the existence of a lesser available offence, manslaughter, could sometimes prove an irresistible temptation to a jury. Yet a verdict of guilty of manslaughter might involve a compromise that, in a particular case, punished the accused for the criminal acts and intentions of the co-offender without the jury having considered properly and accurately the accused's acts and intentions according to the law of common purpose liability.

74 *Manslaughter is available*: Despite these arguments, I have concluded that the better view of the common law is that verdicts of guilty of manslaughter were an option available to the jury upon the counts of the indictment charging the appellant with murder. The risk of compromise verdicts may be avoided or diminished by appropriate judicial instructions. The conflicting evidence in the present case indicates why, as a matter of legal principle, the common law accepts the availability of manslaughter as a verdict in such circumstances. The jury have the right to resolve the issue of culpability which that evidence presented.

75 First, the crime of murder has always been treated by the common law as falling in a special category[55]. As a general rule, "under the … common law, it remains within the power of the jury to find a verdict of manslaughter, even although it means disregarding the direction [of the judge on legal liability for homicide]"[56]. There is no good reason why a case such as the present should be treated as an exception to that general rule. There is every reason why it should not.

76 Secondly, as I remarked in *Barlow*[57], it is "[o]nly if differential verdicts are permitted [that] the trier of fact (usually a jury) [is] able to distinguish between the culpability of the accused and to avoid artificial consequences which may offend the sense of justice. Wherever possible, such consequences should be avoided, particularly because most serious criminal trials in Australia are still conducted before juries whose function is to reflect, in a general way, the community's sense of justice."

77 Thirdly, despite the possibility that the prosecution may have established, according to the letter of the law, that a secondary offender (such as the appellant in this case) was jointly liable with Mr Preston of murder by common purpose, it may still arise in such a case that the "offender responsible in law for the actions of another" may "have a different intention" from that other[58]. Thus, as I put it in *Barlow*[59], "[t]he mind of the one may not go exactly with the hand of the other." As this can be the reality of criminal conduct, even where offences are performed

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55 *R v Saunders* [1988] AC 148 at 160.

56 *Packett v The King* (1937) 58 CLR 190 at 213 per Dixon J; see also *Brown v The King* (1913) 17 CLR 570 at 578-579; *Beavan v The Queen* (1954) 92 CLR 660 at 662.

57 (1997) 188 CLR 1 at 40.

58 *Barlow* (1997) 188 CLR 1 at 40.

59 *Barlow* (1997) 188 CLR 1 at 40.

with some degree of common intention, a rational approach to deciding criminal liability will still permit a reflection of the different states of mind of the respective participants. Just as in *Barlow*[60] I was of the view that it would "require the clearest language in the [Queensland criminal] code to expel that interpretation … because it accords with the sense of justice and of rationality as with the purposes of the criminal law"[61], so in this case "[t]he avoidance of incongruity and the risk of injustice to a particular accused in a joint trial is a proper objective of the criminal law"[62]. Thus, "[a]rtificial rigidities which may occasion injustice should be avoided unless the [law] truly compels them.[63]" It does not compel them here.

78 Fourthly, the acceptance of the availability of a verdict of manslaughter is also consistent with the emphasis which the law has placed, more so in recent times, on the actual state of mind of an accused person. As was said in *McAuliffe*[64], "the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose"[65]. The force of these comments was rather undermined in *McAuliffe* by permitting criminal liability to be established there by reference to what a secondary offender contemplated "as a *possibility* in carrying out the enterprise". Possibilities are infinite in their variety[66]. Nevertheless, the availability of a verdict of manslaughter allows a jury to give effect to its view about the culpability of the secondary offender by reference to whether that offender did, or did not, foresee that the *possibility* existed that the principal offender *might* act with intent to kill or cause grievous bodily harm.

79 Fifthly, acknowledging the availability of manslaughter as a possible verdict in such cases gives effect, as Cooke J put it in *R v Tomkins*[67], to the "community's sense that a man who joins in a criminal enterprise with the knowledge that knives (or other weapons such as loaded guns) are being carried

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60 (1997) 188 CLR 1 at 40.

61 cf *R v Jervis* [1993] 1 Qd R 643.

62 *Barlow* (1997) 188 CLR 1 at 40-41 citing *R v Darby* (1982) 148 CLR 668 at 677.

63 *Barlow* (1997) 188 CLR 1 at 41 citing *King v The Queen* (1986) 161 CLR 423.

64 (1995) 183 CLR 108 at 114.

65 Citing *R v Johns* [1978] 1 NSWLR 282 at 287-290 per Street CJ.

66 Odgers, (1996) 20 *Criminal Law Journal* 43 at 46.

67 [1985] 2 NZLR 253 at 255.

should bear a share of criminal responsibility for an ensuing death; but that, if he did not think that the weapons would be intentionally used to kill, it may be unduly harsh to convict him of murder". I cited this passage in *Barlow*[68]. The same general approach was adopted in the Privy Council in a Hong Kong appeal[69] and in the English Court of Appeal[70]. A compatible approach seems to have been added by the Supreme Court of Canada[71]. We should accept the same approach in expressing the Australian common law.

80 Sixthly, so far as a differentiation between verdicts of murder and manslaughter permit a jury, in a given case, to record their opinion of the culpability of an accused, and, in a joint trial, to indicate their conclusions about the comparative culpabilities of primary and secondary offenders, such differentiation furthers the purposes of criminal justice. It facilitates distinctions in sentencing, conceding that manslaughter is a crime that can vary greatly in gravity depending on the particular circumstances[72].

81 Seventhly, to the extent that, after consideration of the foregoing legal authorities, there is any residual doubt about the availability of manslaughter, the evidence called in the trial of the appellant indicates why, as a matter of legal policy, the common law should include the availability of such a verdict.

82 Assume, for example, applying *McAuliffe*, that the jury were to conclude that the murder of Mr Knowles and the death and serious injury to the other victims lay outside the scope of any actually agreed common purpose between the appellant and Mr Preston. Assume further that the jury were to conclude that, to the extent that he thought about it, the appellant might have contemplated that homicide was a theoretical and remote *possibility* in the carrying out of the enterprise in which he persisted but that he did not *actually* foresee it or really consider that Mr Preston might act with intent to kill or cause grievous bodily harm to the victims. In such a case, it would be open to the jury to return a verdict in the appellant's case of not guilty of murder but guilty of manslaughter.

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68 (1997) 188 CLR 1 at 36-37.

69 *Hui Chi-ming v The Queen* [1992] 1 AC 34 at 46-47.

70 *R v Stewart* [1995] 3 All ER 159 at 169. See also "Case and Comment on R v Dunbar", (1988) *Criminal Law Review* 693 at 694-695.

71 *R v Jackson* [1993] 4 SCR 573 at 586.

72 *Markby v The Queen* (1978) 140 CLR 108 at 112-113; *Wilson v The Queen* (1992) 174 CLR 313 at 331-335.

83 Eighthly, great care on the part of a trial judge is needed to ensure that, by posing the possibility of a verdict of manslaughter, the judge does not effectively deprive an accused of a verdict of acquittal. To the extent that, following *McAuliffe*, the law in Australia has made it more difficult in joint crimes involving any contemplated *possible* use of dangerous weapons to avoid conviction on the footing of the doctrine of common purpose, a final reason for accepting the availability of manslaughter is that it ameliorates the potential overreach of the doctrine of common purpose as it is presently expressed. A more radical cure for such overreach must await legislation that defines the law of joint criminal liability more precisely and in closer harmony with the basic principles of the criminal law[73]. Or an appeal to this Court in which a direct challenge is made to the correctness of *McAuliffe* and other decisions and in which any suggested overreach of joint liability could be cut back and the law re-expressed conformably with basic principle.

84 There is much to be said for clarification or reform of this area of the law by reference to the fundamental rules of the criminal law[74]. After the decision in this appeal, the law will remain difficult for judges to explain, difficult for juries to apply and difficult for appeal courts to decide in the appeals that will inevitably follow convictions in such disputable cases.

85 *Conclusion and concurrence*: In the result, I have reached a conclusion similar to that stated in the joint reasons of Gleeson CJ and Callinan J[75]. The appellant has therefore made out an error of law on the part of the Full Court. That Court was mistaken in refusing to uphold the submission that the trial judge had erred in rejecting the argument of the prosecution that he should leave to the jury the availability of finding the appellant not guilty of murder but guilty of manslaughter.

86 In this Court, the prosecution correctly accepted that, if there were misdirections on the availability of verdicts of manslaughter on the first two counts, the absence of any specific error of direction in relation to the third count could not alone save the trial or the conviction on that count.

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73 For example, in accordance with the recommendations of the Review of Commonwealth Criminal Law, *Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) or of another law reform body in Australia or overseas.

74 Reflected in *Parker v The Queen* (1963) 111 CLR 610 at 632.

75 Joint reasons at [25]-[26].

87 Pending further clarification of the law of joint liability for homicide on the basis of the doctrine of common purpose, to the extent that there is uncertainty, and in order to give a clear rule for application at trials, I agree in the reasons of Gleeson CJ and Callinan J.

Re-examination of the common purpose doctrine

88 It is necessary for me to respond to the observations of Hayne J to the effect that reconsideration of the holding of this Court in *McAuliffe* was neither sought nor required[76].

89 This Court is not a second level court of criminal appeal. We have special responsibilities for the health of legal doctrine in Australia. Upon such questions, the Justices of this Court are not captives to the assumptions, concessions or agreements of parties[77]. There is no constitutional impediment to the consideration of new points in appeals. A view of the Constitution that would have imposed a procedural straitjacket, destructive of the power of this Court to correct serious injustices, has been rejected[78]. The Justices have their own responsibilities to the law, especially where the law appears unclear, uncertain or arguably unjust and in need of re-formulation.

90 There are, of course, judges who are uninquisitive and unconcerned about such matters. I am not one of them. Nor am I alone. During the hearing of this appeal, both Callinan J and I asked questions about relevant academic and professional writing about the law under consideration[79]. This is not exceptional. It is normal for this and other final courts. As I then pointed out, in raising the point, we do not now require that such authors must be dead before their views are considered. Despite some rearguard resistance from formalists, the common law has made progress in this respect in recent decades. This Court is no exception. I decline to return to the dark ages. Others may do so as they please.

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76 Reasons of Hayne J at [113]-[120].

77 See eg *Roberts v Bass* (2002) 77 ALJR 292 at 320 [143]; 194 ALR 161 at 199.

78 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23] per Gaudron J, 153-155 [134]-[138] of my own reasons, 169 [185] per Callinan J; cf at 128-129 [65] per McHugh and Hayne JJ dissenting; *Crampton v The Queen* (2000) 206 CLR 161 at 171 [10] per Gleeson CJ, 182-184 [47]-[50] per Gaudron, Gummow and Callinan JJ, 206-207 [122] of my own reasons.

79 *Gillard v The Queen*, High Court of Australia transcript, 1 April 2003, lines 2395-2415.

91 For parties, bound by the holdings of this Court and with a sole motivation to win a case for their respective interests, it will not always be deemed tactical or prudent to question authority, especially if it is recent and they judge that the case can be won without addressing the point. Occasionally, advocates are unaware of the problem. Sometimes they have insufficient time or inadequate fees to explore it fully. Judges have a different motivation and a higher duty[80]. The common law develops by interstitial movements and by the power of ideas. When legal doctrine is deemed unstable, unclear, or unjust, there is an inherent tendency for ideas to be explored over time until a more stable foundation and restatement of the law is achieved. Often that occurs in the form of legislation. Sometimes it takes the form of a judicial restatement of a common law principle. The process may take decades. If it is to start, it must start somewhere. It will not start if judges act mechanically and suppress doubts that arise for them in proceedings that they are called upon to decide.

92 In the present case, for reasons that I have already explained[81], this Court was placed in a specially difficult position by the agreement of both parties before this Court that a verdict of manslaughter was available. The ambit of the doctrine accepted by the Court in *McAuliffe* made it proper to scrutinise that proposition with special care because of the absence of a contradictor. Resort to analysis of *McAuliffe* and cases like it was therefore necessary and uniquely appropriate. For an area of the law which is suggested to be devoid of real controversy, the subject of *McAuliffe* and related issues has elicited a very large body of writing and criticism. It was directly relevant to the availability of manslaughter raised by this appeal. To the extent that an accused is liable for mere possibilities that were (or were to be taken as) contemplated, the scope of accessorial responsibility for murder is extended. The scope of manslaughter is arguably diminished.

93 The suggestion that published legal analysis should be ignored because of criticism of a judicial decision by an author who was counsel in a case is one that I would reject. The analysis is either good or bad, useful or useless according to its terms. Authors do not own ideas once they are expressed. In the case note in question on this issue, the author disclosed his involvement as counsel and invited allowance for that fact[82]. What he wrote was published as editor of a journal on criminal law. The author's identity was irrelevant. His ideas happen to be useful. This Court is evaluating and expressing the law of a nation. It

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80 *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271 at 283 [51].

81 See above at [44]-[49].

82 Odgers, (1996) 20 *Criminal Law Journal* 43 at 44.

should not take a confined view of its sources. It follows that I cannot agree with what Hayne J has written.

Consideration of the proviso

94 *Relevant considerations*: Having reached the foregoing opinion, that two errors have been shown on the part of the Full Court, the only remaining question is whether the appellant's convictions could be sustained on the basis of the proviso[83]. Setting aside the outcome of such a lengthy trial, on a ground which the appellant originally rejected, is extremely unpalatable. This is especially so because he was found guilty of two murders following judicial instruction on the law of murder which, so far as it went, was not criticised. Clearly, there was evidence to sustain the convictions of murder, depending upon the view that the jury took of that evidence.

95 However, if the availability of returning a verdict of guilty of manslaughter (and of not guilty of murder) should have been made known to the jury, it is impossible to say that such knowledge would have proved irrelevant in this case and that the verdicts of guilty of murder would inevitably have followed.

96 Unlike Mr Preston, the appellant had a number of points to make in his defence. Depending on the view of the appellant's culpability taken by the jury, by reference to whether or not he foresaw that Mr Preston might possibly act with intent to kill or cause grievous bodily harm to the victims, the jury could have returned verdicts of guilty of manslaughter. In such circumstances it cannot be said that the appellant's convictions of murder were inevitable[84]. Those convictions are not insulated from appellate correction because the point was not taken at trial[85]. If the jury were deprived of the opportunity to consider verdicts of manslaughter, potentially more favourable to the appellant than those that they returned, the deprivation of that chance undermines the integrity of the trial[86]. At least it does so in this case where the convictions entered are of murder and carry the heaviest penalty known to the law[87].

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83 *Criminal Law Consolidation Act*, s 353(1).

84 See eg *De Gruchy v The Queen* (2002) 76 ALJR 1078 at 1088 [65]; 190 ALR 441 at 456; *MFA v The Queen* (2002) 77 ALJR 139; 193 ALR 184.

85 *Conway v The Queen* (2002) 209 CLR 203 at 233 [82]; *Heron v The Queen* (2003) 77 ALJR 908 at 915 [38]-[42]; 197 ALR 81 at 90-91 and cases there cited.

86 *Gilbert v The Queen* (2000) 201 CLR 414 at 422 [19]-[20], 441-442 [101]-[103].

87 *Charlie v The Queen* (1999) 199 CLR 387 at 399 [27].

97 *Conclusion: proviso inapplicable*: It follows that the case is not one for the application of the proviso[88]. The appeal must be upheld.

Orders

98 I agree in the orders proposed by Gleeson CJ and Callinan J.

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88 cf joint reasons at [29].

99 HAYNE J. On 15 August 1996, the appellant and another man, Gerald David Preston, drove to a car repair workshop in suburban Adelaide in a van that the appellant had stolen. Leaving the appellant in the driver's seat of the van, Preston got out of the van and went into the workshop where he fired three shots from a pistol, killing two men and wounding a third.

100 The appellant and Preston were charged in the Supreme Court of South Australia with two counts of murder and one count of attempted murder. Each was convicted on all three charges.

101 The appellant did not give evidence at his trial. He had told police that he stole the van thinking that he "was going nicking, stealing" and that he drove Preston to the workshop believing that there was to be a "robbery". The appellant wore a hood; Preston wore either a "mesh-like outfit over his face" or a hood. The appellant denied knowing that Preston was armed with a gun. He said that he did not hear anything during the "couple of minutes" Preston was out of the van and in the workshop.

102 Before going to the workshop, the appellant, at Preston's request, had telephoned the premises to ask if Les Knowles was there. (Mr Knowles was one of the men who was later shot dead.) He was told that Mr Knowles was at the workshop. Before Preston fired at each victim he asked, "Are you Les?".

103 At trial, the prosecution submitted that the judge should direct the jury that the appellant could be found guilty of manslaughter. The practitioner then appearing for the appellant submitted that no such direction should be given. The trial judge did not instruct the jury about manslaughter, putting matters in a way which obliged the jury to acquit the appellant altogether if the jury were not satisfied that the appellant and Preston had both been parties to a common design to kill either Mr Knowles or Mr Knowles and others. In particular, the trial judge directed the jury, and repeated in answer to a specific question from the jury, that the prosecution must prove that the appellant was party to a common design to kill. Accordingly, if the prosecution did not exclude, as a reasonable possibility, that the appellant had only the purpose of participating in a robbery, the jury should return a verdict of not guilty on all counts.

104 On appeal to the Full Court of the Supreme Court of South Australia, the appellant contended, contrary to the submissions made on his behalf at trial, that the jury should have been instructed about manslaughter. Again, the prosecution, as respondent to the appeal, submitted that manslaughter had been open on the evidence led at trial. The Full Court concluded[89] that, contrary to the submissions of both parties, manslaughter had not been an available verdict.

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89 *R v Gillard and Preston (No 3)* (2000) 78 SASR 279 at 291 [346].

105 By special leave the appellant now appeals to this Court, contending that the jury should have been instructed that manslaughter was an available verdict. In argument in this Court, the respondent maintained that manslaughter had been an available verdict. That is, the respondent accepted that, at the appellant's trial, there had been a wrong decision on a question of law[90]. It contended, however, that no substantial miscarriage of justice had actually occurred[91] and that, accordingly, the proviso to s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) applied.

106 The parties to the appeal were right in contending that it had been open, on the evidence led at trial, for the jury to conclude that the appellant was not guilty of murder or attempted murder but was guilty of manslaughter of the two victims who had died. There was a wrong decision on a question of law and, therefore, unless the proviso to s 353(1) was engaged, the Full Court was bound to allow the appeal, quash the appellant's convictions and order a new trial. (It was not contended in that Court, or on appeal to this Court, that s 354(2) might be engaged and a verdict of guilty of manslaughter substituted[92].)

107 The appeal must be allowed. It cannot be said that there has been no substantial miscarriage of justice unless it is right to have regard to the findings of fact which, consistent with the proper application of the directions in fact given at trial, the jury must have made to reach the verdicts they did. The decision of *Gilbert v The Queen*[93], the correctness of which was not challenged by either party, precludes that chain of reasoning. *Gilbert* contemplates, even perhaps requires, that an appellate court must consider the possibility that the jury did not apply the directions they were given but, instead, chose to return a verdict of guilty rather than acquit the accused despite not being satisfied to the requisite standard of all the matters which the trial judge's directions required them to consider.

Joint criminal enterprise

108 The Full Court's conclusion, that a verdict finding the appellant guilty of manslaughter was not available on the facts of the case, depended upon the application to those facts of the principles about criminal complicity. Those

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90 *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

91 *Criminal Law Consolidation Act*, s 353(1).

92 cf *Pemble v The Queen* (1971) 124 CLR 107.

93 (2000) 201 CLR 414.

principles, as the Full Court recognised[94], were considered by this Court in *McAuliffe v The Queen*[95]. It is as well to restate them.

109 As was pointed out in *McAuliffe*[96], the terms "common purpose", "common design", "concert", "joint criminal enterprise" are used more or less interchangeably to invoke a doctrine by which the complicity of a secondary party in the commission of a crime may be established. It is a doctrine which is separate from the liability of an accessory before the fact, who counsels or procures the commission of the crime; it is separate from the liability of a principal in the second degree, who aids or abets in the commission of the crime. Joint criminal enterprise, or acting in concert, depends upon the secondary party (here, the appellant) sharing a common purpose with the principal offender (here, Preston) or with that offender and others[97].

110 In its simplest application, the doctrine of joint criminal enterprise means that, if a person reaches an understanding or arrangement amounting to an agreement with another or others that they will commit a crime, and one or other of the parties to the arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, *all* are equally guilty of the crime regardless of the part played by each in its commission[98].

111 The doctrine has further application. It is not confined in its operation to the specific crime which the parties to the agreement intended should be committed. "[E]ach of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose"[99]. The scope of the common purpose is to be determined subjectively: by what was contemplated by the parties sharing that purpose[100]. And "[w]hatever is comprehended by the understanding or

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94 (2000) 78 SASR 279 at 289 [337].

95 (1995) 183 CLR 108.

96 (1995) 183 CLR 108 at 113.

97 (1995) 183 CLR 108 at 114.

98 (1995) 183 CLR 108 at 114.

99 (1995) 183 CLR 108 at 114.

100 (1995) 183 CLR 108 at 114.

arrangement, expressly or tacitly, is necessarily within the contemplation of the parties to the understanding or arrangement"[101].

112 As *McAuliffe* reveals[102], the contemplation of a party to a joint enterprise includes what that party foresees as a possible incident of the venture. If the party foresees that another crime might be committed and continues to participate in the venture, that party is a party to the commission of that other, incidental, crime even if the party did not agree to its being committed. In such a case, as was said in *McAuliffe*[103], "the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind". To hold the individual liable for the commission of the incidental crime, when its commission is foreseen but not agreed, accords with the general principle that "a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it"[104]. The criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight[105].

Reconsideration of *McAuliffe* neither sought nor required

113 In his reasons, Kirby J suggests that there may be a need to re-express the law relating to complicity. Neither party to the present appeal suggested that this should be done. Both accepted that the principles to be applied are those stated in *McAuliffe*. No need to re-express the law relating to complicity has been shown. Intermediate and trial courts must continue to apply *McAuliffe*.

114 In his reasons, Kirby J refers to some criticisms that have been made of the principles stated in *McAuliffe*[106]. It is necessary to approach those criticisms with two considerations well in mind. First, care must be exercised before adopting arguments advanced in *McAuliffe*, but rejected by the Court in that case,

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101 (1995) 183 CLR 108 at 117.

102 (1995) 183 CLR 108 at 117.

103 (1995) 183 CLR 108 at 117-118.

104 (1995) 183 CLR 108 at 118.

105 (1995) 183 CLR 108 at 118.

106 Cato, "Foresight of Murder and Complicity in Unlawful Joint Enterprises where Death Results", (1990) 2 *Bond Law Review* 182; Odgers, "Criminal Cases in the High Court of Australia (*McAuliffe v McAuliffe*)", (1996) 20 *Criminal Law Journal* 43; Gray, "'I Didn't Know, I Wasn't There': Common Purpose and the Liability of Accessories to Crime", (1999) 23 *Criminal Law Journal* 201.

when they are restated in the form of academic criticism of the decision by counsel who appeared for the appellants[107]. Secondly, and more fundamentally, the criticisms of principle that are advanced all proceed from a premise that doctrines of complicity should be confined in their operation so as to render one person (A) criminally liable for the conduct of another (B) *only* if A has been shown to have agreed to B engaging in that conduct. Putting the same point another way, the criticisms proceed from the premise that A should not be held criminally liable for the conduct of B if A foresaw that B may commit the relevant act but did not agree that B should do that. It is said that only if A agrees to B's conduct is there a sufficient coincidence of act and intent to warrant holding A criminally liable for what B did.

115 The common law in Australia, both before[108] and after *McAuliffe*, did not, and now does not, confine the liability of participants in a joint criminal enterprise to liability for those offences which it is shown that the parties have agreed will be committed. And as the reasons in *McAuliffe* reveal, that is not a uniquely Australian view. It is the position at which the Privy Council arrived in *Chan Wing-Sui v The Queen*[109] and *Hui Chi-ming v The Queen*[110] and at which the English Court of Appeal arrived in *R v Hyde*[111].

116 Further, none of the law reform agencies to which reference is made by Kirby J, with the possible exception of the Canadian[112], has yet proposed that the law should be confined in the manner now suggested. In Canada some suggestions for reform of the law relating to complicity were made in a Working Paper published by the Law Reform Commission of Canada in 1985. Those suggestions included that no one should be liable for furthering an offence without intending that the offence be committed, but it was accepted that there are cases where a person should be held liable even if the offence committed differed from that intended. It is not necessary to explore how those two propositions were to be reconciled. They do not appear to have subsequently been implemented by legislation or adopted in decided cases.

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107 Odgers, "Criminal Cases in the High Court of Australia (*McAuliffe v McAuliffe*)", (1996) 20 *Criminal Law Journal* 43.

108 *Johns v The Queen* (1980) 143 CLR 108.

109 [1985] AC 168.

110 [1992] 1 AC 34.

111 [1991] 1 QB 134.

112 Law Reform Commission of Canada, *Secondary Liability: Participation in Crime and Inchoate Offences*, Working Paper 45 (1985) at 36.

117 The *Criminal Code* (Cth) (enacted to give effect to the recommendations of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General) is not confined in the manner now suggested by commentators. Section 11.2(3) of that Code provides that a person is taken to have committed an offence committed by another if he or she aids, abets, counsels or procures the commission of that offence and intended either that his or her conduct would aid, abet, counsel or procure the commission of *that* offence, or that "his or her conduct would aid, abet, counsel or procure the commission of *an* offence and have been reckless about the commission of the offence (including its fault elements) that the other person *in fact* committed" (emphasis added). The South Australian law reform proposals to which reference has been made also provided for liability in cases where what was done went beyond what was agreed by reference to the concept of recklessness. In this context, foresight of the relevant possibility is central to the notion of recklessness.

118 Common purpose principles rightly require consideration of what an accused foresaw, not just what the accused agreed would be done. The accused is held criminally responsible for his or her *continued* participation in a joint enterprise, despite having foreseen the possibility of events turning out as in fact they did. It does not depend upon identifying a coincidence between the wish or agreement of A that an act be done by B and B's doing of that act. The relevant conduct is that of A – in continuing to participate in the venture despite foresight of what may be done by B.

119 If liability is confined to offences for the commission of which the accused has previously agreed, an accused person will not be guilty of any form of homicide in a case where, despite foresight of the possibility of violence by a co-offender, the accused has not agreed to its use. That result is unacceptable. That is why the common law principles have developed as they have.

120 In this case the jury were not told to consider all of the possibilities that the appellant may have had in mind. What was done was to confine their consideration to the single possibility that the co-accused might deliberately shoot the victims. Central to the appellant's case at trial was that all that he intended was robbery. One possibility to which the jury should have had regard, in the circumstances of this case, was that, in the course of robbery, the co-accused would engage in the unlawful and dangerous act of presenting a loaded weapon at the victim.

The Full Court's decision

121 At the appellant's trial, there was evidence from which it was open to the jury to conclude that the appellant had agreed and intended to participate only in some "nicking" or a "robbery", whereas Preston had gone to the workshop

intending to commit a contract killing. The Full Court considered[113] that "[i]f Preston had murder in mind and Gillard contemplated a robbery only, it is difficult to identify a relevant common criminal purpose". That was because, in the Full Court's view[114], "crucial to the concept inherent in the doctrine that a non-perpetrator authorises the perpetrator to do all that is required to carry out the common design" is that "there must be a meeting of minds in relation to the criminal design".

122 To focus attention, as this part of the Full Court's reasoning did, upon notions of "authority", may distract attention from the central elements of the law relating to joint criminal enterprise. Those central elements are the understanding or arrangement of the alleged participants, and the scope of the common purpose of the parties to the understanding or arrangement. Notions of "authority" might be understood as excluding liability for crimes which the secondary party did not agree would be committed but foresaw might be. But as *McAuliffe* shows, the secondary party is culpable in such a case – because the secondary party participates in the joint criminal enterprise with the necessary foresight.

123 More fundamentally, however, references to a meeting of minds may invoke notions, analogous to principles of the law of contract, which would require a complete *identity* between the individual purposes of each participant in the enterprise before common purpose could be found. In particular, references to a meeting of minds might be taken to suggest that if one person contemplates the commission of one crime, but another contemplates the commission of a different crime, there can be no common purpose between them. That is not right.

124 Where common purpose is alleged, it is essential to identify what the parties *did* agree upon and what it was that each contemplated might occur. That requires attention to, and identification of, the acts and omissions which the parties agreed upon, rather than the identification of the particular crime constituted by the acts which each intends should be performed. To show that not everything that each party had in mind was agreed by all other participants does not deny that there was an arrangement or understanding, amounting to an agreement, to commit a crime.

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113 (2000) 78 SASR 279 at 290 [339].

114 (2000) 78 SASR 279 at 290 [338].

Was manslaughter an available verdict?

125 In the present case, one available view of the facts was that the appellant contemplated that a "robbery" was to take place and that Preston contemplated the deliberate shooting of Mr Knowles. The "robbery" to which the appellant referred in his interviews with police could have been understood by the jury as intended to encompass more than the dishonest appropriation of property. In particular, one available view of the facts was that the appellant contemplated that Preston would confront one or more of those in the workshop and, by threats of violence, cause them to hand over property. (The appellant spoke of money and drugs.) If, contrary to the appellant's denial, the jury concluded that the appellant knew that Preston was armed with a pistol, an available view of the facts was that the appellant contemplated the presentation of that weapon in the course of the robbery.

126 On that view of the facts, it would have been open to the jury to conclude that the appellant and Preston had shared a common purpose: that Preston would enter the workshop and point the weapon at one or more of those at the premises. The pointing of the weapon would be a criminal purpose, it being intended to do so at least as an assault on the victim.

127 The existence of a common purpose identified in this way would not be denied if the jury concluded that the appellant and Preston had different ideas about why the weapon was to be produced (Preston's intention being to use it to kill and the appellant's intention being that it should be used to intimidate or frighten). Rather, the *common* purpose of the two parties would be more limited than the larger purposes intended by one of them.

128 The question for the jury would then have become, what did the appellant contemplate might happen if Preston presented a firearm in the workshop? If, as the prosecution contended at trial, the jury were to conclude that Preston must have produced the weapon and cocked it in the van before he got out, it would be open to the jury to conclude that the common purpose of the parties extended to the pointing of a loaded and cocked firearm at one or more of those in the workshop. If that were so, and if the prosecution failed to establish its principal contention, that the appellant had contemplated the deliberate use of the weapon to kill or do grievous bodily harm, the appellant would, nonetheless, be guilty of manslaughter by unlawful and dangerous act. On this hypothesis, Preston would have gone beyond what had been agreed and contemplated by the appellant when he *deliberately* shot those in the workshop, but the presentation of the loaded and cocked firearm would have been within the scope of the common purpose.

129 It follows that the trial judge's decision to not direct the jury that manslaughter was an available verdict in the trial of the appellant was a wrong decision on a question of law. Section 353(1) of the *Criminal Law Consolidation*

Act required that the appeal to the Full Court be allowed unless the proviso to that section was engaged.

The proviso to s 353(1)

130 What the appellant contemplated might happen on the afternoon that Preston shot the three men was quintessentially a question for the jury at his trial. He had made statements to the police to the effect described earlier, but what conclusions about his state of mind should be drawn from the evidence given about those statements and all the other evidence led at his trial was a matter for the jury.

131 The jury were instructed that they could not convict the appellant of the charge of murdering Mr Knowles, who was alleged to have been the person whom Preston had been paid to kill, unless the appellant was party to a common purpose to murder Mr Knowles. They were instructed that if the joint enterprise was limited to the murdering of Mr Knowles, and what happened to the other two victims was spontaneous unplanned activity by Preston, the appellant was not guilty of the second count of murder or of the count of attempted murder. They were further instructed that, if satisfied that the appellant had been party to a joint enterprise to murder Mr Knowles, and that he foresaw that in the course of carrying out that plan, another might be murdered, or an attempt might be made to murder another, the appellant would be guilty of the second count of murder and the count of attempted murder. Central, however, to the instructions the jury were given was the proposition that they could convict the appellant of murdering Mr Knowles if, and only if, they were satisfied that the appellant had been party to a joint criminal enterprise with Preston to murder Mr Knowles. They were directed that if they were not satisfied of that fact, to the requisite standard, they must acquit the appellant on all counts.

132 If the jury applied the instructions they were given, they could not have returned the verdicts they did without being satisfied beyond reasonable doubt that the appellant was party to a joint criminal enterprise to murder Mr Knowles. If he was party to an enterprise of that kind, manslaughter was not an available verdict and the failure to leave it to the jury would have led to no substantial miscarriage of justice. Can this Court, or more accurately, could the Full Court of the Supreme Court of South Australia, in considering the application of the proviso, proceed from the premise that the jury at the appellant's trial must have made this finding?

133 In *Gilbert*[115], a majority of the Court concluded that if manslaughter should have been, but was not, left to a jury as an available verdict on the

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115 (2000) 201 CLR 414.

appellant's trial for murder, the verdict of guilty of murder did not preclude the possibility that the jury may have failed to apply the instructions they were given. No party in this appeal sought to reopen the decision in *Gilbert*. It follows from what was decided in *Gilbert* that, in deciding here whether no substantial miscarriage of justice has actually occurred and thus, whether the proviso to s 353(1) of the *Criminal Law Consolidation Act* applies, account may not be taken of the findings implicit in the jury's verdicts at the appellant's trial. It must be assumed that the jury may have chosen to disregard the instructions they were given, and convict the appellant of murder and attempted murder, rather than return verdicts of not guilty. Once it is accepted that the jury may have disregarded the instructions they were given, it is not permissible to reason, as the respondent submitted, from the fact that the jury returned verdicts of guilty on all three counts to the conclusion that the jury must therefore be taken to have applied the trial judge's instructions. Once it is said, as it was in *Gilbert*, that the jury may have disregarded the instructions they were given, it cannot be said that some levels of disobedience may be less probable than others.

134 If account cannot be taken of findings made by the jury at the appellant's trial, it is not possible for this Court to say that he did not lose a chance of more favourable verdicts than those returned[116]. The appeal must be allowed, the orders of the Full Court of the Supreme Court of South Australia set aside and in their place there be orders allowing the appellant's appeal to that Court, quashing his convictions and directing that a new trial be had.

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116 *Mraz v The Queen* (1955) 93 CLR 493.