HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

SAMUEL JAMES APPELLANT

AND

THE QUEEN RESPONDENT

James v The Queen
[2014] HCA 6
5 March 2014
M102/2013

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

T Kassimatis with B J Franjic for the appellant (instructed by Valos Black & Associates)

P B Kidd SC with B L Sonnet for the respondent (instructed by Solicitor for Public Prosecutions (Vic))

CATCHWORDS

James v The Queen

Criminal law – Appeal – Appeal against conviction – Intentionally causing serious injury – Whether failure to instruct jury as to lesser alternative verdicts occasioned substantial miscarriage of justice.

Criminal law – Role of trial judge – Whether duty to secure fair trial required instruction on any lesser alternative verdicts regardless of forensic choices of counsel.

Crimes Act 1958 (Vic), ss 16, 17.
Criminal Procedure Act 2009 (Vic), s 239.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. The appellant was convicted following a trial in the Supreme Court of Victoria (Williams J) of intentionally causing serious injury to a man named Khadr Sleiman[1]. A second count, an alternative to the first, charged the appellant with recklessly causing serious injury to Mr Sleiman[2]. Mr Sleiman suffered multiple injuries as the result of being struck by a motor vehicle that at the time was being driven by the appellant. It was the prosecution case that the appellant deliberately struck Mr Sleiman with the vehicle intending thereby to cause him serious injury. It was the defence case that Mr Sleiman was struck accidentally while the appellant manoeuvred his vehicle in reverse in an endeavour to get away from Mr Sleiman, who was menacing him with a knife.

2 During the course of its retirement the jury sought clarification of the distinction between an intention to cause serious injury, the mental element of the offence charged in the first count, and awareness that his acts would probably cause serious injury, the mental element of the offence charged in the second count. In the course of a discussion about how to answer the jury's question the prosecutor raised, for the first time, the question of whether the jury should be instructed of the availability of a further alternative verdict: that the appellant intentionally caused injury, as opposed to serious injury, to Mr Sleiman[3]. The trial judge responded that the prosecution case had not been put on this basis. Her Honour expressed the view that to leave a further alternative verdict at this stage of the trial would deprive the appellant of the possibility of acquittal[4]. By his silence, the appellant's counsel is to be taken to have agreed with that assessment.

3 The jury was not instructed of the availability of the alternative verdict of intentionally causing injury to Mr Sleiman. Nor was the jury instructed of the availability of the alternative verdict of recklessly causing injury to Mr Sleiman[5].

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1 *Crimes Act* 1958 (Vic), s 16.

2 *Crimes Act* 1958 (Vic), s 17.

3 *Crimes Act* 1958 (Vic), s 18.

4 *James v The Queen* [2013] VSCA 55 at [155] per Priest JA.

5 *Crimes Act* 1958 (Vic), s 18.

The jury found the appellant guilty of intentionally causing serious injury to Mr Sleiman.

4 The appellant appealed to the Court of Appeal of the Supreme Court of Victoria (Maxwell P, Whelan and Priest JJA) against his conviction, contending that the trial judge's failure to instruct the jury of the availability of verdicts for each of the lesser offences had occasioned a substantial miscarriage of justice. By majority, the appeal was dismissed. Maxwell P and Whelan JA, applying the test formulated by the Victorian Court of Appeal in *R v Saad*[6], held that the interests of justice had not required that the further alternative verdicts be left[7]. Their Honours' conclusion took into account both the trial judge's assessment that to leave them would be unfair to the appellant and defence counsel's acceptance of that assessment. It also took into account that there was little evidence which raised the alternative verdicts as a real, and not a remote or artificial, possibility[8].

5 In dissent, Priest JA held that *Saad* was wrongly decided[9]. His Honour favoured the approach of the New South Wales Court of Criminal Appeal and the South Australian Court of Criminal Appeal as to the consequences of failing to leave an alternative verdict which is open on the evidence[10]. This approach holds that the statements in *Gilbert v The Queen*[11] and *Gillard v The Queen*[12], with

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6 (2005) 156 A Crim R 533 at 567 [110] per Nettle JA.

7 The appellant's trial took place before the commencement of the *Jury Directions Act* 2013 (Vic) and his appeal did not raise consideration of s 16(1) of that Act, which abolishes any rule of common law under which a trial judge is required to direct the jury about any defences and alternative offences open on the evidence which have not been identified as such during the trial.

8 *James v The Queen* [2013] VSCA 55 at [82] per Whelan JA, Maxwell P agreeing at [2].

9 *James v The Queen* [2013] VSCA 55 at [196].

10 *James v The Queen* [2013] VSCA 55 at [201]-[207], citing *R v King* (2004) 59 NSWLR 515 and *R v Tilley* (2009) 105 SASR 306.

11 (2000) 201 CLR 414; [2000] HCA 15.

12 (2003) 219 CLR 1; [2003] HCA 64.

respect to the failure to leave manslaughter on an indictment of murder, apply by parity of reasoning to the failure to leave any lesser offence which, expressly or by implication, is included in the allegations charged in the indictment ("an included offence"). It followed, for the reasons explained in *Gillard*, that the failure to leave the further alternative verdicts at the appellant's trial occasioned a substantial miscarriage of justice[13].

6 On 16 August 2013 Bell and Gageler JJ granted the appellant special leave to appeal from the orders of the Court of Appeal. The question presented by the appeal is whether, on a trial on indictment, it is the duty of the judge to leave any lesser alternative verdict that is realistically open on the evidence regardless of the forensic decisions of counsel. For the reasons to be given, the answer to that question is "no". The Court of Appeal majority was correct to conclude that the trial judge was not required to instruct the jury of the availability of further alternative verdicts. It follows that the appeal must be dismissed.

The appellant's submissions

7 The appellant's argument may be summarised in the following steps. First, s 239 of the *Criminal Procedure Act* 2009 (Vic), which provides for the return of alternative verdicts, confers an unqualified right on the jury to return a verdict of guilty of any included offence that is open on the evidence.

8 Secondly, the failure to direct the jury on any included offence that is open, regardless of the conduct of the parties, is a miscarriage of justice: the jury, ignorant of the range of possible verdicts which the law allows, may be driven to convict rather than to acquit the accused outright.

9 Thirdly, the statements in *Gilbert* concerning jury deliberations[14] should not be understood as confined to appellate consideration of the trial of an indictment of murder at which manslaughter is not left. Their Honours' statements are equally applicable to appellate consideration of the trial of any offence on indictment.

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13 *Gillard v The Queen* (2003) 219 CLR 1 at 14 [27] per Gleeson CJ and Callinan J, 41-42 [133] per Hayne J.

14 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13], 421 [16] per Gleeson CJ and Gummow J, 441 [101] per Callinan J.

10 Fourthly, there is no principled justification for distinguishing the obligation to instruct the jury on any defence or partial defence that is open on a view of the facts[15] from the proposed obligation to instruct on any alternative verdict that is open on a view of the facts. On this analysis, fairness requires that the jury is informed of any pathway to a verdict that is more favourable to the accused than conviction of the principal offence.

11 Finally, as the jury was not informed of the availability of verdicts for the two included offences, it was not open to the appellate court to conclude that the appellant did not lose the chance of a more favourable verdict and for this reason the failure to leave the alternative verdicts was an error resulting in a substantial miscarriage of justice[16].

12 Acceptance of the appellant's argument requires the appellate court to set aside his conviction for the offence charged in count one notwithstanding that the verdict was returned following a trial at which the law governing liability for that offence, and for the lesser alternative offence charged in count two, was correctly explained to the jury. This result is required notwithstanding that the prosecution confined its case to proof of guilt of the charged offences and that the appellant chose not to invite the jury to convict him of any lesser offence should the prosecution fail in that endeavour.

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15 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ; [1971] HCA 20; *Braysich v The Queen* (2011) 243 CLR 434 at 452-453 [32] per French CJ, Crennan and Kiefel JJ; [2011] HCA 14.

16 Section 276(1) of the *Criminal Procedure Act* 2009 (Vic) relevantly provides that:

> "On an appeal ... the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that –
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> …
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> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
>
> (c) for any other reason there has been a substantial miscarriage of justice."

Alternative verdicts – included offences and manslaughter

13 Section 239 of the *Criminal Procedure Act* 2009 (Vic) provides:

> "(1) On a trial on indictment for an offence other than treason or murder, if the jury finds the accused not guilty of the offence charged but the allegations in the indictment amount to or include, whether expressly or impliedly, an allegation of another offence that is within the jurisdiction of the court, the jury may find the accused guilty of that other offence.
>
> (2) For the purposes of subsection (1), an allegation of an offence includes an allegation of an attempt to commit the offence."

14 The provision is modelled on s 6(3) of the *Criminal Law Act* 1967 (UK)[17]. The enactment of the English provision followed the recommendation of the Criminal Law Revision Committee[18]. The provision served to overcome technicalities of the common law. At common law the jury could not convict of a misdemeanour if the indictment charged a felony, but was at liberty to convict of a less aggravated felony (or misdemeanour if the indictment charged a misdemeanour) provided the words of the indictment covered the lesser offence[19].

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17 That sub-section provides:

> "Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

18 Criminal Law Revision Committee, *Felonies and Misdemeanours*, Report No 7, (1965) Cmnd 2659 at 13-14 [46]. See also *R v Lillis* [1972] 2 QB 236.

19 *Brown v The King* (1913) 17 CLR 570 at 591 per Isaacs and Powers JJ; [1913] HCA 70, citing *Archbold's Pleading, Evidence, and Practice in Criminal Cases*, 23rd ed (1905) at 215-216 and *Halsbury's Laws of England*, 1st ed, vol 9 at 371.

15 Two features of the statutory scheme should be noted[20]. First, the power to return a verdict of guilty of an offence not charged in the indictment is conditioned upon finding that the accused is not guilty of the offence charged. It is not correct to characterise s 239, as the appellant does, as conferring "an unqualified statutory right or power to find an accused person guilty of a lesser offence".

16 Secondly, s 239 is expressed to apply to the trial on indictment of offences other than treason or murder. Professor Williams, writing of its English counterpart, observes that manslaughter is not correctly classified as an included offence. He suggests that its separate treatment as an alternative verdict under s 6(2) of the *Criminal Law Act* 1967 (UK) reflects the special features of the verdict of manslaughter[21].

17 The special features of the verdict of manslaughter on the trial of an indictment of murder are the product of the development of the law of homicide, which is detailed in a number of this Court's decisions[22]. It is sufficient for present purposes to observe that murder and manslaughter emerged as forms of the one felony. By statute, murder became the non-clergyable form of the felony[23]. Murder was distinguished from other homicides by the presence of

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20 It should also be noted that Div 1 of Pt III of the *Crimes Act* 1958 (Vic) contains provisions dealing with alternative verdicts for particular offences, including murder (s 421(1)). Section 421(2) mirrored the provisions of s 239(1) of the *Criminal Procedure Act* 2009 (Vic), and was repealed by s 422(2)(c) of that Act.

21 Glanville Williams, "Included Offences", (1991) 55 *Journal of Criminal Law* 234 at 234-235.

22 *Parker v The Queen* (1963) 111 CLR 610 at 625-628 per Dixon CJ, 650-655 per Windeyer J; [1963] HCA 14; *Gammage v The Queen* (1969) 122 CLR 444 at 449-451 per Barwick CJ, 453-454 per Kitto J, 462-463 per Windeyer J; [1969] HCA 68; *R v Lavender* (2005) 222 CLR 67 at 77-78 [24]-[26], 82 [38], 83-84 [42]-[44] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2005] HCA 37; and see Snelling, "The Alternative Verdict of Manslaughter", (1958) 32 *Australian Law Journal* 137.

23 *Parker v The Queen* (1963) 111 CLR 610 at 650 per Windeyer J.

malice aforethought. It was open on the indictment to return a verdict of murder or manslaughter[24].

18 Sir Owen Dixon, writing extra-curially in 1935, explained the point of present significance[25]:

> "[T]he difference between murder and manslaughter was not the difference between two distinct felonies, but the difference between two descriptions of the one felony. They were differentiated only because the consequences of a conviction had, by statute, ceased to be the same. But the fact that the two descriptions formed only one felony is reflected in one consequence which profoundly affects the practical conduct and often the result of a murder trial of today. For it is because homicide is a single felony, that, upon an indictment of murder, a verdict of manslaughter may be found."

19 The practical conduct of the trial of an indictment of murder at the time Sir Owen Dixon was writing was understood to require a trial judge to leave manslaughter in any case in which the accused or the jury asked about the matter notwithstanding that the facts did not support it[26]. That understanding was corrected in *Gammage v The Queen*, which held that the jury did not have a right to return a "merciful" verdict of manslaughter[27]. The obligation to leave manslaughter in most, although not all, cases was identified by Barwick CJ as arising from the necessity to satisfy the jury of the elements of murder[28]. This was so whether the element in issue was proof of the intention accompanying the unlawful and dangerous act causing death or whether the prosecution had

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24 *Kwaku Mensah v The King* [1946] AC 83 at 92.

25 Dixon, "The Development of the Law of Homicide", in *Jesting Pilate*, (1965) 61 at 65.

26 *Brown v The King* (1913) 17 CLR 570 at 578 per Barton ACJ, 592 per Isaacs and Powers JJ; *Packett v The King* (1937) 58 CLR 190 at 213 per Dixon J; [1937] HCA 53; *Beavan v The Queen* (1954) 92 CLR 660 at 662-663; [1954] HCA 41.

27 (1969) 122 CLR 444 at 451 per Barwick CJ, 456, 458-459 per Menzies J, 462 per Windeyer J, 464 per Owen J.

28 *Gammage v The Queen* (1969) 122 CLR 444 at 451.

negatived a partial defence. In *Varley v The Queen*[29] his Honour explained the obligation as one that is owed to the accused and the Crown alike. In the latter connection, his Honour observed that in default of the jury's satisfaction of all the elements of murder, the Crown was not to be denied a verdict[30]. As will appear, there is good reason not to extend this reasoning to the trial of offences generally.

20 While the trial of an indictment of murder required that the jury be directed on manslaughter where that verdict was open on a view of the facts, the consequences of the wrongful failure to give the direction differed. Where there was material before the jury raising the partial defence provocation, the failure to leave manslaughter was likely to constitute a substantial miscarriage of justice: the verdict of murder did not gainsay that the jury might have convicted of manslaughter had it been invited to consider the matter[31]. The wrongful failure to leave manslaughter in other circumstances did not necessitate the conclusion that the trial had miscarried: the verdict of murder demonstrated the jury's satisfaction of the accused's liability for that offence[32]. The correctness of the latter assumption was the issue in *Gilbert*.

Gilbert and *Gillard*

21 In *Gilbert* the jury was instructed that on the view of the facts for which the defence contended the accused was entitled to outright acquittal. The direction accorded with the law as it was understood at the time. The understanding proved to be wrong, as on the view of the facts for which the defence contended, it had been open to convict Gilbert of manslaughter. The question in this Court was whether the Queensland Court of Appeal erred in dismissing Gilbert's appeal against his conviction for murder under the proviso in s 668E(1A) of the *Criminal Code* (Q). The majority held that the verdict did not

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29 (1976) 51 ALJR 243; 12 ALR 347.

30 *Varley v The Queen* (1976) 51 ALJR 243 at 245; 12 ALR 347 at 351.

31 *Kwaku Mensah v The King* [1946] AC 83 at 94; *Parker v The Queen* (1963) 111 CLR 610; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 163 per Gibbs CJ, Wilson, Brennan and Deane JJ; [1986] HCA 76.

32 *Ross v The King* (1922) 30 CLR 246 at 254 per Knox CJ, Gavan Duffy and Starke JJ, 274 per Higgins J; [1922] HCA 4; *R v Evans* [1969] VR 858 at 867-874 per O'Bryan and Little JJ; *R v Iannazzone* [1983] 1 VR 649 at 653-654.

preclude the possibility that the jury had not applied the instructions concerning proof of the elements of murder. Gleeson CJ and Gummow J disavowed that appellate courts are to assume a mechanistic approach to fact-finding on the part of the jury. In this context, their Honours observed that the jury's findings of fact are made in the context of instructions as to the consequences of the findings[33]. They referred with approval to statements in *Mraz v The Queen* concerning the "realities" of jury deliberations when murder is in issue[34]. In *Mraz* those realities were that murder was punishable with death. Gleeson CJ and Gummow J considered that an equally influential contemporary reality is that "[t]his is an age of concern for the victims of violent crime, *and their relatives*" (emphasis added)[35]. Callinan J, the other member of the majority, also reasoned that it is contrary to human experience, where there is a choice of decisions, that what is chosen will be unaffected by the variety of choices offered[36].

22 The rationale of the decision in *Gilbert* is discussed in *Gillard*. In that case manslaughter was not left when, on a view of the facts, it was an available verdict, albeit not one for which the defence contended. As Hayne J explained, the holding in *Gilbert* precluded the appellate court from taking into account the findings made by the jury and for this reason it could not be concluded that Gillard had not lost a chance of more favourable verdicts than those that the jury returned[37].

23 *Gilbert* and *Gillard* are concerned with the consequences of the wrongful neglect of the obligation to leave manslaughter to the jury in any circumstance in which it is open. History and recognition of the gravity of conviction for murder inform the obligation. *Gilbert* and *Gillard* do not state any wider principle respecting the obligation to leave alternative verdicts for included offences

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33 *Gilbert v The Queen* (2000) 201 CLR 414 at 421 [16].

34 *Gilbert v The Queen* (2000) 201 CLR 414 at 420-421 [14], [17], citing (1955) 93 CLR 493 at 508 per Williams, Webb and Taylor JJ; [1955] HCA 59.

35 *Gilbert v The Queen* (2000) 201 CLR 414 at 421 [17].

36 *Gilbert v The Queen* (2000) 201 CLR 414 at 441 [101].

37 *Gillard v The Queen* (2003) 219 CLR 1 at 42 [134].

(including alternative verdicts for offences other than manslaughter on an indictment of murder[38]) or the consequences of the failure to do so.

The rationale of the proposed rule

24 In the appellant's submission, the contention that the principles in *Gilbert* and *Gillard* should be extended to the trial of all offences arises from the trial judge's obligation to ensure the fair trial of the accused. That obligation was explained by Barwick CJ in a frequently cited passage in *Pemble v The Queen*[39]:

> "Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part."

25 *Pemble* was concerned with the trial of an indictment of murder. Consistently with the submissions of defence counsel the trial judge instructed the jury that it was a case of murder or manslaughter. The trial judge did not in terms instruct the jury that it was open to acquit. No question arose in *Pemble* of the obligation to instruct the jury on liability for included offences. Such authority, as there was at the time, was against the existence of an obligation to leave every included offence comprised in the allegations in the indictment[40]. The correctness of that line of authority was later affirmed by the English Court of Appeal in *R v Fairbanks*, in which it was said that an obligation to leave a lesser alternative arises only if it is necessary in the interests of justice to do so[41].

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38 Those alternative verdicts are provided for by s 421(1) of the *Crimes Act* 1958 (Vic).

39 (1971) 124 CLR 107 at 117-118.

40 *Vaughan* (1908) 1 Cr App R 25; *Naylor* (1910) 5 Cr App R 19; *Parrott* (1913) 8 Cr App R 186 at 192-193.

41 [1986] 1 WLR 1202 at 1205-1206.

26 Plainly enough the fair trial of the accused may require that an alternative verdict be left, including in a case in which the accused disavows reliance on it. However, the proposition for which the appellant contends is the adoption of a rule requiring that every viable alternative verdict be left in every case.

27 Reference should here be made to the decision of the House of Lords in *R v Coutts*[42], upon which the appellant relies. *Coutts*, like *Gillard*, was concerned with a trial of murder at which, with the concurrence of the parties, manslaughter was not left although that verdict was open. Lord Bingham of Cornhill endorsed the reasoning of the majority in *Gilbert*[43]. His Lordship went on to propose that at any trial on indictment, irrespective of the wishes of trial counsel, any obvious alternative verdict for which there is evidence should be left[44]. Two features of the proposed rule may be noted. First, its confinement to an "obvious" alternative verdict is by way of contrast with alternative verdicts "which ingenious counsel may identify through diligent research after the trial"[45]. Secondly, the interest that the proposed rule serves is the public interest in the administration of justice: in some cases application of the rule would benefit the accused, protecting against an excessive conviction, and in other cases it would benefit the public, providing for the punishment of a lawbreaker who is deserving of punishment[46].

28 The rule for which the appellant contends is one of greater stringency than that proposed in *Coutts*. Since the elements of an included offence are expressly or impliedly encompassed in the allegations pleaded in the indictment, included offences will commonly be "viable" in the sense of being open on the evidence. The appellant's proposed rule would not allow the trial judge to omit instruction on any alternative verdict lawfully open, notwithstanding that a realistic lesser

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42 [2006] 1 WLR 2154; [2006] 4 All ER 353.

43 *R v Coutts* [2006] 1 WLR 2154 at 2165-2166 [20], 2168 [25]; [2006] 4 All ER 353 at 366, 368.

44 *R v Coutts* [2006] 1 WLR 2154 at 2167 [23]; [2006] 4 All ER 353 at 367.

45 *R v Coutts* [2006] 1 WLR 2154 at 2167 [23] per Lord Bingham; [2006] 4 All ER 353 at 367.

46 *R v Coutts* [2006] 1 WLR 2154 at 2167 [23] per Lord Bingham; [2006] 4 All ER 353 at 367-368.

alternative offence is charged in the indictment. In some cases, irrespective of the allegations charged in the indictment and the conduct of the trial, the trial judge would be required to direct the jury on a "cascade of lesser offences"[47].

29 This lastmentioned prospect may be thought to be the antithesis of the obligation imposed on the trial judge when summing up to the jury to identify the real issues in the case and to instruct the jury on so much of the law as is necessary to decide those issues[48]. That is so unless the real issues at every trial encompass the accused's guilt of every included offence of which, in law, the accused could be convicted regardless of the forensic choices made by the parties. This latter contention is to be assessed in light of the essential features of our accusatorial and adversarial system of criminal justice.

30 The starting point in this consideration is Barwick CJ's frequently cited account of the incidents of the criminal trial[49]:

> "It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law."

31 Discharge of the trial judge's role in ensuring fairness to the accused requires that the jury receives instruction on any defence or partial defence, provided there is material raising it, regardless of the tactical decisions of counsel[50]. Among other things, this recognises the forensic difficulty of relying on inconsistent defences. The tactical decision not to rely on a defence or partial

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47 *Elfar* (2000) 115 A Crim R 64 at 73 [49] per Sperling J.

48 *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3; *Tully v The Queen* (2006) 230 CLR 234 at 257 [79] per Hayne J; [2006] HCA 56; *R v Getachew* (2012) 248 CLR 22 at 34-35 [29] fn 35; [2012] HCA 10.

49 *Ratten v The Queen* (1974) 131 CLR 510 at 517; [1974] HCA 35.

50 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ.

defence, whether objectively sound or otherwise, does not relieve the trial judge of the obligation to instruct the jury on how on a view of the facts a defence or partial defence arises.

32 Of course, forensic considerations may equally be against defence counsel inviting the jury to consider the accused's guilt of a lesser offence. The submission may be inconsistent with the tenor of the defence case. Nonetheless fairness to the accused may require that the jury be directed of the availability of the alternative verdict. In such a case the failure to do so would be a miscarriage of justice.

33 However, it is wrong to equate leaving a defence or partial defence with leaving alternative verdicts. The two are distinct. Where there is evidence to support a defence or partial defence it is incumbent on the prosecution to negative it. Satisfaction that the defence or partial defence has been negatived will be an issue in the trial and almost always will require the trial judge to so direct the jury[51]. Where the prosecution does not seek the jury's verdict for an offence not charged, the circumstance that in law the evidence may support conviction for a lesser offence does not without more make guilt of that lesser offence an issue in the trial. Fairness in such a case may favour that the accused's chances of outright acquittal on the issues joined not be jeopardised by the trial judge's decision to leave an alternative verdict.

34 Consideration of fairness to the accused led the New South Wales Court of Criminal Appeal to hold that it was unwise for the trial judge to direct on an alternative verdict in a case in which the parties had not raised that matter[52]. The Queensland Court of Appeal has similarly held that fairness may require that the accused's chances of acquittal are not jeopardised by leaving an alternative verdict[53]. These remarks were approved by Kiefel J in *R v Keenan* with the

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51 There may be instances in which the trial judge properly accedes to trial counsel's request not to leave variants of a defence to avoid obfuscating the real issues: see *R v Willersdorf* [2001] QCA 183 at [18] per Thomas JA, McPherson JA agreeing at [3], Chesterman J agreeing at [32].

52 *R v Cameron* [1983] 2 NSWLR 66 at 71; *R v Pureau* (1990) 19 NSWLR 372 at 375-377 per Hunt J.

53 *R v Willersdorf* [2001] QCA 183 at [17], [20] per Thomas JA, McPherson JA agreeing at [3], Chesterman J agreeing at [32].

concurrence of Hayne, Heydon and Crennan JJ[54]. *Keenan* holds that the duty to ensure a fair trial does not require that a lesser charge is left in every case: the test is what justice to the accused requires[55].

35 Statements in the authorities favouring the existence of an obligation to leave any alternative verdict open on the evidence have not been sourced in fair trial principles but in a different and wider public interest. Phillimore J distinguished the two in *Parrott*[56]. Delivering the reasons of the Court of Criminal Appeal in 1913, his Lordship allowed that there may be cases in which the interests of the accused require that a lesser verdict is left. By comparison, his Lordship considered there to be many cases in which the interests of justice will not be met unless the jurors are informed that they may convict of a lesser offence since otherwise "thinking it a case of 'neck or nothing,' they may acquit altogether"[57].

36 An accused may successfully raise a plea in bar on arraignment for an offence of which the accused might have been convicted on the allegations in the indictment at an earlier trial[58]. This consideration inclined King CJ to the view in *Benbolt v The Queen* that it was the trial judge's obligation to direct the jury on any alternative verdict, notwithstanding that the parties had made no reference to that possibility[59]. The failure to do so might preclude the prosecution of the accused for an offence of which he or she was guilty. Contrary to the burden of the appellant's argument, King CJ considered that the overriding fair trial

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54 (2009) 236 CLR 397 at 438 [138], Hayne J agreeing at 422 [80], Heydon J agreeing at 425 [92], Crennan J agreeing at 425 [93]; [2009] HCA 1.

55 (2009) 236 CLR 397 at 438 [138] per Kiefel J, Hayne J agreeing at 422 [80], Heydon J agreeing at 425 [92], Crennan J agreeing at 425 [93].

56 (1913) 8 Cr App R 186.

57 (1913) 8 Cr App R 186 at 193.

58 *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1305 per Lord Morris of Borth-y-Gest.

59 (1993) 60 SASR 7 at 15-19.

obligation would in an appropriate case justify the decision not to leave an alternative verdict[60].

37 The importance under Australian law of maintaining the separation between prosecutorial and judicial functions has been stated in a number of this Court's decisions since *Benbolt*[61]. The view that it is the duty of the trial judge to invite the jury to determine the accused's guilt of an included offence at a trial at which the prosecution has elected not to do so is incompatible with the separation of those functions. It is not the function of the trial judge to prevent the acquittal of the accused should the prosecution fail to prove guilt of the offence, or offences, upon which it seeks the jury's verdict. At a trial at which neither party seeks to rely on an included offence, the trial judge may rightly assess that proof of the accused's guilt of that offence is not a real issue. In such an event, it would be contrary to basic principle for the trial judge to embark on instruction respecting proof of guilt of the included offence[62].

38 The trial judge's duty with respect to instruction on alternative verdicts is to be understood as an aspect of the duty to secure the fair trial of the accused. The question of whether the failure to leave an alternative verdict has occasioned a miscarriage of justice is answered by the appellate court's assessment of what justice to the accused required in the circumstances of the particular case. That assessment takes into account the real issues in the trial and the forensic choices of counsel. As earlier noted, not infrequently defence counsel will decide not to

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60 *Benbolt v The Queen* (1993) 60 SASR 7 at 18-19.

61 *Maxwell v The Queen* (1996) 184 CLR 501 at 513-514 per Dawson and McHugh JJ, 534-535 per Gaudron and Gummow JJ; [1996] HCA 46; *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 269 [2] per French CJ, 279-280 [37] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 37; *Elias v The Queen* (2013) 248 CLR 483 at 497-498 [33]-[35]; [2013] HCA 31; *Magaming v The Queen* (2013) 87 ALJR 1060 at 1067 [20] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 302 ALR 461 at 466; [2013] HCA 40.

62 See above fn 48 and see also *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 106 [36] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14; *R v Khazaal* (2012) 246 CLR 601 at 623 [73] per Gummow, Crennan and Bell JJ; [2012] HCA 26; *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [31]; 295 ALR 624 at 631-632; [2013] HCA 6; *Director of Public Prosecutions (Cth) v JM* (2013) 87 ALJR 836 at 842 [28]; 298 ALR 615 at 622-623; [2013] HCA 30.

sully the defence case (that the only proper verdict is one of outright acquittal) by an invitation to the jury to consider the accused's guilt of a lesser offence. Such a forensic choice does not prevent counsel from submitting that the alternative verdict should nonetheless be left. Much less does it prevent counsel from making that submission where, as here, he or she is asked about the matter. It remains that the forensic choices of counsel are not determinative. The duty to secure a fair trial rests with the trial judge and on occasions its discharge will require that an alternative verdict is left despite defence counsel's objection.

Did justice to the appellant require that the lesser alternative verdicts be left?

39 It is sufficient to refer in broad outline to the evidence in order to explain why the interests of justice to the appellant did not require the further alternative verdicts to be left for the jury's consideration.

40 The incident occurred at night time in the car park of a suburban shopping centre. There was evidence that the appellant and Mr Sleiman had arranged to meet in connection with a debt alleged to be owed by Mr Sleiman to the appellant. It appeared that Mr Sleiman had armed himself with a knife before going to the meeting. It was not in issue that Mr Sleiman was struck by the appellant's vehicle and that as a result he suffered extensive serious injuries. At the trial Mr Sleiman claimed to have no recall of the circumstances of the collision. In a statement earlier made to the police Mr Sleiman had given an account that the appellant had put his vehicle into reverse and swung the steering wheel such that the front of the vehicle struck him as it reversed.

41 The only direct evidence of the collision was that of an eye witness, Monica Woods, a 17 year old high school student. Ms Woods described seeing the appellant's vehicle as "revving back and forth ... and then moving forward". She saw a man who was standing in front of the vehicle projected a few metres into the air. The vehicle drove over the body and away. In cross-examination Ms Woods acknowledged that she had not given an account of the vehicle driving over the body in her police statement. She also acknowledged that at the committal hearing she had said that after the vehicle hit the man she had not seen it run over him.

42 There was expert evidence that Mr Sleiman had suffered significant and potentially life-threatening injuries. In the expert's view, these were the result of a direct or forceful blunt trauma from impact with the front or the rear of the vehicle and were unlikely to have been caused by a "glancing blow".

43 No evidence was adduced by the defence.

44 The appellant relies on Priest JA's analysis in support of his contention that his fair trial required that each alternative verdict be left. That analysis is as follows[63]:

> "In my opinion, the jury would have been entitled to come to the conclusion that they could not reject, on the criminal standard, the thesis that [Mr Sleiman] was struck only a glancing blow; or, perhaps more importantly, that the appellant's appreciation was that he had only struck a blow less severe than what appears to have been the reality. The jury would, I think, legitimately have been entitled to conclude that [Mr Sleiman] – despite his claimed lack of recall – had accurately described to the police in his initial version of events the manner in which the vehicle struck him. …
>
> That being so, I think that it would have been open to the jury to find that the appellant did not intend to cause serious injury (or that he foresaw the probability of serious injury being caused); or, at least, to have entertained a reasonable doubt about it."

45 It may be accepted that it was open to reject the more graphic aspects of Ms Woods' evidence and to consider that Mr Sleiman had been struck by the vehicle as it reversed. Proof of the offence charged in count one required satisfaction that the appellant intended to cause serious injury by striking Mr Sleiman with his vehicle. In the event the jury was not so satisfied it was required to consider whether at the time the appellant drove his vehicle so as to strike Mr Sleiman he was aware that he would probably cause him serious injury and with that awareness he nonetheless proceeded to hit him.

46 The reasonable possibility that Mr Sleiman sustained his injuries as the result of being struck a glancing blow by the appellant's vehicle as he manoeuvred the vehicle in reverse was relied upon by the defence as requiring his acquittal. The elimination of that reasonable possibility was the central issue in the case.

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63 *James v The Queen* [2013] VSCA 55 at [180]-[181].

47 "Serious injury" need not amount to grievous bodily harm for the purposes of these offences[64]. Injuries consisting of the infliction of black eyes and grazes to the head and face have been held to amount to serious injury[65]. Logic may commend that evidence supporting an inference of an intention to cause serious injury must support an inference of intention to cause injury. In this sense it can be said that each of the alternatives was "viable". To distinguish the intention to injure from the intention to cause serious injury, as defined, in the context of giving effect to the intention by deliberately hitting a person with a motor vehicle has a degree of subtlety rightly characterised by Whelan JA as artificial[66]. That observation is even more apt when considering the claimed necessity to direct the jury of the availability of the alternative verdict in recklessness.

48 Fairness to the appellant did not require that either alternative verdict be left. To have instructed the jury on the alternative verdicts at the conclusion of the trial might rightly be judged to have jeopardised the appellant's chances of acquittal. It might have done so because the central issue at trial – had the prosecution excluded the reasonable possibility that the appellant struck Mr Sleiman inadvertently as he manoeuvred the vehicle – may have been blurred in a summing-up which introduced additional, uncharged, pathways to conviction.

49 The appeal must be dismissed.

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64 At the time of the relevant events, s 15 of the *Crimes Act* 1958 (Vic) relevantly provided that "injury" includes "unconsciousness, hysteria, pain and any substantial impairment of bodily function", and that "serious injury" includes "a combination of injuries".

65 *R v Ferrari* [2002] VSCA 186.

66 *James v The Queen* [2013] VSCA 55 at [82(2)].

GAGELER J.

Introduction

50 This appeal turns on two distinct questions of criminal procedure which arose under the *Criminal Procedure Act* 2009 (Vic) before the commencement of the *Jury Directions Act* 2013 (Vic).

51 When was a trial judge required to give a direction that, if a jury found an accused not guilty of the offence charged, the jury might find the accused guilty of a lesser offence included in the offence charged? When did a trial judge's failure to give such a direction result in a substantial miscarriage of justice requiring the Court of Appeal of the Supreme Court of Victoria to allow an appeal against conviction of the offence charged?

52 My answers accord substantially with those of Priest JA, who dissented from the judgment of the Court of Appeal now under appeal to this Court[67]. A trial judge was required to direct that a jury might find an accused guilty of a lesser included offence, if the jury did not find the accused guilty of the offence charged, whenever it was open to the jury on the evidence adduced at the trial to find the accused not guilty of the offence charged but guilty of the lesser included offence, irrespective of any forensic choice made by or on behalf of the accused, unless giving that direction would be unfair to the accused. Failure to give such a direction where so required would result in a substantial miscarriage of justice requiring the Court of Appeal to allow an appeal against conviction of the offence charged if there was reason to consider that the jury might have entertained doubt as to guilt of the offence charged had the direction been given, unless the Court of Appeal was able to conclude from its review of the record that conviction of the offence charged was inevitable.

The first question: the duty to direct as to lesser included offences

53 Section 238 of the *Criminal Procedure Act* provides:

> "At the conclusion of the closing address of the prosecution, the closing address of the accused and any supplementary prosecution address, the trial judge must give directions to the jury so as to enable the jury to properly consider its verdict."

54 The extent to which directions to enable the jury properly to consider its verdict might encompass directions as to offences other than those with which the accused was charged falls to be determined in light of the statutory power of the jury to find the accused guilty of lesser offences: where the offence charged

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67 *James v The Queen* [2013] VSCA 55 at [205]-[207], [217]-[218].

is murder, as conferred by s 421(1) of the *Crimes Act* 1958 (Vic); and where the offence charged is other than treason or murder, as conferred by s 239 of the *Criminal Procedure Act*.

55 Section 421(1) of the *Crimes Act* provides that "[o]n an indictment for murder a person found not guilty of murder may be found guilty of ... manslaughter", or of another of the offences specified in that section, which include "an attempt to commit murder", "but may not be found guilty of any other offence".

56 Section 239 of the *Criminal Procedure Act* provides:

> "(1) On a trial on indictment for an offence other than treason or murder, if the jury finds the accused not guilty of the offence charged but the allegations in the indictment amount to or include, whether expressly or impliedly, an allegation of another offence that is within the jurisdiction of the court, the jury may find the accused guilty of that other offence.
>
> (2) For the purposes of subsection (1), an allegation of an offence includes an allegation of an attempt to commit the offence."

57 Those sections must be read with s 240 of the *Criminal Procedure Act*, which provides that, despite s 421(1) of the *Crimes Act* and s 239 of the *Criminal Procedure Act*, "if the trial judge considers that it is in the interests of justice to do so, the judge may order that the guilt of the accused in respect of all or any of the other offences of which the accused may be found guilty is not to be determined at the trial".

58 Legislative history puts s 421(1) of the *Crimes Act* and ss 239 and 240 of the *Criminal Procedure Act* in an appropriate perspective. All were originally enacted by the *Crimes (Classification of Offences) Act* 1981 (Vic). As originally enacted, s 239(1) and (2) and s 240 of the *Criminal Procedure Act* formed sub-sections of the newly inserted s 421 of the *Crimes Act* following consecutively after what remains s 421(1).

59 The principal purpose of the *Crimes (Classification of Offences) Act* was to abolish the historical distinction between felony and misdemeanour in Victoria. The *Crimes (Classification of Offences) Act* achieved that purpose by inserting s 322B(1) into the *Crimes Act* to provide in terms that "[a]ll distinctions between felony and misdemeanour are hereby abolished". The distinction between felony and misdemeanour had earlier been abolished in the United Kingdom by the identical terms of s 1(1) of the *Criminal Law Act* 1967 (UK). The insertion of s 421 of the *Crimes Act* was consequential on the abolition of the distinction between felony and misdemeanour, and s 421 was modelled in substantial part on s 6 of the *Criminal Law Act.* Section 6 of the *Criminal Law*

Act had been based on recommendations contained in a report of the Criminal Law Revision Committee in 1965[68]. The need for legislation abolishing the distinction between felony and misdemeanour in Victoria to include a provision along similar lines had been highlighted in a report of the Chief Justice's Law Reform Committee in 1973[69].

60 Section 239(1) of the *Criminal Procedure Act* was originally enacted as s 421(2) of the *Crimes Act* and was modelled on s 6(3) of the *Criminal Law Act.* Consistent with the explanation earlier given by the Criminal Law Revision Committee for recommending the enactment of s 6(3) of the *Criminal Law Act*[70], its purpose was explained at the time of its original enactment as being to "reproduce[] the common law rule that a person charged with an offence may be convicted of a lesser offence the ingredients of which are included in the offence with which he is charged" while removing the common law restriction that "a person charged with a felony cannot be convicted of a misdemeanour"[71].

61 The common law rule replaced in the United Kingdom by s 6(3) of the *Criminal Law Act* and in Victoria by s 239(1) of the *Criminal Procedure Act* was that "an accused might be convicted of a lesser offence than that charged, provided that the definition of the more serious offence necessarily included the definition of the lesser offence and that both offences were of the same degree, that is to say, were either felonies or misdemeanours"[72]. In particular[73]:

> "At common law a defendant [could] be convicted of a less aggravated felony or misdemeanor on an indictment charging a felony or misdemeanor of greater aggravation, provided that the indictment contain[ed] words apt to include both offences. In other words, it [was] not necessary to prove the offence charged in the indictment to the whole

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68 United Kingdom, Criminal Law Revision Committee, *Seventh Report: Felonies and Misdemeanours*, (1965) Cmnd 2659 at 13-16.

69 Victoria, Chief Justice's Law Reform Committee, *Abolition of the Distinction Between Felonies and Misdemeanours*, (1973) at 10-11.

70 United Kingdom, Criminal Law Revision Committee, *Seventh Report: Felonies and Misdemeanours*, (1965) Cmnd 2659 at 13-14 [46].

71 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 28 October 1980 at 1652.

72 *Saraswati v The Queen* (1991) 172 CLR 1 at 13; [1991] HCA 21.

73 *O'Brien* (1911) 6 Cr App R 108 at 110, quoting *Archbold's Pleading, Evidence, & Practice in Criminal Cases*, 24th ed (1910) at 228.

> extent laid, provided that the facts proved constitute[d] an offence punishable by law, of which the defendant [could] by law be convicted on the indictment."

The common law rule applied to all felonies and all misdemeanours; the test for inclusion being whether proof of the lesser offence was a necessary step in proving the offence charged[74]. In each case, the jury could "discharge the defendant of the higher crime, and convict him of the less atrocious"[75]. Thus, an accused indicted for robbery might be found not guilty of the robbery but guilty of simple larceny (if the jury considered that the prosecutor failed to prove that the property was taken by violence or putting in fear) by reference to the same common law rule as that by which an accused indicted for murder might be found not guilty of murder but guilty of manslaughter (if the jury considered that the prosecutor failed to prove malice aforethought)[76].

62 The nature and extent of the general common law rule was the subject of comment in *Gammage v The Queen*[77] in the context of considering s 370 of the *Criminal Law Amendment Act* 1883 (NSW), re-enacted as s 23(2) of the *Crimes Act* 1900 (NSW), which provided that where it appeared on a trial for murder "that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter". Windeyer J observed[78]:

> "Long before 1883 the law of England, and of New South Wales, in relation to juries' verdicts in cases of homicide had become settled. The enactment of the predecessor of s 23(2) introduced no novelty into the law ... In Chitty, *Criminal Law* (1826), vol 1, pp 637-642, the power of a jury to find a verdict of manslaughter when acquitting of murder is given as one among a number of illustrations of the power to acquit of a part of an offence charged in an indictment, but, as it was put, to find the prisoner guilty of the residue."

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74 *R v Salisbury* [1976] VR 452 at 454; *R v Cameron* [1983] 2 NSWLR 66 at 68.

75 Chitty, *Criminal Law*, 2nd ed (1826), vol 1 at 637.

76 Chitty, *Criminal Law*, 2nd ed (1826), vol 1 at 637-642; *Archbold's Pleading, Evidence, & Practice in Criminal Cases*, 24th ed (1910) at 228. See also *Brown v The King* (1913) 17 CLR 570 at 591; [1913] HCA 70, citing *Archbold's Pleading, Evidence, & Practice in Criminal Cases*, 23rd ed (1905) at 215-216 and *Halsbury's Laws of England*, 1st ed, vol 9, par 726.

77 (1969) 122 CLR 444; [1969] HCA 68.

78 (1969) 122 CLR 444 at 463.

Kitto J noted[79]:

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

63 In *Parker v The Queen*[80], Windeyer J had earlier observed that "[i]t was at common law always open to a jury who found that a killing was unlawful to refuse to find the element of malice aforethought necessary to make it murder and thus to bring in a verdict of manslaughter" and that "in relation to murder and manslaughter, the Act of 1883 was intended to be a restatement of common law doctrine, but shorn of some of the extravagances of malice aforethought and constructive malice". He continued[81]:

> "At common law murder was reduced to manslaughter by a provocation sufficient in *Hales'* words 'to take off the presumption of malice', that is to say to remove the implication of malice aforethought that the deed created. As the new statutory provisions supplanted the old learning concerning malice aforethought, an express preservation of the jury's right to acquit of murder and convict of manslaughter was prudent."

64 Section 421(1) of the *Crimes Act*, although modelled on s 6(2) of the *Criminal Law Act*, emulated the New South Wales provision the subject of comment in *Gammage* insofar as it carved out from the general power of a jury to return a verdict of not guilty of the offence charged but guilty of a lesser included offence a specific power applicable where the offence charged was murder. Section 6(2) of the *Criminal Law Act* originated in a recommendation of the Criminal Law Revision Committee that, in the interests of certainty, "the alternative verdicts which should be open to the jury on a charge of murder should not depend on the general provision in [s] 6(3) but should be laid down in a special provision" which would limit the available alternative verdicts to specified offences[82]. The Chief Justice's Law Reform Committee recommended

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79 (1969) 122 CLR 444 at 453. See also *Stanton v The Queen* (2003) 77 ALJR 1151 at 1155 [23]; 198 ALR 41 at 47; [2003] HCA 29.

80 (1963) 111 CLR 610 at 657; [1963] HCA 14. See also *R v Lavender* (2005) 222 CLR 67 at 77-78 [25]-[26]; [2005] HCA 37.

81 (1963) 111 CLR 610 at 657, citing Hale, *The History of the Pleas of the Crown*, (1736), vol 1 at 455.

82 United Kingdom, Criminal Law Revision Committee, *Seventh Report: Felonies and Misdemeanours*, (1965) Cmnd 2659 at 14 [49].

a correspondingly tailored provision "restricted to manslaughter and to any other offences of which under existing Victorian law a person [could] be convicted on a trial for murder"[83].

65 In conformity with s 9 of the *Criminal Procedure Act* 1851 (UK), s 421 of the *Crimes Act* (in the form in which it had existed before the *Crimes (Classification of Offences) Act*) had added to the common law rule in providing for a person charged with a felony or misdemeanour to be found guilty in the alternative of attempting to commit the felony or misdemeanour charged[84]. The abolition of the distinction between felony and misdemeanour necessitated reframing that pre-existing statutory provision. Section 239(2) of the *Criminal Procedure Act*, originally enacted by the *Crimes (Classification of Offences) Act* as s 421(3) of the *Crimes Act* and modelled on s 6(4) of the *Criminal Law Act*, was designed to achieve that result.

66 Section 240 of the *Criminal Procedure Act*, originally enacted as s 421(4) of the *Crimes Act*, had no equivalent in the *Criminal Law Act.* It was a Victorian innovation. The Chief Justice's Law Reform Committee recommended that a provision substantially reproducing s 6(3) of the *Criminal Law Act* in Victoria "should expressly confer upon the Court a wide discretion not to leave an alternative verdict to the jury"[85]. Section 240 was explained at the time of its original enactment as a provision which "empowers a judge to decline to put to a jury some or all of the alternative offences of which the accused may be found guilty"[86].

67 Against the background of s 421(1) of the *Crimes Act* and ss 239 and 240 of the *Criminal Procedure Act*, the content of the duty imposed on the trial judge by s 238 of the *Criminal Procedure Act* is informed by the common law principle that "the duty of the Judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them"[87]. What is necessary for the jury to know "is not determined exclusively by reference to the issues presented by trial counsel" but "is determined by

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83 Victoria, Chief Justice's Law Reform Committee, *Abolition of the Distinction Between Felonies and Misdemeanours*, (1973) at 11.

84 United Kingdom, Criminal Law Revision Committee, *Seventh Report: Felonies and Misdemeanours*, (1965) Cmnd 2659 at 15 [50].

85 Victoria, Chief Justice's Law Reform Committee, *Abolition of the Distinction Between Felonies and Misdemeanours*, (1973) at 10.

86 Victoria, Crimes (Classification of Offences) Bill, Notes on Clauses at 2.

87 *Prudential Assurance Company v Edmonds* (1877) 2 App Cas 487 at 507.

reference to the evidence that is received in the trial, and to any legal principles which that evidence enlivens"[88]. Subject always to the requirement for the trial judge to ensure that the trial is procedurally fair, and subject now to the *Jury Directions Act*, what is required in every case is "an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part"[89].

68 Where the offence charged is murder – the circumstance covered by 421(1) of the *Crimes Act* – it has long been settled that the trial judge is duty-bound to direct as to manslaughter "if there [is] a basis in the evidence on which the jury, not being satisfied of all the elements of murder, could find manslaughter" and to do so irrespective of "the tactics or manoeuvring of the accused or of those representing [the accused]"[90]. The question is always whether there is evidence on which the jury, acting reasonably, could find manslaughter and not murder[91], the trial judge not being duty-bound to direct as to manslaughter if "on no view of the evidence which might reasonably be adopted, would the crime amount to manslaughter and not murder"[92]. If the evidence is sufficient to enliven the duty, failure to perform the duty is an error of law[93].

69 Where the offence charged is other than treason or murder – the circumstance covered by s 239 of the *Criminal Procedure Act* – the outworking of the same common law principle must in my view entail that the trial judge is similarly duty-bound to direct as to the possibility of a finding of guilt of an included offence if there is a basis in the evidence on which the jury, though not satisfied of all the elements of the offence charged, might yet be satisfied of the elements of the included offence. While performance of that duty must be subject always to the requirement for the trial judge to ensure that the trial is procedurally fair, its existence and scope cannot depend on forensic choices

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88 *CTM v The Queen* (2008) 236 CLR 440 at 476 [117]; [2008] HCA 25.

89 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118; [1971] HCA 20, citing *Mancini v Director of Public Prosecutions* [1942] AC 1 at 7.

90 *Varley v The Queen* (1976) 51 ALJR 243 at 245; 12 ALR 347 at 351.

91 *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 169; [1986] HCA 76, citing *Parker v The Queen* (1964) 111 CLR 665 at 681; [1964] AC 1369 at 1392.

92 *Beavan v The Queen* (1954) 92 CLR 660 at 662; [1954] HCA 41.

93 *Gillard v The Queen* (2003) 219 CLR 1 at 14 [26], 15 [32], 34-35 [106], 40 [129]; [2003] HCA 64; *R v Nguyen* (2010) 242 CLR 491 at 505 [50]; [2010] HCA 38.

made by, or on behalf of, an accused as to how the defence case is to be framed. Just as the "authority and responsibility of the judge to instruct the jury on questions of law requires the judge 'to put to the jury every lawfully available defence open to the accused on the evidence even if the accused's counsel has not put that defence and even if counsel has expressly abandoned it'"[94], so too does the authority and responsibility of the judge to instruct the jury on questions of law require the trial judge to put to the jury lawfully available alternative verdicts.

70 The course of authority in the Court of Appeal concerning the duty of a trial judge to direct that the jury may find the accused guilty of an alternative offence under s 239 of the *Criminal Procedure Act*, culminating in *R v Nous*[95] and summarised by Whelan JA in the decision under appeal[96], in my view proceeded wrongly in its identification of the relevant principle. In particular, it proceeded wrongly in applying a different principle from that which governs the duty of a trial judge to direct that the jury may find the accused guilty of an alternative offence under s 421(1) of the *Crimes Act*. The governing principle in each case is not what might be considered in all the circumstances of the trial to be "in the interests of justice" but what the jury needs to know to understand the law which bears on the facts before it. The need always to ensure that the trial is fair may in a particular case constrain the duty of a trial judge to direct that the jury may find the accused guilty of a particular alternative offence but the need for fairness is not the driver of that duty. The prospect sometimes raised "that a veritable cascade of lesser offences would have to be left to the jury"[97] has been addressed within the relevant statutory scheme by the discretion of the trial judge to make an order under s 240 of the *Criminal Procedure Act.*

71 Absent an order under s 240 of the *Criminal Procedure Act*, and before the commencement of the *Jury Directions Act*, a trial judge was in my view required in the performance of the duty imposed by s 238 of the *Criminal Procedure Act* to direct the jury in respect of alternative offences, under s 421(1) of the *Crimes Act* or under s 239 of the *Criminal Procedure Act* alike, whenever it was open on the evidence for the jury to find the accused not guilty of the offence charged but guilty of the alternative offence, unless the giving of the

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94 *Braysich v The Queen* (2011) 243 CLR 434 at 453 [32]; [2011] HCA 14, quoting *Fingleton v The Queen* (2005) 227 CLR 166 at 198 [83]; [2005] HCA 34, and referring to *Pemble v The Queen* (1971) 124 CLR 107 at 117-118.

95 (2010) 26 VR 96.

96 *James v The Queen* [2013] VSCA 55 at [80].

97 Eg *R v Doan* (2001) 3 VR 349 at 359 [32], quoting *Elfar* (2000) 115 A Crim R 64 at 73 [49].

direction would be unfair to the accused in the particular circumstances of the case.

72 That result accords both with the duty of a trial judge to direct in respect of included offences at common law as explained by King CJ in the Supreme Court of South Australia in *Benbolt v The Queen*[98], and with the duty of a trial judge to direct in respect of included offences under both s 6(2) and s 6(3) of the *Criminal Law Act* as explained by Lord Bingham of Cornhill in the House of Lords in *R v Coutts*[99]. Whether it also accords with the position under other statutory regimes does not arise for consideration[100].

73 King CJ expressed his conclusion in *Benbolt* as follows[101]:

> "There are strong considerations of justice and policy in favour of the disposal of all alternatives at the trial and the judge ought not lightly to take a course which would preclude consideration of an alternative to the offence charged. … [H]is duty [is] to raise alternatives on his own initiative if there is a reasonable basis for them in the evidence, subject only to overriding considerations of fairness."

74 The strong considerations of justice and policy to which King CJ alluded in *Benbolt* were best expressed by Lord Bingham in *Coutts*[102]:

> "The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But

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98 (1993) 60 SASR 7 at 12, 19.

99 [2006] 1 WLR 2154 at 2167 [23]-[24]; [2006] 4 All ER 353 at 367-368.

100 See eg *R v Keenan* (2009) 236 CLR 397; [2009] HCA 1, which arose under the *Criminal Code* (Q).

101 (1993) 60 SASR 7 at 19.

102 [2006] 1 WLR 2154 at 2159 [12]; [2006] 4 All ER 353 at 359-360.

> to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge".

Lord Bingham added[103]:

> "A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency."

75 The qualification that the trial judge is not to direct the jury as to its power to find the accused guilty of an included offence open on the evidence where the direction would be unfair to the accused admits of the possibility of a case where the accused may have been deprived by assumptions made in the course of the trial of a fair opportunity of meeting the included offence despite the accused having a fair opportunity of meeting the offence charged. The accused cannot in any case be "taken by surprise: he must [in every case] be given a fair opportunity of meeting the case against him"[104].

76 The qualification also admits of the possibility of a case where the included offence is sufficiently remote from, or trivial in comparison with, the offence charged that consideration of the included offence would risk distracting the jury from consideration of issues raised in respect of the offence charged[105]. Fairness to the accused is not, however, to be dictated by a forensic choice made by, or on behalf of, the accused to run an all-or-nothing defence calculated to maximise the chance of acquittal.

77 Whether failure of the trial judge to perform his or her duty to direct in respect of a lesser included offence gives rise to a substantial miscarriage of justice such as to warrant allowing an appeal against conviction of the offence charged in a particular case is a question quite distinct from the existence of the duty[106]. To that distinct question it is now necessary to turn.

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103 [2006] 1 WLR 2154 at 2167 [23]; [2006] 4 All ER 353 at 368.

104 *Pantorno v The Queen* (1989) 166 CLR 466 at 473; [1989] HCA 18.

105 Cf *R v Maxwell* [1990] 1 WLR 401 at 408; [1990] 1 All ER 801 at 807.

106 Cf *Benbolt v The Queen* (1993) 60 SASR 7 at 19-20; *Elfar* (2000) 115 A Crim R 64 at 70-71 [32]-[34].

The second question: substantial miscarriage of justice

78 Section 276(1)(b) of the *Criminal Procedure Act* obliges the Court of Appeal to allow an appeal against conviction if the appellant satisfies the Court of Appeal that "as the result of an error or an irregularity in … the trial there has been a substantial miscarriage of justice".

79 *Baini v The Queen*[107] interpreted s 276(1)(b) of the *Criminal Procedure Act* to encompass an appeal in which the Court of Appeal is satisfied that there has been a departure from a trial according to law[108] but is not satisfied that the error or irregularity did not make a difference to the conviction[109]. The majority proceeded on the basis that it will ordinarily be enough for the appellant to show that, had the error or irregularity not occurred, the jury may have entertained a doubt as to guilt, following which, as a practical matter, it will be for the respondent to the appeal to articulate the reasoning by which it is sought to show that the conviction was inevitable[110]. The majority emphasised that the Court of Appeal will ordinarily be able to be satisfied that an error or irregularity did not make a difference to the conviction only where it is able to conclude from its review of the record that conviction was inevitable[111].

80 It was not argued in the present appeal that a different approach is warranted where the error or irregularity in a trial is a failure of the trial judge to perform a duty to direct in respect of a lesser included offence. Consistency with *Baini* requires, as the first step in establishing that the error or irregularity has resulted in a substantial miscarriage of justice, that an appellant convicted of the offence charged show that the jury might have entertained doubt as to guilt of the offence charged had the direction in respect of the lesser included offence been given.

81 To discharge that burden, the appellant would ordinarily need to rely on the insight of the majority in *Gilbert v The Queen*[112]. The insight was that the making of a choice may be affected by the variety of choices offered[113], and that

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107 (2012) 246 CLR 469; [2012] HCA 59.

108 (2012) 246 CLR 469 at 479 [25].

109 (2012) 246 CLR 469 at 479 [26].

110 (2012) 246 CLR 469 at 481 [31].

111 (2012) 246 CLR 469 at 481 [33].

112 (2000) 201 CLR 414; [2000] HCA 15.

113 (2000) 201 CLR 414 at 421 [16]-[17], 441 [101].

juries, while they are assumed to understand and follow the directions given by trial judges, are not assumed to take "a mechanistic approach to the task of fact-finding, divorced from a consideration of the consequences", but rather to "make their findings of fact in the context of instructions as to the consequences of such findings, and for the purpose of returning a verdict which expresses those consequences"[114]. The insight was articulated in the context of a choice between murder and manslaughter. In respect of such a choice, it had earlier been said in *Mraz v The Queen* that "it would be ignoring the realities of the matter to assume" that a jury which found murder would necessarily have reached the same conclusion if properly instructed as to the availability of a finding of manslaughter[115].

82 The Supreme Court of the United States acted on the same insight in a somewhat broader context in reasoning that[116]:

> "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction."

83 The potential for a jury's fact-finding to be affected by the range of legally permissible verdicts of which the jury is informed is confined neither to murder cases nor to capital cases[117]. That is not to say, however, that the strength of the inference to be drawn from the *Gilbert* insight into jury decision-making might not be less in a case in which the choice between the lesser included offence and the offence of which an appellant was charged and convicted is less finely balanced, or in which the consequences of finding guilt of the lesser included offence are less stark. Whether an appellant in such a case could show that the jury might have entertained doubt as to guilt of the offence charged and whether the respondent could satisfy the Court of Appeal that conviction of the offence charged was inevitable are issues which do not lend themselves to *a priori* analysis. Their resolution in a particular case might depend very much on the

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114 (2000) 201 CLR 414 at 421 [16].

115 (1955) 93 CLR 493 at 508, 513; [1955] HCA 59.

116 *Beck v Alabama* 447 US 625 at 637 (1980). See also *Spaziano v Florida* 468 US 447 at 455 (1984); *Bobby v Mitts* 179 L Ed 2d 819 at 821-822 (2011).

117 Eg *Keeble v United States* 412 US 205 at 212-213 (1973). See generally Kelman, Rottenstreich and Tversky, "Context-Dependence in Legal Decision Making", (1996) 25 *Journal of Legal Studies* 287.

Court of Appeal's assessment of the jury's actual verdict and of the overall weight of the evidence.

Application

84 The first offence of which the present appellant, Mr James, was charged was that "without lawful excuse [he] intentionally caused serious injury" contrary to s 16 of the *Crimes Act*. To find guilt of that offence, it was necessary for the jury to be satisfied that Mr James intended to cause serious injury, rather than merely to cause some injury[118]. The allegation of the offence nevertheless included that, without lawful excuse, Mr James intentionally caused injury – an offence against s 18 of the *Crimes Act*, in respect of which it was sufficient for the jury to be satisfied that Mr James intended to cause some injury. The offence of intentionally causing injury contrary to s 18 of the *Crimes Act* was therefore included within the first offence charged for the purposes of s 239(1) of the *Criminal Procedure Act*.

85 The second offence of which Mr James was charged was that "without lawful excuse [he] recklessly caused serious injury" contrary to s 17 of the *Crimes Act*. To find guilt of that offence, it was necessary for the jury to be satisfied beyond reasonable doubt that Mr James foresaw the probability that his act would cause serious injury, rather than that he merely foresaw the probability that his act would cause some injury. The allegation of the offence nevertheless included that, without lawful excuse, Mr James recklessly caused injury – an offence against s 18 of the *Crimes Act*, in respect of which it was sufficient for the jury to be satisfied that Mr James foresaw the probability that his act would cause some injury. The offence of recklessly causing injury contrary to s 18 of the *Crimes Act* was therefore included within the second offence charged for the purposes of s 239(1) of the *Criminal Procedure Act*.

86 For the reasons given by Priest JA in the Court of Appeal[119], on the evidence adduced at the trial, it was open to the jury not to be satisfied that Mr James intended to cause serious injury but to be satisfied that he intended to cause some injury. Equally, it was open to the jury not to be satisfied that Mr James foresaw the probability that his act would cause serious injury but to be satisfied that he foresaw the probability that his act would cause some injury.

87 The duty of the trial judge was therefore to direct the jury in respect of alternative offences against s 18 of the *Crimes Act*. The duty arose despite the fact that the possibility of an alternative verdict of guilty of such an offence was not raised in the trial until suggested by the prosecutor during the deliberations of

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118 *Westaway* (1991) 52 A Crim R 336 at 337.

119 *James v The Queen* [2013] VSCA 55 at [180]-[181].

the jury. It also arose despite the fact that counsel for Mr James appears for tactical reasons to have eschewed such a direction. There is nothing to indicate that the giving of the direction, even at that late stage of the trial, would have been procedurally unfair to Mr James. Her Honour's rejection of the late suggestion by the prosecutor appears to have been based rather on the understanding that informing the jury of the possibility of the alternative verdicts would have deprived Mr James of the possibility of an acquittal on the all-or-nothing case Mr James had been prepared to run.

88 The verdict of the jury that Mr James was guilty of the offence of intentionally causing serious injury demonstrated that the jury was not satisfied that Mr James was merely reckless. It is difficult in that circumstance to see how the jury might have entertained doubt as to the guilt which it found had the direction in respect of recklessly causing injury been given. It is not difficult, however, to see how the finding of guilt might well have been different had the direction in respect of intentionally causing injury been given. Consistent with the reasons given by Priest JA in the Court of Appeal, it is reasonable to consider that the jury may have been less inclined to be satisfied that Mr James intended to cause serious injury if presented with the alternative and the conviction of the offence of intentionally causing serious injury cannot be found to have been inevitable[120].

89 The conclusion which follows is that the failure to direct that the jury might find Mr James guilty of the alternative offence of intentionally causing injury resulted in a substantial miscarriage of justice.

Orders

90 I would allow the appeal and set aside the decision of the Court of Appeal. In its place, I would allow Mr James' appeal to the Court of Appeal, set aside his conviction, and order a new trial.

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120 *James v The Queen* [2013] VSCA 55 at [217]-[218].