HIGH COURT OF AUSTRALIA

HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

THE QUEEN APPLICANT

AND

DANG QUANG NGUYEN RESPONDENT

The Queen v Nguyen [2010] HCA 38
3 November 2010
M23/2010

ORDER

1. *Special leave to appeal granted.*

2. *Special leave to cross-appeal granted.*

3. *Appeal and cross-appeal each treated as instituted and heard instanter and allowed.*

4. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made in respect of the respondent on 18 December 2009, and, in their place, order that:*

   (a) leave to appeal to that Court against conviction be granted;

   (b) the appeal to that Court be allowed;

   (c) the respondent's convictions be quashed; and

   (d) a new trial be had.

On appeal from the Supreme Court of Victoria

Representation

T Gyorffy with B L Sonnet for the applicant (instructed by Director of Public Prosecutions (Vic))

M J Croucher with C B Boyce for the respondent (instructed by Michael J Gleeson & Associates Pty)

CATCHWORDS

The Queen v Nguyen

Criminal law – Appeal – Verdict unreasonable or cannot be supported having regard to the evidence – Respondent found guilty by jury of murder and attempted murder by complicity – Court of Appeal quashed convictions on ground that verdicts "unsafe and unsatisfactory" in the sense that verdicts were unreasonable or could not be supported having regard to the evidence – Whether verdicts unsafe and unsatisfactory – Whether reasonably open to jury on the whole of the evidence to convict respondent of murder and attempted murder – Task of appellate court.

Criminal law – Murder – Practice and procedure – Directions to jury – Whether alternative verdict of manslaughter sufficiently left to jury – Whether reasonably open to jury to return alternative verdict of manslaughter – Whether failure sufficiently to leave alternative verdict to jury constituted a wrong decision on a question of law – Whether no substantial miscarriage of justice actually occurred.

Words and phrases – "unsafe and unsatisfactory", "substantial miscarriage of justice".

Crimes Act 1958 (Vic), s 568.

1 HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. In the early hours of 8 November 2004, the respondent (Dang Quang Nguyen), and two other men (Dang Khoa Nguyen and Bill Ho), went to a flat in Carlton, Victoria. The prosecution was later to allege that the three men had gone to the flat to collect a debt owed either to Bill Ho or Dang Khoa Nguyen by a man named Mau Duong. Mau Duong was not at the flat when the three men were there.

2 Seven young people were in the flat. Some were asleep; some were watching television. In the flat, the men repeatedly asked where Mau Duong was. The respondent entered the lounge room of the flat holding a sword. During the events that followed, he waved the sword about, cutting two or three of the flat's occupants. Whether the respondent had brought the sword with him, or found it in the flat, was a matter of controversy at trial. Bill Ho produced a firearm that he had brought with him. He fired two shots. The first hit Chau Minh Nguyen, the other Hieu Trung Luu. Chau Minh Nguyen survived. Hieu Trung Luu died as a result of his wound.

Trial, conviction and appeal

3 The respondent was presented with Dang Khoa Nguyen and Bill Ho in the Supreme Court of Victoria on a presentment charging each with the murder of Hieu Trung Luu and the attempted murder of Chau Minh Nguyen. In the trial of the respondent, the central issue was whether the prosecution proved beyond reasonable doubt his complicity in crimes Bill Ho committed against Hieu Trung Luu and Chau Minh Nguyen.

4 The trial, before Williams J and a jury, occupied several weeks in September and October 2007. It was the fourth trial of the accused. The first, in November 2006, ended when all three accused withdrew their instructions to their counsel. The second and third trials proceeded for 10 and 11 days respectively in August and September 2007, but on each occasion the jury were discharged without verdict. On 13 October 2007, the jury at the fourth trial returned verdicts of guilty on both counts against all three accused. The three men were sentenced on 17 December 2007.

5 Within a few days of being sentenced, the respondent gave notice of application for leave to appeal to the Court of Appeal of the Supreme Court of Victoria against his conviction. That application, although made in December 2007, did not come on for hearing until 27 July 2009. It was heard at the same time as an application for leave to appeal against conviction by Dang Khoa Nguyen. In December 2009, two years and one day after the respondent and his co-accused had been sentenced, the Court of Appeal (Neave and Bongiorno JJA,

and Lasry AJA) made orders granting the respondent leave to appeal against his convictions, allowing his appeal, quashing his convictions and directing that judgment and verdicts of acquittal be entered. The appeal by Dang Khoa Nguyen was dismissed.

6 The Court did not publish its reasons for making those orders until 23 February 2010, more than two years after the men had been sentenced, and seven months after the single day taken for the oral argument of the appeals.

7 The reasons of the Court of Appeal were given by Neave JA, the other two members of the Court simply agreeing in her Honour's reasons. The Court of Appeal concluded[1] that the verdicts returned by the jury against Dang Quang Nguyen, the present respondent, were unsafe and unsatisfactory in the sense described by this Court in *M v The Queen*[2]. More particularly, the Court of Appeal concluded[3] that a jury, acting reasonably, must have had a reasonable doubt as to the guilt of the respondent. The Court of Appeal concluded[4] that, no matter whether analysed as a case in which the present respondent was alleged to have acted in concert with the others, as a case of extended common purpose, or as a case in which the respondent aided and abetted commission of the crimes alleged, the evidence before the jury did not permit the jury to be satisfied of the guilt of the respondent beyond reasonable doubt.

8 The prosecution now seeks special leave to appeal against the orders of the Court of Appeal. The prosecution submits that, applying well-established principles to the particular facts of this case, it was open to the jury to convict the respondent of both murder and attempted murder. That submission should be accepted. This is one of those exceptional cases[5] in which the prosecution should have special leave to appeal against the orders of an intermediate court quashing a conviction by a jury and directing entry of a verdict of acquittal. It is in the interests of justice generally, and in the interests of justice in this particular case, that the error made by the Court of Appeal in this case be corrected.

---

1 *R v Nguyen* [2010] VSCA 23.

2 (1994) 181 CLR 487; [1994] HCA 63.

3 [2010] VSCA 23 at [104].

4 [2010] VSCA 23 at [104]-[112].

5 *R v Hillier* (2007) 228 CLR 618 at 640 [53]-[54]; [2007] HCA 13.

9 Accepting the prosecution's submission that the verdicts of guilty returned against the respondent were not unsafe and unsatisfactory would ordinarily entail that the jury's verdict, and consequential conviction and sentence of the respondent, would stand. The respondent submitted, however, that his application for leave to appeal to the Court of Appeal should have succeeded on a ground alleging misdirection of the jury. He further submitted that, in the particular circumstances of this case, success on that ground should lead either to refusal of the prosecution's application for special leave or dismissal of its appeal, rather than to an order for retrial.

10 The complaint of misdirection was first raised on behalf of the respondent in the course of the hearing of his application for leave to appeal to the Court of Appeal[6] and he was given leave to amend his grounds of appeal to that Court accordingly. The complaint, which was also advanced in the application by Dang Khoa Nguyen for leave to appeal to the Court of Appeal, focused upon whether the possibility of returning a verdict of manslaughter instead of murder was sufficiently left to the jury. The Court of Appeal rejected[7] those arguments. In this Court, the respondent sought, initially by notice of contention, but later by application for special leave to cross-appeal, to allege that the Court of Appeal should have held that the trial judge misdirected the jury.

11 These reasons will demonstrate that the directions given by the trial judge were erroneous. The respondent should have special leave to cross-appeal, and the cross-appeal should be allowed. What orders should be made in consequence of that conclusion will be considered separately.

12 Attention should be directed first to the prosecution's application for special leave to appeal. That requires some examination of the evidence led at trial.

The evidence at trial

13 The prosecution's case at trial was that the three men had gone to the flat to collect a debt owed by Mau Duong for drugs that had been supplied to him by either Bill Ho or Dang Khoa Nguyen.

---

6 [2010] VSCA 23 at [15].

7 [2010] VSCA 23 at [141]-[161].

14 Mau Duong gave evidence at trial that he was a drug dealer and had been a heroin addict. He said in evidence-in-chief that, about two weeks before the shootings, he had agreed to buy an ounce of heroin from Dang Khoa Nguyen. Mau Duong described how the heroin had been delivered to him, not by Dang Khoa Nguyen but by Bill Ho, and that the arrangement made was that he would pay $4,500 for the drugs after he had sold them. He said he paid for the drugs by first telling Dang Khoa Nguyen that he was ready to pay, and then, presumably by arrangement with Dang Khoa Nguyen, paying the amount owed to Bill Ho.

15 In his evidence-in-chief he said that, a few days before the shootings, he again agreed to buy another ounce of heroin from Dang Khoa Nguyen for $4,500 on credit. Mau Duong arranged with Dang Khoa Nguyen that the heroin would be delivered by Bill Ho to the flat where the shootings were later to occur. Mau Duong collected the heroin from the flat on Friday, 5 November 2004. He did not pay for it then. On Sunday, 7 November 2004, his telephone recorded that a call had been made to it from a number that Mau Duong believed to be Dang Khoa Nguyen's phone. Mau Duong did not speak to Dang Khoa Nguyen.

16 In cross-examination, Mau Duong agreed that he had earlier said that the transactions he had described in his evidence-in-chief had occurred in the reverse order. The order in which the transactions occurred did not take on any particular significance in the trial.

17 Several of those who had been in the flat when the shootings happened gave evidence at trial that, in the early hours of Monday, 8 November 2004, Bill Ho, Dang Khoa Nguyen and the respondent came to the flat. The room in which all of the relevant events occurred was about 6 metres long by 4 metres wide. It had a double bed, a stereo and a television set and there were numerous people in the room as events unfolded. One or more of the men who had come to the flat was asking, "Where's Mau? Where's Mau?" There was screaming and arguing. One of the men had a samurai sword which he was swinging around. Several witnesses identified the men in a fashion that would permit the jury to conclude that the respondent was the man with the sword. Whether he had come to the flat with the sword, or found it there, was open to question.

18 One of the occupants of the flat (Kathleen Quach) described a man (who the jury could conclude was the respondent) coming into the room with a sword in his hand, followed by Bill Ho and then Dang Khoa Nguyen. She said that the man with the sword (the "long haired one") or another man (Dang Khoa Nguyen) was asking for Mau Duong. On being told by Tien Manh Pham that Mau Duong was not there, Bill Ho asked for Mau's phone number. Ms Quach said that while

Tien was scrolling through his phone looking for a number, the man with the sword was walking around the room pointing the sword at people asking "Where's [Mau]? Do you [know] where [Mau] is?"

19 Another occupant of the flat (Hung Manh Nguyen) gave evidence of a man "waving [a sword] around" and that he (Hung Manh Nguyen) was "scared when the sword [was being waved around] ... so I was standing close to the wall with the other friends". Although he did not remember being hurt, other evidence suggested that he had been cut by the sword. Tien Manh Pham gave evidence of the respondent putting the sword against his throat and, pushing forward in a stabbing motion, cutting him a little bit.

20 Soon after Tien Manh Pham was cut by the sword, Bill Ho shot first Chau Minh Nguyen and then Hieu Trung Luu.

21 Chau Minh Nguyen had been sleeping on the floor. According to the evidence of Kathleen Quach, Bill Ho took a gun from his pocket and "was spinning the barrel around". She later agreed that he had been spinning the "cylinder part of the gun [that] had popped out the side of the gun", an answer that could well be understood as referring to the cylinder of a revolver. Bill Ho agreed in his evidence that he had "deliberately fiddled with the gun ... in a way ... that the occupants of the flat could see". As Kathleen Quach described it, Bill Ho "closed the gun and then Chau woke up so he turned around and [Ho] took a shot". Chau Minh Nguyen was shot in the head.

22 Kathleen Quach said that Hieu Trung Luu (who had been smoking marijuana earlier in the night, but was lying asleep on the bed in the room when the three men came in) woke up because of the shot, and stood on the bed. Bill Ho fired a second shot and Hieu Trung Luu fell on top of the coffee table. At first Kathleen Quach said that the time between shots was "a couple of minutes" but later agreed that she had previously estimated the interval to be 10 to 15 seconds.

23 Chau Minh Nguyen gave an account of events in the room between his waking up and his being shot. The account he gave was generally similar to that given by Kathleen Quach, but was a more elaborate account of what happened immediately before he was shot. Chau Minh Nguyen spoke of his being asleep and waking to find the three men in the flat. He described a man waving a "Japanese sword". He described another man (Bill Ho) kneeling on one knee, asking Tien Manh Pham: "Find Mau for me, find Mau for me". The "man with the sword" was sitting on the bed. The third man (Dang Khoa Nguyen) was sitting on the stereo. Chau Minh Nguyen said that he then saw the man on the

stereo (Dang Khoa Nguyen) say to the man kneeling down (Bill Ho): "Get him off" or "Fuck him off". Bill Ho then pulled out a gun and pointed the gun directly at Chau Minh Nguyen, asking "That guy?". Chau Minh Nguyen testified that the man on the stereo (Dang Khoa Nguyen) "nodded his head", and Bill Ho then shot him.

24 The evidence given at trial about what happened after the two men had been shot was not consistent. Kathleen Quach said initially that "[t]he black haired guy ... with the sword" said "Let's just go and dump the body". Later in her evidence she said that this was said by "either the guy with the gun or the guy with the sword". She said that "they" were still asking for Mau, and that "the black haired guy with the sword" "was walking around the room and he was just slashing down" with the sword. She said that she thought that the sword "got Viet [Viet Tran] on the knee", but that this might have happened before or after the shots had been fired. Kathleen Quach also said in evidence that, before the men left, "the man with the sword" said "If we leave don't call the police or the ambulance" and "they" said "Just, you don't know who we are if anyone ask". In her next answer, she said that all three men ("the blond one and the short haired, the long haired one and the sword") had said this. It was well open to the jury to conclude that the "blond one" was Bill Ho, "the short haired" was Dang Khoa Nguyen, and the one with "the sword" was the respondent, Dang Quang Nguyen.

25 On the whole of the evidence, it was open to the jury to be satisfied, beyond reasonable doubt, that all three men had come to the flat searching for Mau Duong for payment of a debt. In particular, the jury could be satisfied that Dang Quang Nguyen knew that they went to the flat searching for Mau Duong for payment of a debt, and that, either before or after arriving at the flat, Dang Quang Nguyen armed himself with a sword with which he sought to enforce the demands for information that all three were making. The jury could further be satisfied that Dang Quang Nguyen used the sword in a way that showed his willingness to inflict cutting injuries on those in the flat. Those findings of fact were not inevitable, but they were open.

26 It was also open to the jury to conclude that, before the first shooting, Bill Ho had produced a revolver and had spun the cylinder in an attempt to intimidate those who were in the room. Given the size of the room, and the places in the room said to be occupied by those who were there, the jury could conclude that Dang Quang Nguyen (like other occupants of the room) must have seen the gun that Bill Ho had produced and was manipulating in a threatening manner.

The prosecution case

27 To convict Bill Ho of attempted murder, the jury had to be satisfied that he had intended to kill Chau Minh Nguyen[8]. To convict Bill Ho of murder, the jury had to be satisfied that he shot Hieu Trung Luu intending either to kill him or to inflict really serious injury upon him. The jury were instructed accordingly, but the trial judge also directed the jury that, if not satisfied that Bill Ho was guilty of the murder of Hieu Trung Luu, they should consider whether he was guilty of manslaughter by unlawful and dangerous act.

28 The prosecution case against Dang Khoa Nguyen and Dang Quang Nguyen was put on three different bases of criminal complicity: acting in concert, common purpose and aiding and abetting. In argument in this Court, the prosecution submitted that its central thesis at trial was that the three men agreed to collect a drug debt and agreed that, if necessary, they would kill to achieve that end. At trial, the prosecution submitted that if the men had not made that agreement before they arrived at the flat, such an arrangement arose after they got there. This was said to be so because of what happened in the flat, including Dang Quang Nguyen then being armed with a sword.

The defence case

29 Dang Quang Nguyen did not give evidence at trial. In the statement of his defence, made to the jury after the prosecution opening, emphasis was given to the prosecution's task of proving guilt beyond reasonable doubt. It was pointed out that there would be no evidence that Dang Quang Nguyen had been involved in any drug transaction with Mau Duong or that he knew of any drug debt. Accordingly, it was said that the prosecution would not demonstrate any acting in concert or any common purpose to which Dang Quang Nguyen was a party and would not demonstrate that he aided or abetted the commission of any crime by Bill Ho.

30 The general tenor of the cross-examination of witnesses on behalf of Dang Quang Nguyen was that, in the flat, he had appeared to be drunk, to be behaving foolishly, and to be "just having a laugh at the whole incident".

---

8 *Alister v The Queen* (1984) 154 CLR 404 at 421-422 per Gibbs CJ; [1984] HCA 85; *McGhee v The Queen* (1995) 183 CLR 82 at 85-86 per Brennan J; [1995] HCA 69.

31 Bill Ho gave evidence at the trial. Reference has already been made to some of that evidence. He said that he had told the other two men that he was "just going to a friend's house to pick up some money quickly". In answer to questions put on behalf of Dang Quang Nguyen, Bill Ho denied that he had told Dang Quang Nguyen that he had a gun and denied that he had shown him the gun before they entered the flat. He denied that Dang Quang Nguyen had had a sword when he went to the flat. He described Dang Quang Nguyen as "quite simple". In evidence-in-chief he gave an account of the men leaving the flat, and of Dang Quang Nguyen hysterically asking him, more than once, "Why did you shoot him?" His reply, so he said, was "it was an accident".

32 Was it open to the jury, on the whole of the evidence, to return verdicts of guilty against the respondent on both counts?

"Unsafe or unsatisfactory"?

33 The task of an appellate court in considering whether a verdict of guilty returned by a jury "should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence"[9] was described by this Court in *M*[10]. As four members of the Court pointed out[11] in *M*, the conclusion that a verdict should be set aside on this basis is often expressed in terms of the verdict being "unsafe or unsatisfactory", "unjust or unsafe" or "dangerous or unsafe". The question for the appellate court is one of fact.

> "[T]he question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."[12]

As the plurality in *M* went on to point out[13]:

---

9 *Crimes Act* 1958 (Vic), s 568.

10 (1994) 181 CLR 487.

11 (1994) 181 CLR 487 at 492 per Mason CJ, Deane, Dawson and Toohey JJ.

12 *M v The Queen* (1994) 181 CLR 487 at 493 (footnote omitted).

13 (1994) 181 CLR 487 at 493.

> "But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations[14]."

The authoritative guidance which this Court provided in *M* about the task of a court of criminal appeal was expressed[15] in the following terms:

> "It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence[16]. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty[17]."

34 There was ample evidence from which the jury could conclude that Bill Ho was guilty of the attempted murder of Chau Minh Nguyen and the murder of Hieu Trung Luu. Was there evidence from which a jury could conclude, beyond reasonable doubt, that Dang Quang Nguyen was complicit in the attempted murder and the murder which Bill Ho committed?

---

14 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 621; [1984] HCA 7.

15 (1994) 181 CLR 487 at 494-495.

16 *Chamberlain [No 2]* (1984) 153 CLR 521 at 618-619; *Chidiac v The Queen* (1991) 171 CLR 432 at 443-444; [1991] HCA 4.

17 *Chidiac* (1991) 171 CLR 432 at 443, 451, 458, 461-462.

35 The conclusion of the Court of Appeal, that there was not, proceeded[18] from two premises: first, that there was no evidence that Dang Quang Nguyen knew that either or both of Bill Ho or Dang Khoa Nguyen was involved in trafficking heroin or knew of the existence of a drug debt, and second, that there was no evidence that Dang Quang Nguyen knew that Bill Ho went to the flat with a gun, and insufficient evidence to conclude beyond reasonable doubt that Dang Quang Nguyen went to the flat armed with a sword.

36 In this Court, the prosecution submitted that the Court of Appeal did not undertake the task required of it. In large part this submission appeared to rest upon the proposition that the Court of Appeal did not, or at least did not sufficiently, consider what inferences the jury could draw from the evidence that was led. Instead, so the argument proceeded, the Court of Appeal confined its consideration to whether there was any "evidence" [scil. direct evidence] of certain matters (particularly the two matters identified as the premises from which the reasoning of Neave JA proceeded). It is not necessary to consider whether this submission of the prosecution is well founded. For present purposes, it is sufficient to observe that the evidence that was led at trial permitted the jury to be satisfied of the matters identified earlier in these reasons, namely: that all three men had come to the flat searching for Mau Duong for payment of a debt, and that, before or after arriving at the flat, Dang Quang Nguyen armed himself with a sword with which he sought to enforce the demands for information that the men were making.

37 Once it is shown that the jury could conclude that Dang Quang Nguyen was party to an arrangement to collect a debt using violent means if necessary, the question becomes: what level of violence did Dang Quang Nguyen agree would be used, what level of violence did he foresee might be used, what level of violence did he encourage Bill Ho to use? It matters not whether he knew that the debt was for sale of drugs or on some other account. If, as was open to the jury, it was found beyond reasonable doubt that Dang Quang Nguyen saw Bill Ho using a gun in a threatening manner, an appreciable time before the first shot was fired, it was also open to the jury to conclude that, in the light of what Dang Quang Nguyen had already done in the room and his not dissociating himself from the use of the gun, he agreed in the use of deadly force, contemplated that it might be used, or encouraged its use.

---

18 [2010] VSCA 23 at [104].

38 Whether or not Dang Quang Nguyen was (or appeared to be) drunk, whether or not he appeared to be behaving foolishly, he had threatened those in the flat with the sword and had cut two if not three of them before a shot was fired. The jury could conclude that he saw that Bill Ho had a gun, and that Bill Ho was attempting to intimidate the occupants of the flat by spinning the cylinder. It was open to the jury to conclude that Dang Quang Nguyen was complicit in the attempted murder of Chau Minh Nguyen and the murder of Hieu Trung Luu.

39 It was not shown that the verdicts returned by the jury against Dang Quang Nguyen were unreasonable or cannot be supported having regard to the evidence. The Court of Appeal was wrong to conclude to the contrary.

40 Was there, as the respondent submitted, misdirection of the jury?

Misdirection?

41 The trial judge gave the jury both oral and written directions about each of the three different ways in which the prosecution sought to prove its case against Dang Khoa Nguyen and Dang Quang Nguyen, the two men who the prosecution alleged were complicit in crimes committed by Bill Ho. The written directions given to the jury dealt with all three bases of liability without distinguishing between their application in relation to the count of attempted murder and the count of murder. Thus each relevant part of the written directions was introduced by the rubric:

> "In order to prove that Khoa Nguyen or Quang Nguyen is guilty of any crime committed by Bill Ho on the basis of [acting in concert, common purpose or aiding and abetting] the prosecution must prove beyond reasonable doubt that ...".

The matters which it was said that the prosecution was obliged to prove to the requisite standard were described in terms adapted to the particular bases of liability in question.

42 In the case of acting in concert, it was said that the jury had to be satisfied (among other things) that:

> "there was an understanding or arrangement amounting to an agreement between Khoa Nguyen or Quang Nguyen as the case may be – or both of them – and Bill Ho – that *they would kill intentionally if necessary to recover a drug debt*". (emphasis added)

In the case of common purpose, it was said that the jury must be satisfied (among other things) that:

> "(2) there was an understanding or arrangement amounting to an agreement between Khoa Nguyen or Quang Nguyen as the case may be – or both of them – and Bill Ho – that they would use violence to recover a drug debt;
>
> (3) Khoa Nguyen or Quang Nguyen *contemplated or foresaw the possibility that an intentional killing might occur* as a necessary part of carrying out that agreement;
>
> (4) Khoa Nguyen or Quang Nguyen was present at the scene of the crime in accordance with the agreement either helping or being ready to help if called upon – even though he contemplated or foresaw the possibility that an intentional killing might occur as a necessary part of carrying out that agreement". (emphasis added)

By contrast, in the case of aiding and abetting, nothing was said about intention to kill. Rather, the instruction given about aiding and abetting identified the matters to be proved as being that:

> "(1) the crime in question was committed by Bill Ho;
>
> (2) Khoa Nguyen or Quang Nguyen was *present* when Bill Ho committed that crime (being 'in the vicinity of the crime so as to be able to help or encourage its commission if he was inclined to do so') and
>
> (3) Khoa Nguyen or Quang Nguyen intentionally:
>
> (a) *encouraged* Bill Ho to commit that crime (might be by words or presence and behaviour provided he intended to encourage Bill Ho to commit that crime and did encourage him); *or*
>
> (b) *communicated* to Bill Ho that he *assented* and concurred in the commission of that crime (might be communicated by words or presence and behaviour – provided he intended to convey his assent and concurrence that way)
>
> and

(c) Khoa Nguyen or Quang Nguyen knew that Bill Ho was doing the acts which constituted that particular crime – with the necessary intention for that particular crime." (emphasis added)

43 The respondent submitted that the trial judge's directions about complicity did not sufficiently leave manslaughter as an alternative verdict available to the jury against the respondent in respect of the death of Hieu Trung Luu. During her charge to the jury, the trial judge began to give the jury some oral directions about the availability of manslaughter by concert, or manslaughter by extended common purpose. But the trial judge then withdrew those instructions, and gave the jury the written directions to which reference has been made. The effect of those instructions was to leave manslaughter to the jury as a possible verdict against Dang Quang Nguyen *only* if Bill Ho was guilty of that crime. If Bill Ho was found guilty of murder, no case of manslaughter was left for consideration by the jury in respect of Dang Quang Nguyen. Trial counsel took no exception to the instructions.

44 According to the instructions given to the jury, there could be no different verdict of guilt against the accused with respect to the count of murder. That is, if Bill Ho was guilty of murder, the respondent, Dang Quang Nguyen, and the other co-accused, Dang Khoa Nguyen, were in each case either guilty of murder, or not guilty of any crime, with respect to the death of Hieu Trung Luu.

45 The respondent submitted that the trial judge's instructions precluded the jury from considering what were described as "viable and entirely apt alternative verdicts" on the charge of murder. Counsel for the respondent offered three examples of findings of fact which were open, and if made, would have led to a verdict of manslaughter: one in respect of each of extended common purpose, concert and aiding and abetting. As to extended common purpose, it was said that if the jury were satisfied that the respondent knew of the presence of the gun before the shootings occurred, and was party to a plan that violence would be threatened to recover a drug debt, it was possible that the purpose was to do no more than cause serious harm to another short of really serious injury. As to concert, it was said that it may have been that the arrangement was for Bill Ho to do no more than assault or threaten others in a dangerous fashion. As to aiding and abetting, it was said that the respondent's words and actions may have encouraged or assisted Bill Ho to assault or threaten others but not to kill or do really serious injury.

46 Contrary to the prosecution's submission in this Court, each of these conclusions was available to the jury. Again, the conclusions were not the only

findings the jury could make, but they were open. That the prosecution had put its case on the footing that deadly force was always contemplated did not preclude the jury from finding the facts in a way that was consistent with any of the three ways put forward by the respondent in argument in this Court.

47 It is to be observed that the three instances given on behalf of the respondent all focused upon what the respondent knew or intended or contemplated would be done to recover a drug debt. These submissions serve to emphasise a point of particular importance to the way in which the instructions to the jury in this case might have been formulated. As in *Clayton v The Queen*[19], the principal issues in the case against the respondent were factual issues:

(a) What did the respondent agree was to happen in the flat?

(b) What did he foresee was possible?

(c) What did he do in the flat, if anything, to aid and abet Bill Ho in shooting either victim?

Had the jury's attention been directed to those three questions and the necessary directions of law framed by reference to the available answers, the directions would very likely have been far less complicated than they were.

48 The prosecution submitted in this Court that the instructions that were given to the jury about complicity were adequate because, on the charge of attempted murder, any secondary liability of Dang Quang Nguyen depended upon Bill Ho being found to have intended to kill, and no lesser agreement or contemplation would suffice to make Dang Quang Nguyen complicit in that crime. That is, to be guilty of attempted murder, the respondent must have been party to an agreement to kill, or have foreseen that there would be an assault with intention to kill, or have assisted or encouraged an assault committed with that intention. The prosecution further submitted that, because the charge of murder arose out of an event that occurred very soon after the shooting said to be an attempted murder, it was not reasonably open to the jury to conclude that when the second shooting occurred there was some different, lesser, agreement or contemplation on the part of Dang Quang Nguyen. Hence, the prosecution argument continued, the real issue in the case against Dang Quang Nguyen, so far as concerned his complicity in the second crime that was committed, was

---

19 (2006) 81 ALJR 439 at 444 [25]; 231 ALR 500 at 506; [2006] HCA 58.

whether he was party to an agreement to kill or do really serious injury, or foresaw that there would be an assault with murderous intent, or assisted or encouraged an assault with that intent. And this, so it was submitted, was the only way in which the prosecution had put its case at trial.

49 The respondent's argument that the directions given to the jury about the complicity of Dang Quang Nguyen were insufficient should be accepted. It is right to observe that Dang Quang Nguyen could not be found guilty of attempted murder unless he was party to an agreement to kill, or foresaw that there would be an assault with murderous intent, or assisted or encouraged an assault with that intent. The prosecution's argument, that there was no viable case of manslaughter to be considered in relation to the count of murder, depended upon the jury deciding that Dang Quang Nguyen was guilty of attempted murder. That argument assumed that the jury would consider the two charges in the order in which the events were alleged to have occurred, not in the order in which they were stated on the presentment. But the jury were not directed to consider the charge of attempted murder first, and only then turn to the charge of murder. The order in which the jury considered the charges was rightly left for the jury to decide. The written instructions that were given did not require the charges to be considered in any particular order, and treated the two counts as governed by the same principles. If Dang Quang Nguyen was party to an agreement, or had a contemplation, or provided assistance directed to some lesser assault than one intended to kill, it would have been open to the jury to conclude that, although he was not guilty of the charge of attempted murder, a verdict of manslaughter should be returned in respect of the count charging him with murder. The trial judge's directions did not admit of that possibility.

50 This Court's decisions in *Gilbert v The Queen*[20] and in *Gillard v The Queen*[21] require the conclusion that, in giving the directions the trial judge did about complicity, her Honour made a wrong decision on a question of law. It was wrong not to leave manslaughter as an available verdict against Dang Quang Nguyen, even if Bill Ho was guilty of murder. The decisions in *Gilbert* and *Gillard* also require the further conclusion that it cannot be said that there was no substantial miscarriage of justice in the case of Dang Quang Nguyen in not leaving manslaughter as an available verdict.

---

20 (2000) 201 CLR 414 at 416-417 [1]-[2] per Gleeson CJ and Gummow J, 434 [70] per Callinan J; [2000] HCA 15.

21 (2003) 219 CLR 1 at 14 [26] per Gleeson CJ and Callinan J, 15 [32] per Gummow J, 34-35 [106], 40 [129] per Hayne J; [2003] HCA 64.

51 Whether some different conclusion could or should be reached about substantial miscarriage of justice in the case of Dang Khoa Nguyen is a question that was not addressed in argument and about which we express no opinion. Nor is there any occasion to consider the utility of a distinction of the kind identified by the House of Lords in *R v Rahman*[22]. There a distinction was drawn between cases where a weapon of which the alleged secondary party does not know is suddenly produced and used by the principal, and which is more lethal than any weapon which the secondary party contemplated may be carried, and other cases where there was no sudden production of an unknown and more lethal weapon. It is sufficient to say that the principles identified in *Gillard* and *Clayton* do not draw such a distinction.

What orders should be made?

52 The respondent submitted that proceedings against him have been so protracted that, even if the verdicts returned by the jury were not unsafe or unsatisfactory, the conclusion that the trial judge misdirected the jury should lead either to the refusal of the prosecution's application for special leave to appeal or, if that application were to be granted, to the dismissal of the appeal against the orders actually made by the Court of Appeal.

53 The respondent is right to submit that proceedings against him have been unduly protracted. That his first trial did not proceed to verdict may or may not be a matter about which he can complain. That his subsequent trials did not begin until nearly a year later is a cause for concern. The liberty of the accused was at stake. The memory of witnesses was inevitably changing and fading. Why there should be such a long delay was not explained.

54 It is equally unsatisfactory that his application for leave to appeal to the Court of Appeal did not come on for hearing until 18 months after his conviction. That delay is far too long.

55 Once the application for leave to appeal did come on for hearing, it was important that the application be disposed of promptly. It was not. The record of the trial was not voluminous. The transcript of evidence was less than 600 pages and the facts described in the evidence were not complex. The principles to be applied in determining the appeal were well established. There was no division

---

22 [2009] 1 AC 129 at 165 [68] per Lord Brown of Eaton-under-Heywood.

of opinion in the Court of Appeal about the disposition of the case or the reasons given for that disposition. If, as the Court of Appeal concluded, the respondent had been wrongly convicted, orders quashing his conviction, thus securing his freedom from custody, together with reasons for that conclusion, should have been made and published much sooner than they were. Whatever the outcome of the application, the period for the Court's consideration of the matter should have been measured in days or weeks, not months.

56 Despite the undue protraction of this matter, this Court should not refuse special leave to appeal to correct the departure from principle. This Court should not make an order affirming the entry of a verdict of acquittal when the jury at the respondent's trial returned verdicts of guilty that were open on the evidence. The misdirection of the jury identified in this Court required that the respondent's application for leave to appeal to the Court of Appeal be granted, the appeal allowed, his conviction quashed, and an order made that a new trial be had.

57 This Court should grant each party special leave to appeal or cross-appeal as the case requires, treat the appeal and cross-appeal as instituted and heard instanter, allow the appeal and the cross-appeal, and make those orders which the Court of Appeal should have made. Whether, in all of the circumstances of the case, the Director of Public Prosecutions should prosecute the respondent further is a matter for his decision.