HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matter No A198/2003

NOEL JEBATHILAKAN ARULTHILAKAN APPELLANT

AND

THE QUEEN RESPONDENT

Matter No A202/2003

CHISEKO MARK MKOKA APPELLANT

AND

THE QUEEN RESPONDENT

Arulthilakan v The Queen
Mkoka v The Queen
[2003] HCA 74
10 December 2003
A198/2003 and A202/2003

ORDER

In each matter:

Appeal dismissed.

On appeal from Supreme Court of South Australia

Representation:

B J Powell QC with R B Harrap for the appellant in A198/2003 (instructed by Harrap & Stokes)

S W Tilmouth QC with I L White for the appellant in A202/2003 (instructed by McGee Solicitors)

P J L Rofe QC with J P Pearce for the respondent in both matters (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

Arulthilakan v The Queen
Mkoka v The Queen

Criminal law – Murder – Appeals against conviction – Directions to jury concerning statutory murder – Whether trial judge erred in directing jury that presentation of a knife in the course of an armed robbery amounted to an "act of violence" for the purposes of s 12A, *Criminal Law Consolidation Act* 1935 (SA) – Whether misdirection gave rise to miscarriage of justice – Causation – Whether reference to "but for" test of causation constituted a misdirection – Whether presentation of a knife in the course of an armed robbery could be regarded as a substantial cause of death of deceased – Application of proviso in circumstances where not possible to tell whether jury's verdict of guilty of murder was based on statutory murder or common law murder.

Criminal law and procedure – Trial for murder – Appeals against conviction – Whether High Court should allow appellants to raise for the first time a new point concerning the adequacy of the trial judge's directions on causation as an ingredient of the offence – Proviso – Whether in circumstances of established misdirection on ingredients of the offence of murder the conviction of the appellants was inevitable – Test for application of the proviso.

Words and phrases – "act of violence".

Criminal Law Consolidation Act 1935 (SA), ss 12A, 353(1).

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The appellants were tried jointly, in the Supreme Court of South Australia, before Debelle J and a jury, and convicted of murder, wounding with intent to do grievous bodily harm, and attempted armed robbery. They were sentenced to lengthy terms of imprisonment. A co-accused, Carlos Escalante, pleaded guilty to murder, wounding with intent to do grievous bodily harm, and attempted armed robbery.

2 Each appellant appealed unsuccessfully to the South Australian Court of Criminal Appeal. For reasons that are presently immaterial, the appeals were heard by differently constituted courts[1]. The appeal to this Court concerns only the convictions of murder, and, as will appear, the grounds of appeal are relatively confined.

The facts

3 The events giving rise to the charges occurred at Stepney, an inner suburb of Adelaide, in the early hours of Saturday 11 December 1999. The two appellants, with three other men (Carlos Escalante, Raylon Smith and Christian Sinclair), were in a stolen car. They agreed to find someone to "roll" for a mobile telephone. The appellant Mkoka agreed in cross-examination that this meant robbery involving force if necessary.

4 The five men were travelling away from the city, along North Terrace towards its intersection with Fullarton Road. As the car approached the intersection, Sinclair, who was in the front passenger seat, noticed two men, Hillam and Bourne, walking in the same direction along the north western footpath of North Terrace. Hillam was speaking on a mobile telephone. The car stopped a short distance behind Hillam and Bourne. The two appellants and Escalante left the car. The appellant Mkoka was armed with a cue ball in a stocking (described as a "cosh"). The appellant Arulthilakan had with him in the car a knife wrapped in cardboard. That knife came into the possession of Mkoka. Arulthilakan said that he took the knife, still wrapped in cardboard, from his jacket pocket, intending to leave it on the back seat of the car. Mkoka asked if he could take the knife with him. Arulthilakan agreed.

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1 In the case of the appellant Mkoka, *R v CMM* (2002) 81 SASR 300; in the case of the appellant Arulthilakan, *R v NJA* [2002] SASC 113.

5 Escalante was also carrying a knife. It was not in dispute that this was the knife that was used to stab Hillam and Bourne. The blade of Escalante's knife was about 18 centimetres long. Its maximum width was 2.8 centimetres. Mkoka was aware that Escalante regularly carried a knife, and he knew Escalante was carrying a knife on this occasion. Arulthilakan said that he knew Escalante had a knife, and, of course, he had given Mkoka his own knife.

6 The two appellants and Escalante accosted Hillam and Bourne, who kept walking. They crossed the intersection diagonally towards a hotel, which was closed. The three men followed. Escalante made aggressive demands for the mobile phone. Hillam told the three men to go away. Escalante rushed at him. Hillam punched Escalante and then felt a blow to his side. He looked down and saw that he had been stabbed. Hillam sustained four wounds. Two were relatively minor: to the outside of the left knee and to the left leg. Two were substantial: one to the left chest, and another to the left flank. He sought help from a passing taxi driver, entered the taxi, and asked the driver to take him to hospital.

7 Meanwhile, Mkoka had moved towards Bourne when Escalante attacked Hillam. He dropped the knife he had been given by Arulthilakan and put the cosh in his right hand. He dropped the knife in order to get a better grip on the cosh. He said that "obviously a fight had started and [he] thought [Bourne] might go and help [Hillam] in beating up [Escalante]". Mkoka said Bourne came towards him. There was a struggle between the two. Mkoka said he swung the cosh at Bourne and hit him somewhere in the upper body. There followed a period of grappling between the two, during which Mkoka attempted to use the cosh. At some point in the struggle, Escalante intervened and stabbed Bourne. Mkoka and Bourne fell to the ground, still struggling. Mkoka then struck Bourne, who released his grip. Mkoka kicked him in the upper body. Mkoka said he did not know of the stabbing of Bourne until they were back in the car.

8 Hillam gave evidence that when he looked back from the taxi he saw Bourne in the middle of the intersection being kicked and punched by all three men.

9 Bourne's death resulted from a stab wound to the right side of his chest, between the fifth and sixth ribs. Expert evidence explained that the knife caused a puncture wound in the right atrium of Bourne’s heart and the resultant blood loss would have caused death within a few minutes. There were other lacerations on his scalp consistent with blows from a blunt object. There was no dispute at trial that the fatal blow was struck immediately before Bourne fell to the ground.

10 There was no specific evidence as to the total time that elapsed from when the appellants and Escalante alighted from the car until the fatal stabbing of Bourne. In his summing up, the trial judge, without objection, suggested that it appeared from the evidence to have been a period of at most about two or three minutes.

11 At the trial, the appellants sought to make out a case of self-defence. The trial judge declined to leave self-defence to the jury. In both cases, the Court of Criminal Appeal upheld that decision. The case of self-defence was hopeless, and the argument was not pursued in this Court. The central issue in the present appeal concerns the complicity of the appellants in the stabbing by Escalante of Bourne. In that respect, the defence case was that the stabbing of Bourne by Escalante was an independent act on his part, undertaken in the heat of an affray, and after any attempt at robbery had ceased. Plainly, that case was rejected by the jury.

The prosecution case of murder

12 The prosecution case against each appellant on the charge of murder was left to the jury on three alternative bases: the first two related to murder at common law; the third related to what was described as statutory murder. The grounds of appeal in this Court are confined to the directions given concerning statutory murder.

13 In relation to common law murder, the directions proceeded upon the basis that the prosecution had to establish that Escalante stabbed Bourne, intending either to kill him, or at least to inflict grievous bodily harm. On that assumption, the first basis on which murder was left was described as joint enterprise. The prosecution case was that the two appellants were acting jointly with Escalante in pursuit of a common unlawful purpose (armed robbery) which could involve inflicting at least grievous bodily harm. The jury were told that it was necessary for the prosecution to prove that the scope of the agreement or understanding between the three was such that the crime committed by Escalante was either in their actual contemplation or, alternatively, it was in their contemplation that it was possible that one of them might, in the course of the attempted robbery, use a knife to cause grievous bodily harm. The second basis was that the appellants aided and abetted Escalante in the murder of Bourne. In that connection, the jury were told that the prosecution had to prove knowledge that Escalante intended to stab Bourne, and assistance or encouragement in the commission of the crime. It is unnecessary to go into further detail concerning the case of common law murder.

14 In the alternative, the jury were invited to consider statutory murder. As counsel for the appellants submitted, the possibility that the jury convicted on this basis cannot be disregarded. Section 12A of the *Criminal Law Consolidation Act* 1935 (SA) provides:

> "12A. A person who commits an intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more (other than abortion), and thus causes the death of another, is guilty of murder."

15 Armed robbery is a major indictable offence of the kind referred to in s 12A.

The directions on statutory murder

16 The trial judge began by telling the jury that the crime of statutory murder does not require an intention on the part of the accused to cause death or grievous bodily harm; the crime is committed if death results from an intentional act of violence perpetrated while acting in the course of or in furtherance of an armed robbery. He said the first question for the jury to consider was whether the act of violence relied on by the prosecution was committed in the course of an armed robbery. The case for the appellants was that, by the time any use of weapons occurred, they and Escalante were resisting a counter-attack from Hillam and Bourne, and defending themselves. At least theoretically, therefore, there was an open question as to whether the act of violence (said to be the presentation of a knife by Escalante) occurred in the course of the robbery. The defence claimed that, by the time the alleged act of violence had occurred, the attempted robbery was over. The trial judge continued:

> "However, if you are satisfied of that fact, you must then consider three other questions. The first is, was there an act of violence? Ladies and gentlemen, I direct you, as a matter of law, that the introduction of the knife into this affray, for the purpose of threatening or intimidating, or for the purpose of stabbing another, is an act of violence. It constitutes a form of assault. If you find that Escalante presented the knife for the purpose of threatening or intimidating Hillam, or for the purpose of stabbing him, that constitutes an act of violence. As you will hear in a moment, that is the act of violence upon which the prosecution relies.
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> The next matter is whether the act of violence was intentional. You may think that the presenting of the knife and use of it requires a deliberate and intentional act. It is not something which inadvertently or

accidentally occurs. It is for you to determine whether the knife was intentionally presented and used.

The next question is whether the act of violence caused Bourne's death. Ladies and gentlemen, the law takes a commonsense view about causation. It looks to see if there is a causal link or a causal connection between one act and another. Did one act cause another to occur? The act does not have to be the sole cause of the other act occurring. It is enough if it is a substantial cause. It is enough if it is shown that, but for that one event, all the other events would not have happened as they did.

It is the Crown case that if the knife had not been presented and used at the commencement of this attempted armed robbery, the death of Bourne could not have occurred. It says that, having presented the knife, Escalante used it to stab Hillam and then to stab Bourne. The Crown says he was attacking both for the purpose of the armed robbery, or for the purpose of extricating themselves from it. The defence says there is no possible causal link between the presenting of the knife at that early stage in the robbery, and the later stabbing of Bourne. It says that Escalante had become very aggressive, that he was acting quite independently of the others, and that he made a separate decision to stab Bourne.

You will decide, ladies and gentlemen, whether you are satisfied that the presenting of the knife at the very outset of this attempted armed robbery caused Bourne's death.

If you are satisfied the act of violence was committed whilst all the accused were in the course of the attempted armed robbery, or extricating themselves from it, there are two alternative routes by which it is open for you to find these accused guilty of statutory murder. Again, it is either by the route of joint enterprise, or by the route of aiding and abetting.

As to joint enterprise, if you are satisfied that all of the accused had the common purpose that they would roll or rob Hillam, and for the purpose of their joint enterprise they would be armed with knives and a billiard ball, that they would use the knives and billiard ball if necessary to achieve their purpose in the course of the attempted armed robbery, the knives or billiard ball would be used to threaten or intimidate the victims. I realise that sounds very similar to the concept of joint enterprise in relation to common law murder, but it is different in that it is not necessary that any of the accused had an intention to cause death, or to cause grievous bodily harm, or contemplated as part of the joint enterprise

the possibility that the use of the knives could result in an intentional inflicting of grievous bodily harm. That is the difference between them.

The case for both the Crown and the defence on this issue are very similar to those I have already outlined in relation to common law murder. As to joint enterprise, the prosecution says that all of this occurred in the course of the armed robbery, or whilst they were endeavouring to extricate themselves from it and remove themselves from the scene. The prosecution says that this all plainly occurred in the course of the armed robbery. Resistance, says the Crown, is always a real likelihood if you are going to commit an armed robbery. They met that resistance. Thus, they were inextricably involved in this attempt and had to escape from it. Thus, says the Crown, it is plain that all of this occurred in the course of the commission of the armed robbery, and that the initial presentation of the knife for its use to threaten or to stab Hillam was a cause of the death of Bourne.

The defence case, of course, is that by this time the robbery was all over, if it had ever started. The defence case is that it was quite unrealistic to suppose that by the time these events occurred the robbery – there was any commission of an attempted armed robbery. I remind you of what I have already said in relation to that in the context of either common law murder or the intent to cause grievous bodily harm.

The defence also says that in no respect is it fair to say or to conclude that the initial presenting of this knife at the early stage of attempted armed robbery, even if it was on foot, caused Bourne's death. Escalante was behaving, they said, quite aggressively and independently.

Similarly, in the case of the question whether they aided or abetted Escalante in the commission of the offence, this is much the same as in relation to the earlier offences. The prosecution case is that they did aid and abet, and that they both willingly engaged in the attempted armed robbery, and that indicates their intent.

The defence case is that there was a fight, each defending the other; they had no idea that knives would be used in the fight. Mkoka, indeed, had thrown his away. All they were doing was acting in their own defence and in defence of each other."

17 The trial judge returned to the matter of causation at the end of his summing-up, when he said:

> "You have to be satisfied that there is a causal link between the introduction of the knife into the affray, and the death of Bourne. It is the Crown case that if the knife had not been presented and used at the commencement of this attempted armed robbery, the death of Bourne could not have occurred. The Crown says that having introduced the knife into the affray, Escalante used it to stab Hillam, and then to stab Bourne. The Crown says he was attacking both Hillam and Bourne for the purpose of the armed robbery.
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> The defence, I repeat, says there is absolutely no possible causal link between the presenting of the knife at this early stage of the affray, this early introduction of it into the affray, and the stabbing of Bourne, which, on any view, had to have occurred later. It says that Escalante had become very aggressive. It says not even Hillam saw the knife being presented. It says that Escalante's aggression was such that he was acting quite independently, and that he made quite a separate decision to stab Bourne ... so says the defence, there is no causal link between the introduction of this knife at the beginning of this affray, and the later stabbing of Bourne."

18 To put into context the references, in explaining the defence case, to an "early stage of the affray", and what occurred "later", it is to be remembered that the entire episode occupied about two or three minutes.

19 In relation to the directions on causation, to which no objection was taken, it is to be noted that what the trial judge said about the subject was, of course, closely related to the competing cases as fought at the trial. The defence case on causation was that Escalante's use of his knife was not part of the armed robbery which all three men had undertaken but was, rather, an independent act of aggression on his part in response to the violence that erupted when Hillam and Bourne resisted their pursuers. The prosecution case was that Escalante's use of his knife was part of the armed robbery, and that the response of Hillam and Bourne was foreseeable and, indeed, the very kind of contingency for which the attackers had prepared by arming themselves with knives and a cosh. Those were the competing views of the facts to which the concept of causation had to be applied.

The grounds of appeal

20 Two criticisms are now made of the directions set out above.

21 The first criticism relates to the first paragraph in the directions quoted and, in particular, to the statement that, as a matter of law, the presentation of the knife by Escalante constituted an act of violence. The respondent acknowledges that it would have been better if the learned judge had directed the jury that it was open to them to find as a fact that the presentation of the knife constituted an act of violence, or that the presentation of the knife was capable of being regarded as an act of violence. Nevertheless, the respondent points to the whole of what was said in the paragraph, and to the hypothesis upon which the direction "as a matter of law" was given. The jury were told that, *if* they found that Escalante presented the knife for the purpose of threatening or intimidating Hillam, or for the purpose of stabbing him, then that constituted an act of violence.

22 In a report to the Court of Criminal Appeal the trial judge said: "The issue whether the presenting of the knife was an act of violence was argued as a question of law by all counsel. No one objected to the manner in which it was left to the jury."

23 Whether an act is an act of violence is a question of fact. There may be a question of law as to whether an act is capable of being regarded as an act of violence. The judge invited the jury to find as a fact whether Escalante presented his knife for the purpose of threatening, or intimidating, or stabbing the owner of the mobile telephone. On the assumption that they made such a finding of fact, the jury were told that, as a matter of law, that conduct involved an act of violence. They should have been told that, as a matter of law, the conduct was capable of being regarded as an act of violence. In the circumstances, however, it makes little difference. How else might such conduct have been regarded? The complaint of the appellants is that the direction foreclosed an issue. In a practical sense, there was no real issue. If the jury made the finding of fact which formed the condition upon which the direction of law was given, it was not reasonably open to them to come to any conclusion other than that the presentation of the knife was an act of violence. The directions went on to outline the defence case, and to remind the jury of the arguments advanced against the conclusion of fact for which the prosecution contended. If, however, that conclusion were drawn, then the further conclusion that what was involved was an act of violence was inescapable. Technically, there was a misdirection, but it gave rise to no miscarriage of justice.

24 The second criticism of the directions was not advanced either at trial or in the Court of Criminal Appeal. It relates to what was said concerning causation. The ground of appeal is expressed as follows:

"... [the] directions:

(i) withdrew from the jury's consideration the issue of whether the production of the knife by [Escalante] in the circumstances indicated by the trial judge, [was] a substantial or significant cause of the death of Bourne ...;

(ii) had the effect as a matter of law of directing the jury that '*but for that one event*', the death of Bourne would not have happened; and/or

(iii) withdrew from the jury's consideration the issue whether the production of the knife in the circumstances indicated by the trial judge, was no more than a negligible or de minimis cause of the death of Bourne, and hence not causative in law."

25 In argument, counsel for the appellants directed attention particularly to the concluding sentence of the third of the paragraphs from the directions quoted above. They submitted that a proper direction would have been that causation was a matter of fact for the jury, to be determined, applying common sense, but with an appreciation that they were deciding legal responsibility and that the act for which the accused was responsible must be a substantial or significant cause in a common sense and practical way, but need not be the sole cause. When those submissions are compared with what the trial judge said, it is evident that the principal difference is in the sentence earlier mentioned, and in particular, in the reference to a "but for" approach to causation. The respondent agreed with the appellants as to what was described as "the status of the 'but for' test in civil and criminal law" and contended that, if there was a misdirection, there was no miscarriage of justice. Reference was made on both sides to the judgments in this Court in *Royall v The Queen*[2].

26 The context in which the question of causation arose required consideration of whether an intentional act of violence (the presentation by Escalante of a knife for one of the purposes earlier mentioned) in the course or furtherance of an armed robbery was a cause of the death of Bourne. The defence case was that Escalante was acting, not in the course of the planned robbery, but independently in response to the conduct of Hillam and Bourne, the attempted robbery having come to an end.

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2 (1991) 172 CLR 378.

27 In *Ryan v The Queen*[3], Windeyer J, dealing with the common law concept of felony murder, said[4]:

> "There was a time when a man was guilty of murder, and punished accordingly, if while doing any unlawful act he happened to kill another man, however unexpectedly and unintentionally. This harsh rule became gradually mitigated. By the eighteenth century, although a man who in the course of committing a crime unintentionally killed another might still for that reason be guilty of murder, this was only when the crime was a felony. By the middle of the nineteenth century doubts had begun to be expressed about this doctrine ... The generally accepted rule of the common law today is, however, that an unintended killing in the course of or in connexion with a felony is murder if, but only if, the felonious conduct involved violence or danger to some person."

28 In South Australia, the law on the subject is now to be found in s 12A; but what was said by Windeyer J explains the genesis of the statutory provision. Causing the death of another by committing an intentional act of violence in the course of a major indictable offence, even though there is no intent to kill or cause grievous bodily harm, constitutes statutory murder.

29 There was nothing artificial about the prosecution's identification of the intentional act of violence on which it relied. The plan upon which the appellants and Escalante embarked was to "roll" Hillam in order to obtain his mobile telephone. That involved robbery, accompanied, if necessary, by force. Perhaps there was a theoretical possibility that Hillam would hand over the telephone without resistance, but the three intending robbers had, between them, two knives and a cosh. They were not intending to rely on their powers of verbal persuasion. They had equipped themselves to deal with resistance. The appellants knew Escalante was armed. It was not difficult to infer why he was armed. The jury came to the matter of causation on the assumption that they had already found that Escalante presented his knife to Hillam for the purpose of threatening or intimidating or stabbing him. That was how he introduced his knife into the proceedings. That was an intentional act of violence, in the course or furtherance of a robbery. Bearing in mind the events that unfolded, and the brief interval of time in which they occurred, it was open to the jury to find that the act of

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3 (1967) 121 CLR 205.

4 (1967) 121 CLR 205 at 240-241.

violence was a substantial cause of the death of Bourne. Once the jury found that Escalante had presented a knife to Hillam for the purpose described, then it was open to them to reason that the resistence of Hillam and Bourne, the resulting struggle, and the fatal stabbing of Bourne, were all part of a sequence of events resulting from the act of violence. Of course, the defence endeavoured to put a different complexion on the events. But the jury rejected the defence case. The question is whether there was error in the way in which the prosecution case was left to them and, if so, whether there was a miscarriage of justice.

30 In some contexts, the identification of an act as causing the death of a victim may be important because it will affect issues of voluntariness, intent, or other matters relevant to the offence charged. *Ryan*[5] and *Royall*[6] provide examples of the relationship between such issues and questions of causation. In *Ryan*, where the accused shot the deceased, there were a number of possible, and significantly different, views open as to the manner in which the gun discharged. It was necessary to identify the various possibilities, and give appropriate directions, because, depending on which view was taken, the act of the accused which caused the death of the deceased might or might not have been voluntary. In *Royall*, the problem arose because, although it was clear that the victim fell to her death from the window of a sixth floor flat, there was uncertainty as to how she came to fall from or through the window, and there was a question of identifying an act of the accused which caused that fall. A number of alternative possibilities were left to the jury. The question was whether the trial judge properly directed the jury as to the particular acts, any one of which they might regard as the cause of the deceased's death. The question was significant because, on the issue of intent, different matters might have been taken into account, depending upon which act of the deceased was identified as an act which caused death[7]. Of the various possibilities left to the jury, that which required the most careful direction on causation and intent was a possibility that the victim had jumped from the window in response to aggressive conduct on the part of the accused. A majority of the Court thought the directions on that possibility were satisfactory. McHugh J disagreed, but found that there was no miscarriage of justice. It was to that particular problem of causation that the observations of the various members of the Court were addressed. It was the problem presented by the case of a victim who dies as a result of his or her own

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5 (1967) 121 CLR 205.

6 (1991) 172 CLR 378.

7 (1991) 172 CLR 378 at 386-387.

act in the course of attempting to escape from an attacker. That problem is far removed from the present case.

31 Deane and Dawson JJ said:[8]

> "In a defenestration case such as the present one it is as likely as not that the accused will not have intended the deceased to meet his or her death by jumping from a window, but it is important to keep the question of causation separate from that of the mental state required for murder. Provided that the words or actions of the accused which cause the deceased to jump or fall from the window (that is, the words or actions which cause death) are accompanied by the requisite intent, that will be sufficient to constitute murder.
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> Of course, there may be no single cause of the death of the deceased, but if the accused's conduct is a substantial or significant cause of death that will be sufficient, given the requisite intent, to sustain a conviction of murder. It is for the jury to determine whether the connexion between the conduct of the accused and the death of the deceased was sufficient to attribute causal responsibility to the accused."

32 McHugh J emphasised the particular difficulty that arose on the facts of the case. It was in that context that he made reference to the "but for" test. He said:[9]

> "If [Royall's] conduct ... induced the deceased to jump out of the window so as to avoid further attack, it might be thought that 'but for' the attack the deceased would not have lost her life and that the applicant, therefore, had caused her death. But this Court has recently rejected the proposition that in the law of negligence the test of causation at common law is the 'but for' test: *March v Stramare (E & MH) Pty Ltd*[10]. In criminal cases, the common law has also refused to apply the 'but for' test as the *sole* test of causation. Nevertheless, the 'but for' test is a useful tool in criminal law for determining whether a causal link existed between an accused's act or omission and the relevant injury or damage. But before a person will be

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8 (1991) 172 CLR 378 at 411.

9 (1991) 172 CLR 378 at 440.

10 (1991) 171 CLR 506.

held criminally liable for his or her act or omission, the causal link between that act or omission and the injury or damage must be sufficiently cogent to justify attributing *causal responsibility*, ie legal responsibility, to that person." (first emphasis added; second emphasis in original)

33 He went on to point out that difficult issues of causation could arise where an accused's act would not have brought about the event or occurrence without the intervention of a subsequent act of the victim or a third party. In such cases, courts "have sought to use more specific tests for determining whether 'but for' acts or omissions of the accused were 'causally responsible' for the event or occurrence"[11]. He concluded that, in a case of the kind he was considering, an accused should not be held causally responsible unless his or her conduct induced the victim to take action which resulted in harm to him or her and that harm was either intended by the accused or was of a type which a reasonable person could have foreseen as a consequence of the accused's conduct[12].

34 In the present case, the competing arguments on causation did not give rise to legal difficulties of the kind that arose in *Royall*. On the prosecution case, a robbery was in progress from the time the three men left the stolen car until the time of the fatal stabbing of Bourne. Their purpose was to rob Hillam of his mobile telephone. They were armed to threaten their victims, and to deal with any resistance they might encounter. The victims resisted, as was clearly foreseeable. Escalante used his knife in the resulting encounter, first stabbing Hillam, and then Bourne. His presentation of the knife for the purpose of threatening or stabbing Hillam was an act of violence in the course of an armed robbery, and the sequence of events was such that it could be, and ought to be, regarded as a substantial cause of the death of Bourne. That was how the case was left to the jury. The competing view of the case, which was fairly put to the jury, was as summarised in the last paragraph of the directions quoted above.

35 The directions did not withdraw from the jury a consideration of any factual issue that arose for decision. One of the dangers of a "but for" test of causation is that, in some cases, it is capable of indicating that a negligible causal relationship will suffice, but that was not a realistic risk in the present case, especially where the trial judge, in the sentence preceding the sentence that is now criticised, referred to "a substantial cause". The concluding sentence in the

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11 (1991) 172 CLR 378 at 441.

12 (1991) 172 CLR 378 at 451.

third of the paragraphs quoted above could not fairly be understood as qualifying the previous sentence. The two sentences were plainly intended to be read together. Evidently, it never occurred to anyone at the trial that the judge intended to tell the jury that a negligible causal connection would suffice. If that impression had been created, objection would surely have followed. Now, two stages removed from the trial, such a complaint is made for the first time. It should be rejected.

36 On the prosecution case, as it was left to the jury, what the trial judge described as "the introduction [by Escalante] of the knife into the affray" was clearly capable of being regarded as a substantial cause of the death of Bourne, not just because, if Escalante had been unarmed, he could not have stabbed Bourne, but because this was an armed robbery, accompanied by the obvious possibility of resistance and violent struggle. The trial judge made that clear. The response of the defence at trial was, not to seek to meet that argument on its own terms, but to endeavour to persuade the jury to a view (or possible view) of the facts according to which, when Hillam and later Bourne were stabbed, there was no longer an armed robbery in progress, and Escalante was acting independently of the appellants in his use of his knife. The issues that arose in relation to causation were fairly put to the jury.

37 This ground of appeal has not been made out.

Conclusion

38 Both appeals should be dismissed.

39 KIRBY J. These appeals from judgments of the Court of Criminal Appeal of South Australia[13] present four questions concerning the appellants' convictions of murder in accordance with the *Criminal Law Consolidation Act* 1935 (SA) ("the Act"). The questions should be answered favourably to the appellants. Their convictions should be quashed and a new trial ordered.

The facts, trial, directions and appeals

40 The background facts are explained in the reasons of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons")[14]. Also explained there are the three bases upon which the charge of murder was left to the jury in the joint trial of Mr Noel Arulthilakan and Mr Chiseko Mkoka ("the appellants")[15].

41 The only issues argued in this Court concern the directions given to the jury by the trial judge (Debelle J) relating to statutory murder as provided in s 12A of the Act. Most of the relevant directions of the trial judge concerning the requirements of the Act are set out in the joint reasons[16]. Those directions address the three elements appearing in the definition of statutory murder, namely (1) whether the conduct constituted "an intentional act of violence"; (2) whether such conduct was committed whilst the accused were acting in the course or furtherance of a "major indictable offence"; and (3) whether the intentional act of violence caused the death of Mr Matthew Bourne ("the deceased").

42 There was no contest that armed robbery of the deceased and his companion Mr Colin Hillam, the victims of the criminal conduct, constituted a "major indictable offence" attracting the application of s 12A of the Act. Accordingly, the argument in this Court focused on elements (1) and (3) of the statutory elements. Whereas the appellants advanced their complaint about the directions on element (1) before the different benches of the Court of Criminal Appeal that heard their respective appeals, the complaint concerning the issue of causation, raised by element (3), was not argued until the matter reached this Court.

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13 In the case of Mr Mkoka's appeal: (2002) 81 SASR 300. In the case of Mr Arulthilakan's appeal: *R v NJA* [2002] SASC 113.

14 Joint reasons at [3]-[15].

15 Joint reasons at [12].

16 Joint reasons at [16]-[17].

43 Before us, the appellants submitted that there was a material misdirection to the jury concerning the pertinent "intentional act of violence" disclosed by the evidence, relevant to the way the jury should approach this consideration. They also argued that the directions on causation were erroneous. They submitted that each of these misdirections of law, and especially cumulatively, deprived them of a trial according to law and occasioned a substantial miscarriage of justice. Notwithstanding the earlier failure to take precise objection to the points argued in this Court, the appellants submitted that no impediment of a constitutional or discretionary character stood in the way of the determination of the points in these appeals in which the lawfulness of their convictions was still a live question for the decision of the judicature.

The issues

44 The four issues presented by the appeals are:

(1) *The new appeal ground issue*: Whether this Court should allow the appellants to raise the point concerning the adequacy of the trial judge's directions on causation, now argued for the first time.

(2) *The intentional act of violence issue*: Whether in respect of statutory murder, the judge misdirected the jury on the law relating to the "intentional act of violence" as applicable to the requirements of the Act and whether the presentation of a knife by the appellants' co-accused, Mr Carlos Escalante, to the deceased's companion, Mr Hillam was capable of constituting an "intentional act of violence" for the purpose of the offence.

(3) *The causation issue*: Whether the trial judge erred in law in the way in which he directed the jury concerning causation in respect of statutory murder.

(4) *The proviso issue*: Whether, if the answers to the foregoing issues are in the affirmative, the "proviso"[17] should be applied, on the basis that no substantial miscarriage of justice has actually occurred affecting the convictions of the appellants.

The additional grounds may be raised

45 An earlier suggestion that, for constitutional reasons, a failure to raise and argue a ground of appeal was fatal to the consideration of the point by this Court,

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

having regard to the nature of the "appeal" to it[18] (being a strict appeal), has been rejected[19]. Where proceedings remain alive within the judicature, it is open to this Court to permit new grounds of appeal to be added.

46 Doing this, is subject to any relevant considerations of procedural fairness and to applicable discretionary factors. Conventionally, one such discretionary factor, favouring rejection of a propounded new ground, is where it is concluded that the course taken at trial was adopted for reasons of forensic advantage. I see no such consideration in the present case. At all times, counsel for the appellants objected to, or complained about, the reliance of the prosecution on statutory murder. Specifically, at trial, counsel objected to the prosecution's argument that statutory murder was available in relation to each of the appellants as an alternative to "common law murder". From the point of view of the appellants, the distinction between "common law" and statutory murder was one presenting serious forensic disadvantages. Statutory murder did not require proof beyond reasonable doubt of an intention on the part of each accused to cause death or grievous bodily harm to the deceased. Nor did it require proof that the accused reasonably contemplated, as part of a joint enterprise, the possibility that use of knives could result in an intentional infliction at least of grievous bodily harm.

47 The new point now raised by the appellants was clearly expressed at the special leave hearing. The adequacy of directions on the issue of causation involves a point of law[20]. It is alleged to affect the lawfulness of the conduct of the appellants' trial. It can be decided by this Court on the basis of the trial transcript. It has been fully argued. If made good, subject to the "proviso", it requires the quashing of the appellants' convictions for most serious offences. Like the other members of the Court, I consider that the failure of the appellants to reserve the point at trial is not fatal to its determination by this Court. The first issue should therefore be decided in favour of the appellants.

The directions on "act of violence" were erroneous

48 The trial judge directed the jury that "as a matter of law … the introduction of the knife [by Mr Escalante] … for the purpose of threatening or

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18 Constitution, s 73.

19 *Pantorno v The Queen* (1989) 166 CLR 466 at 475-476; *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 153-155 [134]-[138], 164 [170]-[171]; cf 128-129 [65]; *Crampton v The Queen* (2000) 206 CLR 161 at 171 [10], 182-184 [47]-[50], 206-207 [122].

20 The issue of causation itself is one of fact and thus reserved for the jury's decision: *Royall v The Queen* (1991) 172 CLR 378 at 441.

intimidating, or for the purpose of stabbing another, is an act of violence". Having regard to the language of this instruction, the jury would have felt bound to comply with what the judge told them was a direction of law. The judge reminded the jury that the particular "act of violence" relied upon by the prosecution was the introduction of the knife into the affray by Mr Escalante presenting the knife to the deceased's companion, Mr Hillam.

49 I agree with the joint reasons that the direction on this point was erroneous in law[21]. Whether any particular conduct constituted an "intentional act of violence" was a question of fact for the jury; not a matter of law upon which the judge was entitled to direct the jury. At most, the judge was entitled to say that, having regard to the evidence, the conduct of Mr Escalante in presenting the knife to Mr Hillam was capable of being regarded by them as a relevant "intentional act of violence". He should have told the jury that it remained for them (in accordance with s 12A of the Act) to determine whether that act of Mr Escalante in fact amounted to a relevant "intentional act of violence" in the case or not. And that the onus of proof rested on the prosecution to establish that fact beyond reasonable doubt.

50 More than once, in recent times, this Court has had occasion to insist that it is not the function of a judge in a criminal trial to direct the jury as to how they should reason towards a conclusion of guilt[22]. Least of all is it for a judge to withdraw from the jury's consideration an essential factual element of the offence by informing them that the subject to be decided is a "matter of law", when it is in truth a matter of fact. The correct approach for the judge to take was that observed in *R v Butcher*[23]. There, in respect of an analogous provision, a direction that "[i]t will be open … to find that the accused in fact committed an act of violence in holding the knife out the way he did …" was approved. By directing the jury to act on the proposition that the production of the knife by Mr Escalante was, as a matter of law, the relevant "intentional act of violence", effectively the trial judge gave the jury no option but to find that this was so.

51 The joint reasons conclude that this misdirection was "technically" made out[24]. If by "technically" it is suggested that the misdirection was inconsequential, I disagree. With respect to the trial judge who conducted the trial with clarity and fairness, upon the hypothesis posited, that the jury convicted the appellants of statutory murder, the direction wrongly assumed judicial

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21 Joint reasons at [23].

22 eg *Azzopardi v The Queen* (2001) 205 CLR 50 at 69-70 [50].

23 [1986] VR 43 at 52-53.

24 Joint reasons at [23].

responsibility for a factual finding concerning one of the three relevant factual ingredients of the offence. On the face of things, this is not a technical error but one that mis-stated an ingredient of the offence and the respective parts played in the trial by the judge and the jury.

52 The issue of whether the error occasioned a miscarriage of justice within the "proviso" raises a different question. It is one that only arises where a misdirection or insufficient direction of law is established, as it is here. The "proviso" issue should be dealt with separately and in conjunction with any other error(s) that are established. Only then will the "proviso" be applied accurately in relation to an evaluation of the overall conduct of the trial and of the convictions resulting from it. There are dangers in segregating suggested errors in a trial, disposing of them one by one as "technical" and failing to consider the effect of the errors cumulatively on the safety of the trial. With respect, this is an error evident in the approach of the joint reasons. It involves a misapplication of the "proviso" for that provision of the Act directs attention to the global question of whether there has been a miscarriage of justice. That question can only be answered when the entirety of the trial is considered, including every established error or misdirection of law that occurred within it. The decisions must be made taking distinct steps.

The directions on causation were erroneous

53 The appellants complained about the trial judge's directions on the third element in the definition of statutory murder. They accepted that the judge was correct in instructing the jury that the specified "act of violence", as defined, did not have to be the *sole* cause of the deceased's death and that it was enough if it was a *substantial* cause. That this is so is shown by much authority[25]. No complaint was made about the judge's direction that it was enough for the jury to decide that Mr Escalante's presentation of the knife to Mr Hillam was a "substantial cause" of the deceased's death for which the appellants were liable under the Act. The judge also referred in his directions on causation to "commonsense". To that extent, he mentioned a consideration which this Court, both in civil[26] and criminal[27], cases has said the decision-maker must take into account in resolving contested questions of causation.

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25 eg *McAuliffe v The Queen* (1995) 183 CLR 108 at 118; *R v Hallett* [1969] SASR 141 at 149.

26 *Fitzgerald v Penn* (1954) 91 CLR 268 at 277-278; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412-413; *Chappel v Hart* (1998) 195 CLR 232 at 238 [6], 243 [24], 268-269 [93.2], 281-282 [111]; cf *Alphacell Ltd v Woodward* [1972] AC 824 at 847.

27 *Royall v The Queen* (1991) 172 CLR 378 at 387, 423.

54 The complaint of the appellants was that the judge misdirected the jury on causation in two particular ways:

(1) In his reference to "commonsense", he did not instruct the jury that it was *their* commonsense that *they* should bring to bear in the resolution of the causation problem. Instead, he stated that "the law takes a commonsense view about causation". As so expressed, the direction could have been understood to be one of law made by the judge, not one of fact left to the jury to decide; and

(2) The judge told the jury (with emphasis added) that "[i]t is enough if it is shown that, *but for* that one event, all the other events would not have happened as they did".

55 Contested issues of causation are amongst the most difficult that have to be resolved in the law, as in other fields where aetiology is in issue[28]. In *Ryan v The Queen*[29], Barwick CJ emphasised that "the choice of the act causing death is not for the presiding judge or for the Court of Criminal Appeal: it is essentially a matter for the jury under proper direction". In that case, Barwick CJ pointed out that the mere presentation of a gun, which subsequently discharged allegedly without intention on the part of the accused, could only be the *cause* of death if the unwilled discharge of the gun ought to have been in the contemplation of the accused at the time. This analysis makes vital the correct identification of the event propounded as the "cause" and accurate instruction on the proper approach of the jury to linking that event with a subsequent one. Here, the propounded primary event was Mr Escalante's presentation of the knife to Mr Hillam. The propounded secondary event was the stabbing of the deceased by Mr Escalante which was the immediate cause of his death. It was essential that each of the events be clearly identified and drawn to the jury's notice with accurate instruction on the way the relevant statutory concept of causation was to be approached. Otherwise, there would be a misdirection or a failure to direct the jury adequately on the law essential to the third element of the offence of statutory murder.

56 As to the first complaint, concerning the judge's failure to tell the jury that it was *their* commonsense which *they* had to bring to bear in the causation question, I would not find error. In the context, the trial judge was telling the jury the approach they should take. That is how I consider they would have interpreted what his Honour said.

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28 See *Chappel v Hart* (1998) 195 CLR 232 at 263-264 [86]-[87].

29 (1967) 121 CLR 205 at 218.

57 The reference to the "but for" test of causation is, however, a legal misdirection. In civil cases, this Court in *March v Stramare (E & M H) Pty Ltd*[30] rejected the "but for" test as the exclusive test of causation. At most, the "but for" test can only constitute a "threshold test for determining whether a particular act or omission qualifies as a cause"[31]. It is insufficient to "make that act or omission a legal cause of the damage"[32]. The problem of the "but for" test is that, on its own, it casts the net of causation too widely. It includes acts of a remote and peripheral or purely temporal connection which have no part to play in the determination of the "legal cause".

58 There is no reason for the test of causation for the purposes of attaching *criminal* liability to be different from that adopted by this Court in cases of *civil* liability. If anything, the reasons that have led to the rejection of the "but for" test in civil trials have greater applicability in the context of the criminal law. This is because, as McHugh J pointed out in *Royall v The Queen*[33], the inquiry is one addressed to whether a link has been proved by the prosecution that is "sufficiently cogent to justify attributing *causal responsibility*, ie legal responsibility, to that person".

59 In this Court, the respondent agreed with the appellants' submission that the "but for" test for determining criminal responsibility was inadequate and incomplete. In effect, it did not seek to support the directions to the jury of the trial judge on that issue. Instead, it sought to defend the outcome of the trial by reference to the "proviso" and to an alternative contention.

60 It follows that the jury were erroneously instructed as to the test of causation that they were to apply to the supposed link between the presentation by Mr Escalante of a knife to threaten Mr Hillam and the death of the deceased shortly thereafter. There was thus a cumulative misdirection of law. It affected the third element of statutory murder upon which the prosecution relied. The appellants have therefore made out their complaint that the conduct of their trial

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30 (1991) 171 CLR 506 at 516-517, 522.

31 (1991) 171 CLR 506 at 530; cf at 534.

32 (1991) 171 CLR 506 at 530.

33 (1991) 172 CLR 378 at 440 (original emphasis). cf Yeo, "Giving Substance to Legal Causation", (2000) 29 *Criminal Reports* (5th) 215 at 219; Yeo, "Blamable Causation", (2000) 24 *Criminal Law Journal* 144 at 148; Editorial, "Semantics and the threshold test for imputable causation", (2000) 24 *Criminal Law Journal* 73; Presser, "All for a Good Cause: The Need for Overhaul of the *Smithers* Test of Causation", (1994) 28 *Criminal Reports* (4th) 178.

was tainted by legal error. This enlivens, effectively for the first time, the provisions of the "proviso". Given the unanimous rulings of this Court on the misdirections, and the very proper concessions for the respondent in that regard, essentially this is an appeal concerned with the "proviso". That is so because it is established, or conceded, that errors of law occurred in the directions given by the trial judge to the appellants' jury.

The proviso is inapplicable

61 *Requirement of accurate trials*: The starting point for the consideration of the "proviso" is a reminder of the fundamental postulate of our criminal law that everyone facing trial by jury is entitled to have the jury accurately instructed on the law that they are to apply. That is especially true in respect of the elements constituting the offence(s) upon which the jury is asked to reach their verdict. It is of particular importance that the jury be accurately instructed in a case, as here, where the offences charged were that of murder, the most serious offence in the criminal calendar[34]. Because conviction of murder ordinarily, as here, results in a sentence of life imprisonment, with consequential prolonged deprivation of liberty[35], and because each of the appellants was a juvenile at the time of the offence and of his trial[36], these facts constitute further contextual considerations that oblige this Court to examine very closely all of the matters relevant to the trial, before affirming convictions that followed guilty verdicts preceded by erroneous legal directions on the elements of the offence of which the appellants were found guilty.

62 Where legal error in the directions to a criminal jury is shown, it is for the prosecution to establish affirmatively that no substantial miscarriage of justice has actually occurred. This means that the prosecution must demonstrate that the error that is established could not reasonably have been supposed to have affected the result of the trial[37] or, as it is sometimes put, that the convictions of the appellants were inevitable[38].

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34 *Charlie v The Queen* (1999) 199 CLR 387 at 400 [29].

35 Counsel informed the Court that Mr Mkoka and Mr Arulthilakan were each sentenced to life imprisonment with a 10 year non-parole period: [2003] HCA Trans 289 at 69-70.

36 Mr Mkoka was 15 years old at the time of the offence. He was, for the purposes of the *Young Offenders Act* 1993 (SA) a "child". See (2002) 81 SASR 300 at 313 [56]. Mr Arulthilakan was 17 years old at the time of the offence.

37 *Mraz v The Queen* (1955) 93 CLR 493 at 514-515; *Stokes v The Queen* (1960) 105 CLR 279 at 284-285; *Driscoll v The Queen* (1977) 137 CLR 517 at 543.

38 *Conway v The Queen* (2002) 209 CLR 203 at 226 [63]; cf 242 [106].

63 *Inferring the jury's reasoning*: The verdicts taken from the jury in the appellants' trial did not differentiate between the respective ways in which the count of murder was decided. That count was charged by reference to the common law applicable in South Australia[39] and also to statutory murder, formerly known as felony murder, as now provided by the Act[40]. The trial judge directed the jury on the count of murder as defined at common law and then explained the elements of statutory murder. Because there is no way of discovering with certainty how the jury proceeded in their reasoning, and because the verdicts themselves are inconclusive in this regard, it is a matter of speculation as to whether the jury proceeded first by the "common law" route (involving consideration of the alleged common purpose of the appellants and Mr Escalante) or whether they first considered statutory murder (with its more restricted elements, requiring no specific finding that the appellants each intended the death of, or grievous bodily harm to, the deceased or was to be taken to have so intended by the circumstances in which that death occurred).

64 Before this Court, each side presented competing arguments on this issue. The respondent suggested that the manner in which the judge's directions proceeded and the logic of the case indicated that the first way in which the jury would have determined the guilt of the appellants was by reference to common law principles, involving the identification of the common purpose of the appellants and Mr Escalante. On the other hand, the appellants submitted that the jury may well have found the test for statutory murder a simpler point at which to

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39 The Act, s 11. That section provides: "Any person who commits murder shall be guilty of an offence and shall be imprisoned for life". Although described as common law murder, it is in fact a statutory offence whose ingredients are defined by the common law.

40 The Act, s 12A. The section was inserted in the Act by the *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act* 1994, s 5. The amendment followed a Discussion Paper by Goode, "The Abolition of Felonies and Misdemeanours", Attorney-General's Department (SA) 1994. In the paper the author cites Professor Fisse's criticism that felony murder was "a barbarous relic which quite unnecessarily complicates the law": Fisse, *Howard's Criminal Law*, 5th ed (1990) at 71. See also Lanham, "Felony Murder – Ancient and Modern", (1983) 7 *Criminal Law Journal* 90 at 101. Numerous law reform bodies had urged abolition. In Canada, felony murder was found to be contrary to the *Canadian Charter of Rights and Freedoms*: see *R v Vaillancourt* (1987) 39 CCC (3d) 118. The Discussion Paper urged retention of "statutory murder" on the basis of its "popular appeal": see Goode, "The Abolition of Felonies and Misdemeanours", Attorney-General's Department (SA) 1994 at [4.5].

begin their deliberations, having regard to the confined scope of the statutory definition, particularly following the misdirections of law of the trial judge.

65 As a matter of logical inference, there is some ground for preferring the submission that the jury would probably have first considered the question of whether statutory murder had been made out. Counsel for the prosecution told the jury that "… above all else, in this trial, that one offence [statutory murder] is abundantly clear". The jury might well have agreed. Accurately described, statutory murder omitted disputable considerations relevant to the intentions and purposes of the appellants. It therefore seems distinctly possible that the jury might have proceeded to decide their verdict on the basis of statutory murder first without considering the common law principles at all.

66 Against this proposition, the respondent contended that the jury's verdicts finding the appellants guilty on the third count (which charged the appellants with wounding Mr Hillam)[41] were an indication that the jury had reached a conclusion that the appellants had engaged in an unlawful joint enterprise in respect of Mr Hillam. This indicated, so it was argued, that the jury had considered the *intention* of the appellants in respect of the offence against Mr Hillam. From this, the respondent urged it was but a small step to infer that the jury similarly decided their verdicts on the count of murder on the footing of the common *intention* of the appellants and Mr Escalante, directed to the wounding of the deceased that caused his death. Further, the structure of the trial judge's instructions to the jury placed emphasis upon murder at common law. His Honour dealt with that first and then gave his directions on statutory murder stating that "[t]he Crown simply puts it forward as an alternative route by which you can find the accused guilty of the crime of murder".

67 Whilst it is certainly possible that the jury dealt first with "common law" murder, it is impossible to be certain. Thus the charge concerning the wounding of Mr Hillam was quite distinct from that of the murder of the deceased. That wounding happened earlier in time. It occurred in a different place. It involved a different victim. The jury were correctly instructed to consider each of the counts separately. The issue of intention in relation to Mr Hillam had to be decided to reach a verdict on the third count. It did not have to be decided in relation to the more serious first count if the route of statutory murder was taken. The verdict on the third count does not inevitably demonstrate that the appellants were convicted of murder on the basis of the "common law"[42]. In the end, therefore, identification of the jury's basis for reaching the verdicts of murder is a matter of pure speculation.

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41 Contrary to the Act, s 21.

42 As applied by the Act, s 11.

68 *Was conviction inevitable?* This being the case, the approach that must be followed is that adopted in *Domican v The Queen*[43]. That was an appeal involving directions on identification evidence which were found to have been inadequate in what was otherwise a very strong prosecution case. The majority of this Court concluded that the "proviso" could not be applied to overcome the misdirection unless the Court, invited to apply the proviso, considered that conviction of the appellant was inevitable, independently of the identification evidence[44]. The applicable principle is stated by Brennan J[45]:

> "… where, on the evidence and consistently with the directions of the trial judge, it is open to a jury to convict on any of two or more independent bases, a misdirection or an inadequate direction which would vitiate a conviction on one of those bases necessarily results in the setting aside of a guilty verdict despite the availability of another sound basis for conviction. That is because it is not possible to conclude that a guilty verdict has been founded on a sound basis when it was open to the jury to convict on a basis affected by the misdirection or inadequate direction. A Court of Criminal Appeal cannot apply the proviso by speculating either that the jury acted on a body of evidence which was unaffected by the misdirection or inadequate direction; nor can the Court speculate that, if the jury had acted on such evidence, they would have convicted. If a misdirection or inadequate direction would vitiate a conviction … and that basis of conviction was open to the jury, it is impossible to be satisfied that, by reason of the misdirection or inadequate direction, the accused did not lose a chance of acquittal."

69 Applying that approach to the present case, the establishment of two errors in the explanation of the ingredients of the offence of murder upon the basis of either of which the jury might have reached their verdicts, necessitates the quashing of the convictions unless it can be said that the verdicts of guilty to murder were inevitable. Is that a conclusion that should be reached in this appeal?

70 *The appellants' forensic arguments*: In my opinion, it is not. It is true that the appellants took part in a shocking crime. Their proved conduct deserves condign punishment. There were numerous charges, alternative to murder, upon

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43 (1992) 173 CLR 555.

44 (1992) 173 CLR 555 at 565-566.

45 (1992) 173 CLR 555 at 570-571. His Honour dissented on the basis that the direction on identification was adequate. The dissent does not affect the correctness of the approach to the proviso explained in this passage.

which they could have been presented for trial. By choosing the most serious charge of murder, the prosecution assumed a significant burden. That choice also required an accurate trial.

71 The immediate act that killed the deceased was that of Mr Escalante in stabbing him and puncturing his heart. Neither of the appellants stabbed the deceased. Neither of them personally and individually carried or inserted the knife that was the proximate cause of death. Those acts were done, and done only, by Mr Escalante. At the beginning of the trial, Mr Escalante pleaded guilty to statutory murder, leaving the guilt of the appellants, relevantly of murder, to be determined by the jury. Because the appellants did not themselves perform the act that led to the profound loss of blood in the chamber of the deceased's heart occasioning his death, their guilt of murder is the consequence of the application to their conduct of a legal fiction[46]. In factual terms, they were guilty of attempted armed robbery and other offences. However, their guilt of murder is the result either of a common law doctrine or of the statute so far as it provides for an expansion of the ordinary notion of murder and alters the requirements of that crime.

72 In saying this, I do not minimise the conduct of the appellants by their participation in the offences against Mr Hillam and the deceased, Mr Bourne. I simply draw to notice that, in the forensic context, the appellants' moral culpability for the death of the deceased was much less than that of Mr Escalante. Such considerations can sometimes weigh heavily in the deliberations of a jury. So might the appellants' respective ages. It cannot therefore be said that this was a trial where the appellants had no available forensic arguments.

73 It is true that the entire events that culminated in Mr Escalante's stabbing of the deceased, happened in a matter of minutes. But that is not unusual in affrays of this kind. The focus of the statute is upon the *cause* of death of the deceased. The price of removing the necessity of establishing intent to cause that death or at least grievous bodily harm is the obligation, imposed on the prosecution by the Act, to establish beyond reasonable doubt that an identified intentional act of violence for which the accused is responsible *caused* that death. Only then is the accused rendered by law "a person who … is guilty of murder".

74 It is true that each of the appellants had a personal involvement with a knife as he embarked upon his criminal conduct. However, again, in the evidentiary setting, both appellants were left with distinct arguments to advance before the jury. The possession and carrying of knives is reprehensible, dangerous and morally culpable, especially for those who take part in an armed robbery knowing that another participant has a knife. But to secure a conviction

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46 cf *R v Martineau* [1990] 2 SCR 633.

for statutory murder it remains for the prosecution to prove the causal link between the accused and the identified act of violence of someone else and the ensuing death by the use of a knife by that other person. This Court should do nothing to enlarge the fiction that courts and scholars have pointed out is otherwise inconsistent with the fundamental postulates of our criminal law, namely liability for intentional acts. Certainly, it should do nothing in such a case to minimise the burden cast on the prosecution by law to prove each and every element of the offence in the case of each accused.

75 Mr Arulthilakan had originally left his knife in the stolen car in which he was travelling with the other offenders. His conduct in leaving his knife behind could be viewed by the jury as a positive act, somewhat unusual in such circumstances, to distance himself from the use of knives in the ensuing confrontation. Whilst it is true that he agreed to Mr Mkoka's request to take the knife he had left in the car into the affray, his evidence was that he did so solely to facilitate the robbery not for use in stabbing anyone. On the basis of the evidence, Mr Arulthilakan had distinct evidentiary submissions to urge upon the jury relevant to his acquittal of murder.

76 Similarly, Mr Mkoka, although he took Mr Arulthilakan's knife into the affray, dropped the knife on the road. Arguably, this action was also capable of being viewed by the jury as distancing himself from the use of the knife in such a dangerous situation. He gave evidence that he was aware that Mr Escalante was in possession of a knife as he approached the victims and that he knew that Mr Escalante carried a knife "fairly often". However, Mr Mkoka asserted that he did not see the knife in Mr Escalante's hand when he dropped the knife he had taken and proceeded to use a cosh. The cosh struck the deceased on his head. Whilst the actions of Mr Mkoka, directed at a stranger are shocking, it was common ground that the wounds occasioned by the cosh did not themselves cause the deceased's death. The cosh was an instrument used in the attempted armed robbery. It follows that Mr Mkoka was also left with arguments to urge upon a jury that separated his actions from the *cause* of the deceased's death.

77 In exchanges with counsel, the trial judge himself appeared to acknowledge the difficulty which, forensically, the prosecution faced in linking Mr Escalante's presentation of his knife to Mr Hillam and the act that caused the deceased's death. Trial counsel for Mr Arulthilakan, referring to the identified "act of violence", asked "How, with respect, can it be said that the stabbing of Hillam can be the act of violence causing the death of Bourne? That is untenable." To this remark, the trial judge said "I agree". If the learned trial judge agreed to this argument, it was clearly open to the jury to agree with it.

78 The presentation of Mr Escalante's knife to Mr Hillam occurred on the side of the road opposite that on which Mr Escalante later stabbed the deceased in the heart. Whilst the events were closely interrelated and compressed into a matter of minutes, the causation issue remained a real question to be answered by

the jury. It was a factual question. It was one upon which the jury were obliged to deliberate. On the facts it was not inevitable that a jury would convict the appellants. It was open to a properly instructed jury, on the evidence, to conclude that the appellants were involved (including in the case of Mr Mkoka with his cosh) solely in the attempted armed robbery. It was open to the jury to decide that the *significant* cause, and the sole *substantial* cause, of the death of the deceased (and thus the legal cause contemplated by the Act) was the independent act of Mr Escalante alone (a man revealed by the evidence to have been highly agitated, excitable and apparently violent). If the jury so decided it was open to them to conclude that the appellants were not guilty of statutory murder. This would have consigned the prosecution to establishing the requisite *intention* necessary to secure a conviction of each appellant of murder at common law. The same evidentiary considerations were available to each of the appellants on this score. Guilt of causation of murder was not inevitable.

79 *Conclusion: a new trial*: This analysis made the trial judge's instructions to the jury on the elements of statutory murder important, and potentially decisive. In the event, the two errors of law in the directions on this point were crucial. Once the judge had informed the jury that, as a matter of law, the introduction by Mr Escalante of the knife for the purpose of threatening, intimidating or stabbing Mr Hillam was the relevant "intentional act of violence", this effectively confined the jury's role, in respect of statutory murder, to deciding the causation issue. But in the context, if the jury concluded that the involvement of the appellants was solely in relation to the attempted armed robbery, their verdict, as a matter of fact, on the "intentional act of violence" for which the appellants were responsible, was vital in reaching their verdict on statutory murder.

80 Even more importantly, the "but for" direction given by the trial judge on the issue of causation confined even more narrowly the remaining issue that the jury then had to decide. On the basis of that direction, it was a very small step for the jury to conclude that the event involving Mr Escalante and Mr Hillam was closely connected to Mr Escalante's stabbing of the deceased so soon afterwards. Each involved Mr Escalante. Each involved his knife. The direction therefore diverted the jury from deciding the question of causation presented by the definition of statutory murder contained in the Act. Properly explained, this would have required the jury to decide whether the presentation by Mr Escalante of his knife to Mr Hillam was the cause of the subsequent death of the deceased or, at least, a significant contributing cause of that death for which the appellants were liable[47]. In law it was not enough that it was simply one event in the chain of events that unfolded. Defining it in such a way made it virtually impossible for the appellants to escape a guilty verdict of statutory murder.

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47 *R v Nette* [2001] 3 SCR 488 at 513-514 [44]-[46].

Conclusion and orders

81 The appellants are entitled to raise the points they have argued in this Court. Misdirections of law have been established, as is now accepted by the entire Court. The misdirection on causation was specially significant in this case. This Court cannot know whether the foundation of the jury's verdicts of guilty of murder was based on statutory murder or common law murder. In the circumstances, the only basis upon which the misdirections may be excused is if the respondent establishes that the convictions of the appellants were inevitable. The evidence demonstrates that the appellants had real factual arguments to present to the jury. It was essential, therefore, that the elements of the offence of statutory murder be accurately explained to the jury. They were not. In the light of the factual arguments, it cannot be said that the convictions of the appellants were inevitable. Accordingly, the "proviso" does not apply.

82 The appeals should be allowed. The orders of the Court of Criminal Appeal of South Australia in respect of each of the appellants should be set aside. In lieu thereof, it should be ordered that the appellants' appeals to that Court be allowed; their convictions quashed; and a new trial ordered.