HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

DIMITRIOS LIKIARDOPOULOS APPELLANT

AND

THE QUEEN RESPONDENT

Likiardopoulos v The Queen
[2012] HCA 37
14 September 2012
M24/2012

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

M J Croucher SC with L C Carter on behalf of the appellant (instructed by Lewenberg & Lewenberg)

G J C Silbert SC with B L Sonnet for the respondent (instructed by Solicitor for Public Prosecutions (Vic))

CATCHWORDS

Likiardopoulos v The Queen

Criminal law – Murder – Accessorial liability – Appellant convicted of murder – Crown accepted guilty pleas from five other participants to lesser offences – Trial judge left to jury Crown case based on accessorial liability – Whether appellant could be convicted as accessory to murder when Crown had accepted pleas from all other participants to lesser charges – Whether trial judge should have left accessorial case to jury – Whether Crown could lead evidence that other participants murdered the deceased – Whether inconsistency between convictions of other participants and accused – Whether exercise of prosecutorial discretion an abuse of process.

Words and phrases – "abuse of process", "accessory", "aiding and abetting", "counselling or procuring", "principal", "prosecutorial discretion".

Crimes Act 1958 (Vic), s 323.

1 FRENCH CJ. I agree with the order proposed in the joint judgment and, subject to one reservation, with the reasons which their Honours give for that order. That reservation relates to an observation in the joint judgment concerning the reviewability of prosecutorial discretions.

2 The general unavailability of judicial review in respect of the exercise of prosecutorial discretions rests upon a number of important considerations. One of those considerations, adverted to in the joint judgment, is the importance of maintaining the reality and perception of the impartiality of the judicial process[1]. A related consideration is the importance of maintaining the separation of the executive power in relation to prosecutorial decisions and the judicial power to hear and determine criminal proceedings[2]. A further consideration is the width of prosecutorial discretions generally and, related to that width, the variety of factors which may legitimately inform the exercise of those discretions. Those factors include policy and public interest considerations which are not susceptible to judicial review, as it is neither within the constitutional function nor the practical competence of the courts to assess their merits. Moreover, as their Honours point out, trial judges have available to them sanctions to enforce well-established standards of prosecutorial fairness and to prevent abuses of process.

3 The above considerations, reflected in a number of decisions of this Court referred to in the joint judgment of Gaudron and Gummow JJ in *Maxwell*, support the proposition that in a practical sense prosecutorial decisions are for the most part insusceptible of judicial review. But as Gaudron and Gummow JJ also pointed out, the approach of earlier authorities which treated such decisions as unreviewable because they were seen as part of the prerogative of the Crown "may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all States and Territories and in the Commonwealth."[3] Further as their Honours observed "it may pay insufficient regard to the fact that some discretions are conferred by statute"[4].

4 The statutory character of prosecutorial decision-making in Australia today does not lessen the significance of the impediments to judicial review of such decisions, which are created by the constitutional and practical

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1 *Maxwell v The Queen* (1996) 184 CLR 501 at 534 per Gaudron and Gummow JJ; [1996] HCA 46.

2 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 39 per Brennan J; [1989] HCA 46.

3 (1996) 184 CLR 501 at 534 per Gaudron and Gummow JJ.

4 (1996) 184 CLR 501 at 534 per Gaudron and Gummow JJ.

considerations referred to above. However the existence of the jurisdiction conferred upon this Court by s 75(v) of the Constitution in relation to jurisdictional error by Commonwealth officers and the constitutionally-protected supervisory role of the Supreme Courts of the States[5] raise the question whether there is any statutory power or discretion of which it can be said that, as a matter of principle, it is insusceptible of judicial review. That question was not argued in this case and does not need to be answered in order to decide this case. It involves a question arising under the Constitution. I would not wish my agreement with the reasons given in the joint judgment to be taken as acceptance of a proposition that the exercise of a statutory power or discretion by a prosecutor is immune from judicial review for jurisdictional error, however limited the scope of such review may be in practice.

5 Subject to the above reservation, I agree with the reasons of their Honours and the order they propose.

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5 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1.

6 GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. In early March 2007, a number of people were involved in the sustained, brutal beating of a young, intellectually handicapped man named Christopher O'Brien. Mr O'Brien died of the injuries suffered in the course of the beating. Seven people, including the appellant, were charged with his murder. The charge was withdrawn against one person and the prosecution accepted pleas of guilty to lesser offences from five of the others. The appellant was the only person to be committed to the Supreme Court of Victoria on the charge of murder.

7 On 13 February 2009, the appellant was arraigned in the Supreme Court (Curtain J) on a presentment charging him as a principal with the murder of the deceased. Evidence was given at the trial that the appellant had assaulted the deceased and encouraged others to assault him. It was the Crown case that the appellant was a party to a joint criminal enterprise to inflict really serious injury on the deceased and that, pursuant to the enterprise, one or more of the parties to it had done the act or acts causing death ("the principal case"). An alternative case, that the appellant was guilty of murder because he had directed and encouraged the principal offenders to murder the deceased, was also left for the jury's consideration ("the accessorial case"). The jury returned a verdict of guilty of murder.

8 The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Victoria (Buchanan, Ashley and Tate JJA). He contended that the trial judge erred in her directions concerning joint criminal enterprise and in leaving the principal case when it was not established that he had been present when the act or acts causing death were carried out. He also contended that the trial judge erred in her directions concerning the accessorial case and in leaving that case in circumstances in which the Crown had accepted pleas of guilty to lesser offences from those whom it alleged had been the principal offenders[6]. Each of these grounds was rejected and the appeal was dismissed.

9 On 9 March 2012, the appellant was granted special leave to appeal from the order of the Court of Appeal on the sole ground that it was an error to leave the accessorial case. For the reasons to be given, there was no obstacle in law to the appellant's conviction for murder on the accessorial case. Nor was it an abuse of the process of the court for the Crown to prosecute the appellant as an accessory to murder when it had accepted pleas of guilty to lesser offences from

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6 *Likiardopoulos v The Queen* [2010] VSCA 344 at [39].

those whom it alleged had been the principal offenders. It follows that the appeal must be dismissed.

10 Some account should be given of the evidence at the trial. What follows is a summary of that evidence, largely taken from the judgment of the Court of Appeal.

11 The appellant was aged 47 years at the date of the killing. His 19 year old son, John, was living with him in a house in Noble Park, Melbourne. A man named Hakan Aydin was living in a bungalow at the rear of the premises. Aydin was aged 26 years. The appellant's younger son, Constantine, aged 17 years, was present at the Noble Park home at least during some of the material events. So was his girlfriend, Antoinette. Drugs were readily available at the appellant's home and it was common for people to visit the home to purchase drugs. Among the regular visitors were two men, Shalendra Singh and Darren Summers. Summers was living in a house nearby.

12 The deceased was 22 years old. He had an intellectual age of around 14 years. He had been living in a special care residence in Noble Park. In October 2006, he moved into Summers' house. Several months after moving into the house, Summers accused the deceased of taking a bracelet belonging to his girlfriend. After this confrontation, the bracelet reappeared. Summers told the Likiardopoulos family about the incident. At around this time, one of the appellant's associates complained that his mobile phone had been lost or stolen at the appellant's home. Suspicion initially fell on Singh. Singh was detained at the appellant's home and assaulted by members of the household. He was ultimately successful in persuading them of his innocence. As a recompense for the assault, and to secure his silence, Singh was invited to move into the household. He accepted this offer.

13 Suspicion concerning the missing mobile phone next fell on the deceased, who was summoned to the appellant's home under some pretext. Once inside the home, the deceased was repeatedly assaulted over a period of about two days. The assaults were carried out by persons including the appellant, John Likiardopoulos, Aydin and Singh. They included punches to the head and face, kicks to the body, blows inflicted with ashtrays, sticks and a hammer, and forced drinking of detergent. The appellant's participation in the assaults included that he administered two "king hits" to the deceased which dislodged two of his teeth and that he joined others in punching and kicking him. Towards the end of his ordeal, the deceased lost control of his bowels. The appellant directed others to take him to the bathroom and clean him up. The deceased was unable to walk

unassisted on his return. He was put on a chair from which he fell to the floor, where he lay convulsing until he died.

14 The appellant gave directions for the disposal of the body and the removal of incriminating evidence. The body was dumped in the Dandenong Creek at Bangholme. Skeletal remains were later recovered. These revealed fractures of the vertebrae, shoulders, ribs and nose. Two of the teeth had been knocked out. It was open to conclude that death had been occasioned by the various assaults, although no particular act or acts could be identified as causal.

15 The appellant admitted his involvement in assaulting the deceased to civilian witnesses.

16 The appellant did not give or call evidence at the trial.

17 The pattern over the course of the deceased's ordeal was for his attackers to take breaks from time to time, during which they consumed "ice" and other drugs and rested before returning to the attack. It was not established that any one person had been present throughout the whole of the violence inflicted on the deceased. The prosecution did not contend that the appellant had been present throughout. On one version of the events, the appellant was not at home when the deceased arrived and the violence commenced.

18 It appears that the police received some information about the incident a little over five months later. They interviewed the appellant and his son, John. Three days later, on 14 August 2007, Aydin was interviewed. He admitted his involvement in assaulting the deceased and led the police to the place where the body had been deposited. Following the recovery of the remains, the appellant, his two sons, Antoinette, Aydin, Singh and Summers were charged with the murder of the deceased. The charge against Antoinette was later withdrawn. Aydin and Singh gave evidence for the Crown at the appellant's trial.

19 On the principal case, the appellant was liable for the murder of the deceased under the principle of criminal responsibility variously described as joint criminal enterprise, common purpose or concert[7]. On this analysis, it was necessary to prove that the appellant was a party to an understanding or arrangement, whether formed expressly or tacitly, with John Likiardopoulos,

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7 *McAuliffe v The Queen* (1995) 183 CLR 108 at 113 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ; [1995] HCA 37; *Gillard v The Queen* (2003) 219 CLR 1 at 35 [109] per Hayne J; [2003] HCA 64.

Aydin and Singh, to inflict really serious injury on the deceased and that, while that arrangement was on foot, one or more of the parties to it did the acts which caused death intending thereby to do really serious injury to him[8]. The appellant's participation in the enterprise while possessed of the requisite intention (here, to inflict really serious injury) operates to fix him with liability for the acts of the other parties carried out in pursuance of it. On the principal case, the appellant's liability is direct and, as his argument acknowledged, his amenability to prosecution for murder is unaffected by the Director of Public Prosecutions' ("the Director") acceptance of pleas to lesser offences from all of the other parties to the joint criminal enterprise.

20 The accessorial case depended upon the same evidence as that relied upon to establish the principal case. This was the evidence of what the appellant said and did at the scene. In particular, the accessorial case relied on evidence that the appellant directed and encouraged others to assault the deceased. On the accessorial case, the appellant's guilt of murder would be established by proof that one or more persons assaulted the deceased intending to do him really serious injury, and that with knowledge of those facts, the appellant intentionally assisted or encouraged that person or those persons in the commission of the fatal assaults[9].

21 This Court was informed that the accessorial case had been advanced out of the concern that the principal case might founder on the inability to establish that the appellant had been present throughout the whole of the infliction of violence on the deceased. Counsel for the Crown submitted that this concern stemmed from a mistaken belief as to the essentiality of presence, arising out of Smith J's charge to the jury in *R v Lowery and King (No 2)*[10]. Be that as it may, the trial judge entertained no such misapprehension. Her Honour directed the jury that it was not necessary to prove that the appellant had been present throughout the whole of the time during which the assaults took place in order to

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8 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ; *Gillard v The Queen* (2003) 219 CLR 1 at 8 [10] per Gleeson CJ and Callinan J, 15 [31] per Gummow J, 35-36 [110] per Hayne J.

9 *Giorgianni v The Queen* (1985) 156 CLR 473 at 487-488 per Gibbs CJ, at 500 per Wilson, Deane and Dawson JJ; [1985] HCA 29.

10 [1972] VR 560 at 561.

establish his guilt as a party to the joint criminal enterprise. The Court of Appeal correctly rejected the appellant's challenge to that direction.

22 An appreciation of the nature of the challenge in this Court is assisted by reference to basic common law distinctions between categories of participation, namely, those of principals, accessories *before* the fact, accessories *at* the fact, and accessories *after* the fact. In *Osland v The Queen*[11], Callinan J explained:

> "The distinguishing feature of accessories *at* the fact was their presence at the commission of the crime. Accessories *at* the fact were described as 'aiding and abetting' the commission of the crime. Accessories *before* the fact were referred to as having 'counselled or procured' the crime. Different penalties were typically imposed for the various classifications of participation."

23 In the present case, the trial judge used the language of counselling and procuring in directing the jury respecting accessorial liability. However, as noted above, these are the words used to describe the accessory before the fact who encourages or instigates the offence but who is not present at its commission (the principal in the third degree). The accessory who is present at the scene assisting or encouraging its commission (the principal in the second degree) is said to aid and abet the principal offender[12]. Her Honour directed that it was the Crown case that the appellant "directed, encouraged and exhorted others present to inflict really serious injury to [the deceased]" and that he knew the essential circumstances of the offence (that they were going to administer a severe beating to the deceased with the requisite intention) "because he was present at the time when that was being done".

24 The appellant submitted that in law he could not be an accessory to murder in circumstances in which the Crown had accepted pleas of guilty to lesser offences from each of the persons said to be principal offenders, because the liability of an accessory is derivative. The appellant's submissions proceeded on the footing that the accessorial case against him was as an accessory before the fact. The submission fastened on the use of the words "counsel and procure" and not on the factual case that was left, which was that the appellant's accessorial liability arose from his conduct at the scene directing and

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11 (1998) 197 CLR 316 at 400 [206]; [1998] HCA 75.

12 *Giorgianni v The Queen* (1985) 156 CLR 473 at 480 per Gibbs CJ, 493 per Mason J.

encouraging the principal offenders to assault or to renew their assaults on the deceased[13]. However, as will be explained, nothing turns on this circumstance for the resolution of issues raised by the appeal. In short, the evidence at trial was capable of proving that each of those whom the appellant was said to have directed and encouraged were liable as principals for the murder of the deceased.

25 This renders otiose the reliance by the appellant on what in *Osland*[14] McHugh J said were the common law principles of accessorial liability, but without the occasion to advert to changes in the common law itself and to statutory interventions beginning in England in the first half of the 19th century. The passage in question, omitting footnotes, reads:

> "Those who aided the commission of a crime but were not present at the scene of the crime were regarded as accessories before the fact or principals in the third degree. Their liability was purely derivative and was dependent upon the guilt of the person who had been aided and abetted in committing the crime. Those who were merely present, encouraging but not participating physically, or whose acts were not a substantial cause of death, were regarded as principals in the second degree. They could only be convicted of the crime of which the principal offender was found guilty. If that person was not guilty, the principal in the second degree could not be guilty. Their liability was, accordingly, also derivative."

26 At common law, the derivative nature of the liability of the accessory required the attainder of the principal offender before the accessory was amenable to justice[15]. The inconvenience of the rule led to its abandonment in the case of accessories at the fact (aiders and abettors), who came to be treated as principals[16]. It remained that the accessory before the fact could not be

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13 See generally J C Smith, "Aid, Abet, Counsel, or Procure", in Glazebrook (ed), *Reshaping the Criminal Law*, (1978) 120.

14 (1998) 197 CLR 316 at 341-342 [71].

15 K J M Smith, *A Modern Treatise on the Law of Criminal Complicity*, (1991) at 110, citing Thorne (trans), *Bracton on the Laws and Customs of England*, (1968), vol 2. See also Smith at 22 fn 17. See further Stephen, *A History of the Criminal Law of England*, (1883), vol 2 at 232.

16 Hale, *The History of the Pleas of the Crown*, (1736), vol 1 at 623-626; Hawkins, *A Treatise of the Pleas of the Crown*, 8th ed (1824), vol 2 at 438-439; K J M Smith, *A*

(Footnote continues on next page)

prosecuted before the conviction of the principal offender. Statutory reforms in the 19th century in England removed this procedural bar[17]. These provisions were re-enacted in the *Accessories and Abettors Act* 1861 (UK) (24 & 25 Vic c 94) and were copied in Victoria[18]. The English provisions were held to allow the conviction of the accessory before the fact, despite the acquittal of the principal offender[19]. In Victoria[20], the current provision governing the trial of accessories before the fact and present at the fact is s 323 of the *Crimes Act* 1958 (Vic), which provided at the relevant time:

Modern Treatise on the Law of Criminal Complicity, (1991) at 111. The principal in the second degree was amenable to conviction for an offence of greater seriousness than the principal in the first degree: *R v Richards* [1974] QB 776; J C Smith, "Aid, Abet, Counsel, or Procure", in Glazebrook (ed), *Reshaping the Criminal Law*, (1978) 120 at 121.

17 The *Criminal Law Act* 1826 (UK) (7 Geo 4 c 64), s 9 provided that every accessory before the fact "shall be deemed guilty of Felony, and may be indicted and convicted, either as an Accessory before the Fact to the principal Felony, together with the principal Felon, or after the Conviction of the principal Felon, or may be indicted and convicted of a substantive Felony, whether the principal Felon shall or shall not have been previously convicted, or shall or shall not be amenable to Justice". However, in *R v Russell* (1832) 1 Mood 356 [168 ER 1302], it was held that the provision did not operate to make the accessory before the fact amenable to justice in circumstances in which the principal offender could never be tried for the offence. The *Criminal Procedure Act* 1848 (UK) (11 & 12 Vic c 46) was then enacted. It provided in s 1 that "if any Person shall become an Accessory before the Fact to any Felony, whether the same be a Felony at Common Law or by virtue of any Statute or Statutes made or to be made, such Person may be indicted, tried, convicted, and punished in all respects as if he were a principal Felon."

18 *Criminal Law and Practice Statute* 1864 (Vic), ss 274, 275.

19 *R v Hughes* (1860) Bell 242 [169 ER 1245].

20 Equivalent provisions are in force in each State and Territory: *Crimes Act* 1900 (NSW), ss 345-346; *Criminal Code* (Q), ss 7-9; *Criminal Law Consolidation Act* 1935 (SA), s 267; *Criminal Code* (Tas), ss 3-5; *The Criminal Code* (WA), ss 7-9; *Criminal Code* (ACT), s 45; *Criminal Code* (NT), ss 8-10, 12.

> "A person who aids, abets, counsels or procures the commission of an indictable offence may be tried, indicted or presented and punished as a principal offender."

27 In *Osland*, a case of claimed inconsistency of verdicts, Gaudron and Gummow JJ said that as a result of s 323 it would rarely be necessary to decide whether a person present at the scene of the crime is guilty as principal or accessory[21]. It is unnecessary to pursue the matter further here. Nor does resolution of the appeal require consideration of the Crown's Notice of Contention, which invited the Court to "sweep away all the outdated distinctions between principals and accessories"[22]. This is because, accepting that liability on the accessorial case was purely derivative, the evidence in the appellant's trial was capable of proving that those whom the appellant was said to have directed and encouraged to commit the offence had murdered the deceased.

28 The appellant developed his argument by submitting that, for "juristic purposes", there was no murder to which he could be an accessory in circumstances in which those alleged to be principals had been convicted of offences less than murder. The submission was said to be supported by the decision of the Privy Council in *Surujpaul v The Queen*[23] and statements respecting the rationale for it made by Callinan J in *Osland*[24].

29 Surujpaul was jointly tried with four other men on an indictment charging each with murder. At the close of the Crown case, one accused was acquitted by direction. There was uncertainty as to which, if any, of the remaining accused had been present at the scene and which, if any, had been accessories before the

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21 (1998) 197 CLR 316 at 329 [26].

22 The principle for which the respondent contended was stated as follows: "[A] person is criminally responsible for the acts of another when that person can be shown to have either acted as part of a common enterprise (or in concert) [principals in the first degree], or aided and abetted such person [principals in the second degree] or counselled and procured such person [principals in the third degree]; as to what actual crime the person has committed that will be determined by his or her own *mens rea* and not that of any other actor in the commission of the *actus reus*."

23 [1958] 1 WLR 1050; [1958] 3 All ER 300.

24 (1998) 197 CLR 316 at 406 [233].

fact to the murder. The jury were directed in returning their verdicts to state in each case whether the accused was guilty or not guilty of being an accessory before the fact to murder, and guilty or not guilty of murder as principal. Surujpaul was found guilty as an accessory before the fact and not guilty as a principal while each of the remaining accused were acquitted outright. The conviction was set aside on appeal.

30 It was the acquittal of all of the accused of murder as principals which led Callinan J to observe that Surujpaul's conviction as an accessory was "offensive to the law as to logic" and, in the context of a joint trial, to say that "there was, for juristic purposes no murder in respect of which any one of the accused could have been an accessory"[25]. Like *Osland*, *Surujpaul* was concerned with inconsistent verdicts returned by a jury at the joint trial of persons charged with the commission of a single offence. No question of inconsistency of verdicts arises in this appeal. And, as earlier noted, at the appellant's trial, the Crown adduced evidence that was capable of establishing that one or more of those whom the appellant directed or encouraged had murdered the deceased[26].

31 The appellant's challenge to the accessorial case was put alternatively as one of abuse of process. Central to this contention was the Director's election to accept pleas of guilty to lesser offences from the principal offenders, while prosecuting the appellant as an accessory to murder. The persons whom the appellant is alleged to have counselled, procured, aided or abetted to murder the deceased are John Likiardopoulos, Aydin, Singh and, possibly, Con Likiardopoulos.

32 The Director is charged with the institution, preparation and conduct on behalf of the Crown of proceedings in the Supreme Court of Victoria in respect of any indictable offence[27]. If he considers it desirable to do so, he may institute, prepare and conduct any committal proceedings under the *Magistrates Court Act* 1989 (Vic)[28]. Aydin and John Likiardopoulos each offered to plead guilty to

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25 *Osland v The Queen* (1998) 197 CLR 316 at 406 [233] per Callinan J.

26 See *Remillard v The King* (1921) 59 DLR 340 at 342 per Anglin J, 344 per Brodeur J, 349-350 per Mignault J; *R v Williams* (1932) 32 SR (NSW) 504 at 507-508. See also K J M Smith, *A Modern Treatise on the Law of Criminal Complicity*, (1991) at 114.

27 *Public Prosecutions Act* 1994 (Vic), s 22(1)(a).

28 *Public Prosecutions Act* 1994 (Vic), s 22(1)(b).

manslaughter in the Magistrates Court. Each was committed for sentence for the manslaughter of the deceased. On 30 September 2008, they were sentenced by Lasry J for that offence[29]. Singh offered to plead guilty to an offence under s 325(1) of the *Crimes Act* 1958 (Vic), which is similar to the offence of being an accessory after the fact. He was committed for sentence to the Supreme Court of Victoria as an accessory to the manslaughter of the deceased. On 5 August 2008, he was sentenced by Lasry J for this offence. Con Likiardopoulos also offered to plead guilty to being an accessory to the manslaughter of the deceased contrary to s 325(1) and was committed for sentence on that charge[30].

33 The appellant submitted that to prosecute him as an accessory to the murder of the deceased when the Crown had accepted pleas to offences less than murder from the alleged principal offenders had a tendency to bring the administration of justice into disrepute. It had that tendency because "there is now, on the record, an acceptance by the court, at the instance of the Crown, that these people are not murderers". Allied to this was the submission that "the Crown cannot be heard to say to a jury that these persons are guilty of murder in circumstances where they have accepted that they are not".

34 The claimed incongruity between the record of convictions for lesser offences and the accessorial case was said to have required the trial judge to refuse to leave the latter case to the jury. The submission did not address the source of the power to withdraw a case that was open on the evidence[31]. Nor did it engage with the circumstance that no such application was made to the trial judge. Although no point was taken by the Crown in this respect, one strand of the appellant's argument assumed that conviction and sentence for the s 325(1) offence would permit Singh and Con Likiardopoulos to raise a plea in bar to a presentment charging them with the murder of the deceased. In what follows, the appellant's argument will be addressed by reference to the case that he was an accessory to the murder of the deceased by John Likiardopoulos and Aydin since undoubtedly each could successfully raise a plea in bar to arraignment for the murder of the deceased.

35 The second of the appellant's submissions quoted above is grounded in estoppel. Relevantly, it asserts that the Crown was precluded from leading

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29 *R v Aydin* [2008] VSC 388; *R v Likiardopoulos* [2008] VSC 387.

30 *R v Singh* [2008] VSC 293.

31 See *Hui Chi-ming v The Queen* [1992] 1 AC 34 at 57.

evidence to prove that John Likiardopoulos and Aydin murdered the deceased because each had been convicted of his manslaughter. The submission is misconceived. The conviction and sentence of John Likiardopoulos and Aydin for the manslaughter of the deceased was conclusive in proceedings between each man and the Crown. The Crown could not controvert the conviction for manslaughter by leading evidence in subsequent proceedings against either man to establish that he had murdered the deceased[32]. However, John Likiardopoulos and Aydin were strangers to the proceedings brought against the appellant. Their convictions for manslaughter were not conclusive against the world of the facts on which they were based[33]. The Crown was not precluded from adducing evidence to establish the fact that John Likiardopoulos and Aydin murdered the deceased.

36 The first of the appellant's submissions quoted above is also misconceived. As earlier explained, there is no inconsistency between the convictions of John Likiardopoulos and Aydin for manslaughter (or the convictions of Singh and Con Likiardopoulos as accessories after the fact to manslaughter) and the appellant's conviction for murder on the accessorial case. The evidence given at the appellant's trial differed from the facts admitted by the pleas of guilty entered by the other four accused.

37 The appellant maintained that it was unfair that the Crown should be permitted to advance a case at his trial that the principal offenders were persons from whom it had chosen to accept pleas of guilty to lesser offences. The Director's acceptance of the proffered pleas of guilty involved an exercise of prosecutorial discretion. As Gaudron and Gummow JJ explained in *Maxwell v The Queen*, the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to

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32 *Rogers v The Queen* (1994) 181 CLR 251 at 273 per Deane and Gaudron JJ; [1994] HCA 42; *R v Carroll* (2002) 213 CLR 635 at 647-650 [35]-[45] per Gleeson CJ and Hayne J, 663 [93] per Gaudron and Gummow JJ, 673-676 [130]-[138] per McHugh J; [2002] HCA 55; *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 at 343-344 [43] per Gummow and Hayne JJ, 357-358 [88]-[89] per Kirby J, 360 [95] per Callinan J; [2006] HCA 30. See also *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458 at 479.

33 *Cross on Evidence*, 8th Aust ed (2010) at [5180].

be prosecuted and for what[34]. For this reason, their Honours considered that certain decisions involved in the prosecution process are insusceptible of judicial review. Further, sanctions available to enforce well established standards of prosecutorial fairness are to be found mainly in the powers of a trial judge and are not directly enforceable at the suit of the accused or anyone else by prerogative writ, judicial order or an action for damages[35]. It is well settled that the circumstances which may amount to an abuse of process are not to be narrowly confined[36] and it is possible to envisage cases in which an exercise of prosecutorial discretion may amount to an abuse of the process of the court. However, there is nothing in the conduct of the proceedings arising out of the death of the deceased that has produced unfairness of the kind that would lead a court to intervene to prevent the abuse of its process[37].

38 Prominent among the factors bearing on the exercise of the prosecutorial discretion is likely to be consideration of the evidence available to establish guilt of the more serious offence[38]. The appellant's submission that there was "on the

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34 *Maxwell v The Queen* (1996) 184 CLR 501 at 534; [1996] HCA 46, citing *Barton v The Queen* (1980) 147 CLR 75 at 94-95; [1980] HCA 48; *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 38-39, 54 per Brennan J, 77-78 per Gaudron J; [1989] HCA 46; *Williams v Spautz* (1992) 174 CLR 509 at 548 per Deane J; [1992] HCA 34; *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75 per Gaudron J; [1995] HCA 66.

35 *Whitehorn v The Queen* (1983) 152 CLR 657 at 665 per Deane J; [1983] HCA 42; see also *Cannon v Tahche* (2002) 5 VR 317.

36 *R v Carroll* (2002) 213 CLR 635 at 650-651 [47]; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 265-268 [9]-[16] per Gleeson CJ, Gummow, Hayne and Crennan JJ, 299-300 [141]-[142] per Kirby J, 316 [209] and 321 [223] per Callinan J; [2006] HCA 27.

37 *Hui Chi-ming v The Queen* [1992] 1 AC 34 at 57.

38 See *Maxwell v The Queen* (1996) 184 CLR 501. It may be noted that the guidelines issued by the Office of Public Prosecutions in Victoria, which appear to have been in force at the date of the proceedings against John Likiardopoulos, Aydin and Singh, included in par 2.6.5:

> "No plea will be accepted by the Crown unless it reasonably reflects the nature of the criminal conduct of the accused and provides an adequate basis upon which the Court can impose an appropriate sentence. In exercising

(Footnote continues on next page)

record" an acceptance by the court at the instance of the Crown "that these people are not murderers" is apt to mislead in this context. Commonly, the factors informing the Director's election to accept pleas to lesser offences will not be known. In this case, the respondent outlined a number of them in written submissions. In summary, the considerations were these. At the time the appellant and the others were charged with the murder of the deceased, the case against each was weak. Aydin had made admissions in his interview with the police but these would not have supported his conviction for murder. The Crown did not have evidence to support the conviction of John Likiardopoulos, Singh or Con Likiardopoulos of murder. The sentencing of Aydin and Singh for manslaughter and as an accessory after the fact to manslaughter respectively enabled the Crown to lead evidence from each at the appellant's trial. This included direct evidence of the appellant's participation in the assaults on the deceased. The evidence from Aydin and Singh was also evidence which, with other evidence, supported, as a step in proof of the appellant's accessorial guilt, the finding that one or more of those whom he had directed or encouraged had assaulted the deceased with the intention which made the act murder.

39 The moral culpability of the accessory will sometimes be greater than that of the principal offender. It was open to consider that to be the case here. The appellant was a man of mature years. His dominance over the other persons in the household does not appear to have been in issue. The evidence of his encouragement of the principal offenders included that he had urged Singh to redouble his assaults on the deceased, saying, "Do you remember how it felt when it was happening to you? Is that all you've got?". And that he had ordered Singh to take a break before telling him to "get back into it". And that he had encouraged John Likiardopoulos and Aydin to "get into" the deceased and to continue beating him after he had been cleaned up and brought back into the kitchen/dining area. There was no unfairness and the administration of justice was not brought into disrepute, by reason of the acceptance of pleas of guilty to lesser offences from the persons whom the Crown alleged had acted at the appellant's urging, in prosecuting the appellant as an accessory to the murder of the deceased.

40 The appeal should be dismissed.

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this discretion it has to be borne in mind that in a particular case the public interest may be better served by the certainty of a conviction secured by the acceptance of a lesser plea than by the unpredictability inherent in a contested trial."

41 HEYDON J. The questions which arise may be examined in the following order.

The respondent's "simple" position

42 First, it is necessary to consider the position advanced by the respondent, which it said was a "simple" one:

> "[T]his Court should now finally sweep away all the outdated distinctions between principals and accessories in favour of a single coherent principle underlying the law of complicity. Stated succinctly, a person is criminally responsible for the acts of another when that person can be shown to have either acted as part of a common enterprise (or in concert) … or aided and abetted such person … or counselled or procured such person".

These three groups of offenders were described in the submission respectively as principals in the first degree, principals in the second degree, and principals in the third degree. The submission continued:

> "[A]s to what actual crime the person has committed that will be determined by his or her own *mens rea* and not that of any other actor in the commission of the *actus reus*." (emphasis in original)

43 The respondent downplayed the radicalism of that submission during oral argument. But it would not be right even to consider the desirability of taking the step suggested by the respondent unless it was necessary to do so. It would not be necessary to do so unless it was impossible to reject the appellant's submissions on some other ground. It is possible to do that, and hence the "simple" position of the respondent need not be examined. One of the issues that would need to be examined if the respondent's position were considered is whether so radical a change would have unintended adverse consequences for accused persons. To alter the criminal law retrospectively and adversely to the interests of accused persons is a course not open to the courts, only to the legislature.

The appellant's "derivative liability" submission

44 The appellant submitted:

> "[L]iability by way of counselling or procuring (or being an accessory before the fact) is derivative. If there is no murder by a principal, there can be no liability for murder as an accessory by way of counselling or procuring." (footnote omitted)

The appellant described the case as one of "counselling and procuring others to commit murder". It was a case based on the appellant's conduct in being present for at least part of the long period during which the victim was done to death, and

encouraging others present, who allegedly were principal offenders, to attack the victim. Bearing that in mind, the propositions advocated by the appellant are correct. But it does not follow from the fact that none of the alleged principals present had been convicted of murder that they were not in fact guilty of murder as principals. If the appellant's argument were to be accepted, the appellant would have had to analyse the evidence in such a way as to support the conclusion that none of the principals were guilty of murder. This the argument did not do. And the argument could not have done it. Instead the appellant relied on various catch-phrases, emphasised in the following quotations. The appellant said: "there was, *for juristic purposes*, no murder by any of the persons relied on as potential principals." The appellant put it another way: "there could be, *for legal purposes*, no murder in circumstances where the Crown had accepted pleas of guilty from those persons upon whom they relied as the principal offenders". The appellant submitted that the prosecution's stance was "not *open in law*". The "juristic" and "legal" element in the submission was that the prosecution had accepted pleas of guilty from the alleged principal offenders, not to murder, but to manslaughter and to being an accessory after the fact to manslaughter. That "juristic" and "legal" element cloaked the fact that for all practical purposes the alleged principal offenders were guilty of murder.

45 The appellant relied on an analogy with *Surujpaul v The Queen*[39]. That was a joint trial in which all the accused except Surujpaul were acquitted of murder, while he was found guilty as an accessory before the fact to murder. Like *Osland v The Queen*[40], on which the appellant also relied, that case is distinguishable. No analogy may be drawn between cases involving joint trials and the separate proceedings against the alleged principals here, which resulted in convictions for crimes other than murder. There is no inconsistency in the "verdicts". As between the prosecution and an alleged principal offender, that offender is not now to be treated as guilty of murder. But as between the prosecution and the appellant, there is no bar to treating the alleged principal offenders as guilty of murder if the evidence will support that conclusion. The state of the evidence in each of the trials between the prosecution and each alleged principal offender is one thing. The state of the evidence in the trial between the prosecution and the appellant is another. Whether the alleged principal offenders should be treated as guilty of murder in the appellant's trial depended on the evidence in *that* trial. The key question was thus: was the evidence at the trial of the appellant capable of establishing that the alleged principals committed murder? It was. The appellant did not demonstrate the contrary. Indeed he scarcely tried to.

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39 [1958] 1 WLR 1050; [1958] 3 All ER 300.

40 (1998) 197 CLR 316; [1998] HCA 75.

Abuse of process

46 *Effect on administration of justice.* The appellant submitted that the prosecution's approach in seeking a conviction based on what the appellant called "counselling and procuring" brought the administration of justice into disrepute. The appellant also submitted that the prosecution's approach had a tendency to erode public confidence in the administration of justice. If either of these claims mattered[41], they invite the retort that to refuse to prosecute the appellant for murder in the manner in which he was prosecuted would have brought the administration of justice into even more disrepute and eroded public confidence in it even more. That is because of the significant role which, according to the evidence in *his* trial, the appellant played in ensuring that the fatal assaults of the victim continued. The respondent correctly submitted that cases of the present kind would be unprosecutable unless arrangements were made to accept pleas to lesser crimes than those which would otherwise appear in the indictment. When the investigation into the deceased's death began, the detectives necessarily had to behave in the manner of a Maigret without the mist. There was at best only a very weak circumstantial case of murder. Then one of the alleged principals began to negotiate with the police for immunity from a murder charge in return for information and a plea of guilty to manslaughter. People in that position will often not co-operate without some hope of reduced punishment, sometimes to be achieved by a reduction in the charge. The collapse of that principal converted a weak circumstantial case into a stronger direct evidence case. In due course other principals followed suit. From the time before the first plea of manslaughter was accepted until the time when the appellant's trial began, the case against the various accused grew much stronger. That change in strength strongly negates the submission that there was an abuse of process.

47 *Inconsistency in prosecution position.* The appellant submitted that by accepting the pleas of guilty of the alleged principals, "there is now, on the record, an acceptance by the court, at the instance of the Crown, that these people are not murderers. Yet, at the trial of the appellant the Crown asserts that they were."

48 There is no inconsistency unless the evidence in the cases was identical. It was not shown to be identical.

49 *Estoppel.* The appellant submitted: "the Crown should be confined to proceeding with murder on the basis of joint criminal enterprise. Further, the Crown should be prevented from asserting that those others engaged in the joint criminal enterprise committed murder or any offence other than the offences

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41 Cf *Moti v The Queen* (2011) 86 ALJR 117 at 141-143 [98]-[102]; 283 ALR 393 at 423-425; [2011] HCA 50.

which the Crown has previously accepted they committed." The appellant submitted: "the Crown cannot be heard to say to a jury that these persons are guilty of murder in circumstances where they have accepted that they are not". This appears to be the language of estoppel. But what type of estoppel? It is not any form of estoppel by record. Nor is it any known form of estoppel by representation. If the submission is taken literally, the appellant should have objected at the trial to evidence tending to show that murder had been committed by those who had already been dealt with. If successful, that objection would have completely hamstrung the trial of the appellant on any charge. This demonstrates the absurdity of the appellant's position. The appellant submitted that the way out of the absurdity was for the prosecution to have proceeded against the appellant on the basis of joint criminal enterprise coupled with the appellant's intention to cause really serious injury. But the submission does not explain why the prosecution should be forced to abandon a perfectly legitimate method of demonstrating the appellant's guilt of murder. There was in truth nothing to prevent the prosecution from proceeding against the accused persons one by one and proving to conviction, or accepting pleas of guilt as to, whatever charges it felt proper in the light of the evidence available to it at the time.

50 *Unfairness.* The appellant put a submission that the "Janus-headed approach" by the prosecution was "an unfair use of the Supreme Court's process." This amounted to no more than a rolled-up way of putting his other abuse of process arguments. It should be rejected for the same reasons.

51 *Sense of grievance.* It was submitted on behalf of the appellant that he would experience "a particular sense of grievance" because of the prosecution conduct in proceeding against him on the basis that others had committed murder, when they had been convicted of something less. If he really does have a sense of grievance, it is not, in view of the appellant's role in the brutal conduct he superintended, a justified one.

Order

52 The appeal must be dismissed.