HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

RODNEY PETER PICKERING APPELLANT

AND

THE QUEEN RESPONDENT

Pickering v The Queen
[2017] HCA 17
3 May 2017
B68/2016

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 6 May 2016, and in its place order that:*

   (a) the appeal be allowed;

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

   (c) a new trial be had.

On appeal from the Supreme Court of Queensland

Representation

M J Copley QC with C J Grant for the appellant (instructed by Anderson Telford Lawyers)

M R Byrne QC with G J Cummings for the respondent (instructed by the Director of Public Prosecutions (Qld))

CATCHWORDS

Pickering v The Queen

Criminal law – Justification and excuse – Resisting actual and unlawful violence threatened to person – Where appellant stabbed deceased – Where appellant acquitted of murder but convicted of manslaughter – Where s 31(1) of *Criminal Code* (Q) not left to jury – Whether appellant able to rely on s 31(1) to deny criminal responsibility in relation to offence of manslaughter – Whether s 31(2) renders s 31(1) unavailable wherever evidence discloses that act of accused constitutes offence described in s 31(2) regardless of charge.

Words and phrases – "act", "criminally responsible", "liable to punishment", "offence".

Criminal Code (Q), s 31.

1 KIEFEL CJ AND NETTLE J. The appellant was tried in the Supreme Court of Queensland for the murder of Ivan John Owens ("the deceased"). He was acquitted of murder but convicted of manslaughter. The appellant's appeal to the Court of Appeal from that conviction was dismissed[1].

2 The question on this appeal is whether a miscarriage of justice occurred by reason of the failure of the trial judge to leave to the jury the possible application of s 31(1)(c) of the *Criminal Code* (Q) ("the Code"). For the reasons which follow, that question should be answered affirmatively and the appeal should be allowed.

Relevant statutory provisions

3 So far as is relevant, s 31 of the Code provides:

> "(1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say –
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> …
>
> (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person …
>
> (2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element …"

The facts

4 The appellant's evidence concerning the events in question may be stated shortly. The appellant and the deceased were best friends. On the night in question they had been drinking with a group of people in a hotel. The appellant and the deceased argued and the deceased challenged the appellant to a fight, but it did not take place. When the appellant went home he noticed that his 22 year old son was not there and decided to look for him. He took a fishing knife with him because he was concerned that he might come across the deceased in his search. He thought that he might need to produce a knife to keep the deceased at bay.

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1 *R v Pickering* [2016] QCA 124.

5 The appellant went to a house where he knew some people would be gathered. He entered the yard and was standing near a vehicle when the deceased and another man approached him. The deceased became very angry and aggressive towards the appellant, despite the attempts of the appellant and others to placate him. The appellant pulled out his knife and told the deceased to stay away. He repeated this a number of times. The appellant reminded the deceased about another "good mate" who had "killed himself over a woman". The deceased reacted angrily to this and came towards the appellant. The appellant was pressed up against the vehicle and turned to see the man who was accompanying the deceased raise a steel bar above his head. The appellant said that he was scared and begged the deceased to stay away from him. He had never seen the deceased so angry before. He said that the deceased was going to "steam-roll me ... he was going to wipe me out". Suddenly, he said, the deceased was on top of him and his knife was in the deceased.

6 The deceased died due to an injury inflicted by the appellant when he stabbed the deceased in the left upper part of his chest under the collarbone. The blade of the knife severed a major artery and a major vein. Only moderate force was necessary to inflict the injury given the sharpness of the knife used by the appellant.

The purpose of s 31(1) and (2)

7 The purpose of s 31(1) and (2) is clear. Section 31(1) provides exculpation to a person who would otherwise be criminally responsible under the Code for an act or omission in the circumstances there specified. Section 31(2) excepts from s 31(1) certain offences. If the offence for which a person would be criminally responsible is one to which s 31(2) applies, that provision maintains the person's criminal responsibility.

Proceedings in the Court of Appeal

8 Before the Court of Appeal (Fraser JA, Holmes CJ and Gotterson JA agreeing), it was not in dispute, and their Honours accepted[2], that s 31(1)(c) was fairly raised on the evidence at trial unless it were excluded by s 31(2). No direction was given by the trial judge as to those provisions. Although the jury were instructed to consider whether the appellant was guilty of manslaughter in the event that they acquitted him of murder, they were not directed to consider whether the prosecution negatived the possibility that the appellant's act of stabbing was an act which came within s 31(1)(c).

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2 *R v Pickering* [2016] QCA 124 at [9].

9 It was also not in dispute, and the Court of Appeal found[3], that there was a reasonable possibility that the trial judge's failure to direct the jury on s 31(1)(c) may have affected the verdict. The Court of Appeal accepted[4] that, if s 31(2) did not exclude the application of s 31(1)(c), there had been a miscarriage of justice. In that event, it would follow that the appellant's conviction should be quashed and a new trial ordered. However, the Court of Appeal concluded[5] that the appellant's case fell within the exceptions stated in s 31(2).

The appellant's arguments before the Court of Appeal

10 The appellant's argument before the Court of Appeal necessarily focussed upon the construction of s 31(2). The appellant argued that s 31(2) in its terms did not contemplate excluding from the protective provision of s 31(1) an act which constituted manslaughter. The Crown argued that because the act for which he sought exculpation caused grievous bodily harm, s 31(2) applied to it. This was so even though the appellant had not been charged with an offence of which unlawfully causing grievous bodily harm is an element.

11 The appellant submitted that the "act" for the purpose of s 31(1)(c) was the stabbing of the deceased. The question for the jury was whether the act of stabbing the deceased was reasonably necessary in order to resist actual and unlawful violence threatened to him. Section 31(2) would not serve any useful purpose if it denied the protection given by s 31(1) to an act which was not the subject of the charge. The phrase "an act ... which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element" should be understood to refer to the "offence" in respect of which he seeks exculpation, namely manslaughter.

12 The appellant contended that this construction was supported by the accepted meaning of the word "act" in Ch 5 of the Code, namely a physical action distinct from its consequences. The expression "which would constitute ... an offence of which grievous bodily harm … is an element" did not apply merely because the evidence showed that the act in question was productive of grievous bodily harm.

13 The final limb of the appellant's argument was that, as a matter of construction, s 31(2) could not apply because grievous bodily harm is not an "element" of the offence of manslaughter.

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3 *R v Pickering* [2016] QCA 124 at [17].

4 *R v Pickering* [2016] QCA 124 at [18].

5 *R v Pickering* [2016] QCA 124 at [47].

The Court of Appeal's reasoning

14 The Court of Appeal rejected the appellant's arguments and concluded that the appellant's case fell within the exceptions stated in s 31(2). The Court of Appeal considered that the words in s 31(2), "an act … which would constitute … an offence of which grievous bodily harm to the person of another ... is an element", were to be construed according to their ordinary meaning, considered in their statutory context[6]. The context for s 31 was provided by the sentences which might be imposed for the offences of manslaughter and of unlawfully doing grievous bodily harm and the inferences to be drawn from them about legislative policy. The Code provided a more severe maximum penalty for manslaughter than for doing grievous bodily harm. The maximum penalty for manslaughter has always been life imprisonment (s 310); for unlawfully doing grievous bodily harm it is 14 years imprisonment (s 320).

15 The Court of Appeal discerned the policy of the Code to be that, because manslaughter involves the death of a person, it is generally to be regarded as a much more serious offence than an offence of doing grievous bodily harm. On the appellant's construction, s 31(2) would exclude the protection of s 31(1) where the offence charged is unlawfully doing grievous bodily harm, but not where the offence charged is manslaughter. In any given case, the only relevant factual difference between the two offences might be that, in the case of manslaughter, the offence results in death, whereas, in the case of unlawfully doing grievous bodily harm, the offence results in something very much less; and, depending on the circumstances, it might be entirely fortuitous whether an act of doing grievous bodily harm results in one or other outcome. On that basis, the Court of Appeal concluded[7] that the effect of the appellant's construction could not have been intended by Parliament, and that an alternative construction which could avoid those results should be adopted.

16 The Court of Appeal accepted that there was some support for the appellant's submission that the "act" referred to in s 31(1)(c) and in s 31(2) is the physical act which is an element of the offence charged. It observed[8] that in *Larsen v G J Coles & Co Ltd*[9], the Full Court took the relevant act in relation to s 23 of the Code to be the "act charged". Their Honours also observed[10] that, in

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6 *R v Pickering* [2016] QCA 124 at [41]-[42].

7 *R v Pickering* [2016] QCA 124 at [43]-[45].

8 *R v Pickering* [2016] QCA 124 at [44].

9 (1984) 13 A Crim R 109 at 110-111.

10 *Larsen v G J Coles & Co Ltd* (1984) 13 A Crim R 109 at 111.

that case, the "act or omission" in s 24 was also the act or omission charged. The Court of Appeal allowed[11] that it was not difficult to accept that the reference in s 31(1)(c) to the "act" is to the "act or omission" identified in the introductory words of s 31(1). But, their Honours said, it did not follow that the exception in s 31(2) applies only in relation to an act or omission which is an element of the particular offence with which the appellant was charged[12].

17 The Court of Appeal held[13] that "the criterion of operation of the exception in s 31(2) is a specified quality of the act or omission referred to in s 31(1): if the act or omission 'would constitute' an offence described in s 31(2), then protection for that 'act or omission' is excluded". The expression "would constitute" did not require that the frame of reference be confined to the offence charged.

18 On the Court of Appeal's construction, s 31(2) applied to offences whether charged or not. The construction adopted by the Court of Appeal was that whatever offence is charged the question is "whether or not the act or omission for which the accused seeks protection in relation to the offence charged constitutes one of the offences described in s 31(2)"[14].

19 In the result, the construction adopted by the Court of Appeal was applied[15] to the appellant's case as follows. The relevant "act" in s 31(1)(c), for which the appellant sought protection in relation to the offence of manslaughter, was the appellant's act of stabbing the deceased in the way he did. Grievous bodily harm was an element of the offence of unlawfully doing grievous bodily harm[16]. There was no doubt, on the medical evidence, that the injuries inflicted by the appellant amounted to grievous bodily harm. It followed, in the terms of s 31(2), that the appellant's act of stabbing the deceased was an act that would constitute the offence of unlawfully doing grievous bodily harm. Therefore s 31(2) operated to exclude the protection under s 31(1)(c). It did not matter that the deceased died of his injuries and the appellant was charged with murder and convicted of manslaughter.

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11 *R v Pickering* [2016] QCA 124 at [44].

12 *R v Pickering* [2016] QCA 124 at [44].

13 *R v Pickering* [2016] QCA 124 at [45].

14 *R v Pickering* [2016] QCA 124 at [45].

15 *R v Pickering* [2016] QCA 124 at [47].

16 *Criminal Code* (Q), s 320.

Difficulties with the Court of Appeal's reasoning

20 The Court of Appeal's reasoning is attended by a number of difficulties. Principally, it extends the focus of the inquiry as to criminal responsibility beyond the physical act the subject of the offence charged, to the consequences of that act. Although the Court of Appeal explained that its construction had regard to the quality of the act in question, the "quality" to which their Honours referred was the nature and extent of the injury inflicted, namely, "grievous bodily harm"[17]. The difficulty with that approach is that, although "grievous bodily harm" is often used, in a shorthand way, to refer to the offence of unlawfully doing grievous bodily harm, "grievous bodily harm" is a consequence, not a quality, of an act causing grievous bodily harm.

21 The words "a person is not criminally responsible" appear in a number of provisions in Ch 5 of the Code which concern criminal responsibility, such as ss 22, 23, 25 and 27. "Criminally responsible" is defined by s 1 to mean "liable to punishment as for an offence". "Offence" is defined in s 2 as "[a]n act or omission which renders the person doing the act or making the omission liable to punishment". These sections, like s 31(1), provide an excuse to a person from criminal responsibility for an offence for which they would otherwise be liable to punishment. That is to say, they are directed to the offence or offences with which a person is charged. As the appellant points out, cognate provisions in Ch 5, which provide excuses from criminal responsibility for acts, have been held to refer to the offence with which the accused person is charged[18]. They do not refer to the consequences of the offence with which the person is charged.

22 The "act" constituting an offence for which a person may be excused from criminal responsibility has a settled meaning. In *Kaporonovski v The Queen*[19], Gibbs J was concerned with the "act" referred to in s 23 of the Code. It provided, in relevant part, that "a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will". His Honour said[20] that

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17 Section 1 of the *Criminal Code* (Q) relevantly provides that "grievous bodily harm" includes "any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health".

18 *Walden v Hensler* (1987) 163 CLR 561 at 573, 603; [1987] HCA 54; *Stevens v The Queen* (2005) 227 CLR 319 at 324 [11]; [2005] HCA 65; *Larsen v G J Coles & Co Ltd* (1984) 13 A Crim R 109 at 111.

19 (1973) 133 CLR 209 at 231; [1973] HCA 35.

20 *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231.

the "act" to which the section referred was some physical action apart from its consequences. His Honour gave as examples the firing of the rifle rather than the wounding in *Vallance v The Queen*[21], and the wielding of the stick as compared to the killing of the baby in *Timbu Kolian v The Queen*[22]. In the present case the "act" in question, in both s 31(1) and (2), is the physical act of the appellant stabbing the deceased. It does not include the physical harm the deceased suffered as a consequence.

23 Section 31(2) relevantly excepts from the exculpatory provisions of s 31(1) murder and those offences of which grievous bodily harm is an element. The only reference to "an act" is that which constitutes the offence of murder. In terms, s 31(2) is not concerned with an act having a particular "quality" which is to be discerned from its consequences. The inquiry is directed to whether the offence in question is either murder or an offence of which grievous bodily harm is an element. Manslaughter is not one of those offences.

24 Finally, as Fraser JA acknowledged[23], critical to the Court of Appeal's reasoning was the meaning to be given to the words "would constitute ... an offence" in s 31(2). It was by reference to these words that their Honours widened the operation of s 31(2) beyond murder and the other offences identified in s 31(2) to any act which, although not charged as one of the other offences identified in s 31(2), would be capable of constituting one of those offences. But s 31(2) is not constructed in that way. The "act" it refers to is the act which constitutes murder. According to their natural and ordinary meaning, the words "act ... which would constitute the crime of murder" mean simply that, were it not for the operation of s 31(1), the act would constitute murder and the accused is criminally responsible for that act. The words "which would constitute" are syntactically unconnected to the other offences identified in s 31(2). The effect of s 31(2) is thus to maintain that criminal responsibility only for murder and the other offences to which it refers, by withdrawing those offences from the operation of s 31(1).

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21 (1961) 108 CLR 56; [1961] HCA 42.

22 (1968) 119 CLR 47; [1968] HCA 66.

23 *R v Pickering* [2016] QCA 124 at [45].

The proper construction of s 31(2)

25 The definition of an offence determines its elements. In *Kaporonovski v The Queen*[24], McTiernan ACJ and Menzies J said[25]:

> "Prima facie an offence of which an assault is an element means an offence which is not committed unless there be an assault, for it is the definition of an offence which determines its 'elements'."

26 Manslaughter is defined by s 303 as "unlawfully kill[ing] another under such circumstances as not to constitute murder". Unlawful killing refers to causing death without authorisation, justification or excuse[26]. Critically, grievous bodily harm is not an element of manslaughter.

27 Because s 31(1) and s 31(2) are concerned with an act for which a person may be criminally responsible, the offence to which those provisions refer is that with which an accused is charged or a lesser included offence of which the accused may be convicted. Properly construed, therefore, s 31(2) relevantly provides that if, but for s 31(1), the offence charged or a lesser included offence of which the accused is liable to be convicted is murder or one of which grievous bodily harm is an element, the accused cannot be excused under s 31(1)(c) from the act constituting the offence.

Policy concerns

28 Central to the Court of Appeal's reasoning were concerns about the seriousness of the crime of manslaughter relative to the offence of unlawfully doing grievous bodily harm. As the Court of Appeal observed[27], on the appellant's construction, a person would be criminally responsible for that offence but not for manslaughter despite the maximum sentence for the latter being much higher.

29 It may be accepted that s 31(2) may produce some anomalous results. As has been observed, s 31(2) applies to the offence of intentionally causing grievous bodily harm, and the maximum sentence for intentionally causing

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24 (1973) 133 CLR 209.

25 *Kaporonovski v The Queen* (1973) 133 CLR 209 at 217.

26 *Criminal Code* (Q), ss 291, 293.

27 *R v Pickering* [2016] QCA 124 at [43].

grievous bodily harm, like manslaughter, is life imprisonment[28]. Section 31(2) is apt also to refer to the lesser offence of unlawfully doing grievous bodily harm, for which the sentence is much less. Thus, depending on the facts of a given case, it may appear odd that an accused is entitled to claim the benefit of s 31(1) in answer to a charge of manslaughter, but, had the victim not died, the accused would not have been entitled to claim the benefit of s 31(1) in answer to a charge of intentionally causing grievous bodily harm or of doing grievous bodily harm. As against that, however, manslaughter is an offence that may be committed in an infinite variety of circumstance, ranging from what for all intents and purposes is tantamount to murder down to something which, when viewed objectively, is no more heinous than a moment's inattention to a task in hand[29]. For that reason, it is notorious that manslaughter attracts a wider range of sentences than any other crime[30]. That being so, it does not present as illogical for the legislature to have determined that the offence of manslaughter should be included within the protection of s 31(1)(c).

30 A legislative choice has been made as to which offences will not be subject to the exculpatory provision of s 31(1). The offence of manslaughter is not an offence of murder and is not an offence of which grievous bodily harm is an element. A person charged with manslaughter is not to be denied the benefit of s 31(1)(c) because the injury inflicted in the circumstances there described amounts to grievous bodily harm.

31 During the course of argument on this appeal a question was raised as to whether the Court of Appeal's construction would create difficulties, in particular for the defence, with respect to the evidence to be led, given that s 31(2) could apply to offences not the subject of charges. The appellant did not suggest that these difficulties were insurmountable, although there are perhaps further reasons for concluding that s 31(2) does not have the effect for which the Crown contended. It is not necessary to consider the question in any detail. The terms of s 31(2) are clear.

Conclusion

32 The appeal should be allowed, the appellant's conviction quashed and a new trial ordered.

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28 *Criminal Code* (Q), s 317.

29 *R v Lavender* (2005) 222 CLR 67 at 70 [2]; [2005] HCA 37.

30 *R v Blacklidge* unreported, New South Wales Court of Criminal Appeal, 12 December 1995 per Gleeson CJ.

33 GAGELER, GORDON AND EDELMAN JJ. The appellant was tried in the Supreme Court of Queensland before a judge and jury on a count of murder. The Crown alleged that the appellant had stabbed the deceased. The appellant was acquitted of murder but convicted of manslaughter pursuant to s 576(1) of the *Criminal Code* (Q) ("the Code").

34 The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland on the sole ground that a miscarriage of justice had occurred because s 31(1)(c) of the Code was not left to the jury. Under s 31(1)(c), a person is not criminally responsible for an act if the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person. But under s 31(2), that protection does not extend, among other things, "to an act … which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element".

35 It was not in dispute that s 31(1)(c) was fairly raised on the evidence at trial unless it was excluded by s 31(2)[31]. The Court of Appeal (Fraser JA, Holmes CJ and Gotterson JA agreeing) held that s 31(2) applied if, on the evidence, the act for which an accused seeks to avoid criminal responsibility would constitute an offence of the kinds described in s 31(2), irrespective of whether such an offence had actually been charged[32]. It was not suggested that grievous bodily harm or an intention to cause such harm was an "element" of the offence of manslaughter in Queensland[33]. However, the Court of Appeal held s 31(1)(c) did not avail the appellant, because his act of stabbing the deceased in the way he did was an act that "would constitute" the offence of unlawfully doing grievous bodily harm to another[34], an offence described in s 31(2)[35]. The appellant's appeal was therefore dismissed.

36 The issue on appeal to this Court is narrow. Does s 31(2) of the Code apply to an act only if the accused has been *charged* in relation to that act with an offence of the kinds described in s 31(2) and seeks to invoke s 31(1) to deny criminal responsibility on that charge? Or does s 31(2) apply wherever the

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31 *R v Pickering* [2016] QCA 124 at [4], [9].

32 *Pickering* [2016] QCA 124 at [45].

33 See s 303 of the Code.

34 *Pickering* [2016] QCA 124 at [47].

35 See s 320 of the Code.

evidence discloses that the act done by the accused constitutes one of the described offences regardless of the charge? The former, not the latter, is the correct construction of s 31(2). Section 31(1) is not available to deny criminal responsibility on a charge of any of the offences described in s 31(2). Section 31(1) may, if it is open on the evidence, be available in relation to any other offence that is charged or that is available as an alternative verdict.

37 The appeal should be allowed.

Statutory framework

38 Section 31, headed "Justification and excuse—compulsion", is located in Ch 5 (entitled "Criminal responsibility") of the Code. The section provides:

> "(1) A person is not *criminally responsible for an act* or omission, *if the person does or omits to do the act under any of the following circumstances*, that is to say—
>
> (a) in execution of the law;
>
> (b) in obedience to the order of a competent authority which he or she is bound by law to obey, unless the order is manifestly unlawful;
>
> (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person in the person's presence;
>
> (d) when—
>
> (i) the person does or omits to do the act in order to save himself or herself or another person, or his or her property or the property of another person, from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and
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> (ii) the person doing the act or making the omission reasonably believes he or she or the other person is unable otherwise to escape the carrying out of the threat; and
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> (iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened.

(2) *However, this protection does not extend to an act* or omission *which would constitute* the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.

(3) Whether an order is or is not manifestly unlawful is a question of law." (emphasis added)

39 "[C]riminally responsible" is defined as "liable to punishment as for an *offence*"[36] (emphasis added). "[O]ffence", in turn, is defined as "[a]n act or omission which renders the person doing the act or making the omission liable to punishment"[37]. The "act" constituting an offence refers to some "physical action, apart from its consequences"[38].

Operation of s 31

40 Section 31(1) relevantly provides that a person is "not criminally responsible" for an act if the person does that act in one of the specified circumstances. That is, in relation to that *act*, they are not "liable to punishment as for an *offence*"[39] (emphasis added). "[O]ffence" is relevantly defined as an act which renders the person doing the act liable to punishment[40]. It necessarily follows that an act done in one of the circumstances specified in s 31(1) is not an offence; the act does not constitute an offence.

41 Section 31(2), in its terms, qualifies the scope of s 31(1). Section 31(2) relevantly provides that the protection in s 31(1) does not extend to an act which "*would* constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element" (emphasis added). It applies where the act "would constitute", not "constitutes", one of the described offences. It is conditional. Accordingly, it is necessary to

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36 s 1 of the Code.

37 s 2 of the Code.

38 *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231; see also at 241; [1973] HCA 35.

39 See the definition of "criminally responsible" in s 1 of the Code.

40 s 2 of the Code.

identify the condition which enlivens s 31(2). Put another way, the question is: "would constitute" if, or but for, what?

42 Sub-sections (1) and (2) of s 31 apply in sequence. Section 31(2) can be enlivened only where an accused seeks to invoke s 31(1) in relation to a particular charge. Therefore, the conditional or hypothetical "would" logically directs attention to the effect of s 31(1). It logically raises the question: in circumstances where the accused seeks to invoke s 31(1) (so that the relevant act, done in one of the specified circumstances, does not constitute an offence), would that act constitute one of the offences described in s 31(2) but for the operation of s 31(1)?

43 That understanding of s 31(2) has the following consequences. First, s 31(2) only applies to an act if the accused has, in relation to that act, been charged with one of the described offences (or such an offence is available as a statutory alternative to the offence charged[41]) and the accused seeks to invoke s 31(1) to exculpate himself or herself in relation to the described offence. Contrary to the conclusion of the Court of Appeal, s 31(2) is not directed to, or concerned with, whether the evidence discloses that the accused committed one of the described offences regardless of the charge.

44 Second, where a single act is alleged to constitute multiple offences (or where there is provision for a statutory alternative verdict), s 31(2) applies to that act only in relation to the offences which are described in s 31(2). That may be illustrated by reference to the circumstances of this case, where the appellant was charged with murder and a verdict of manslaughter was available as a statutory alternative. In such circumstances, s 31(2) prevents an accused from relying on s 31(1) in relation to the primary charge of murder, but it does not render s 31(1) unavailable in relation to the alternative verdict of manslaughter.

45 In short, the practical effect of s 31(2) is as follows. Section 31(1) is not available to deny criminal responsibility on a charge of any of the offences described in s 31(2). Section 31(1) may, if it is open on the evidence, be available in relation to any other offence that is charged or that is available as an alternative verdict.

46 In the Court of Appeal's view, that would produce a "surprising" result in that the protection afforded by s 31(1) would be available for manslaughter but not for unlawfully doing grievous bodily harm[42]. The result was said to be

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41 See Ch 61 ("Effect of indictment") of the Code.

42 See *Pickering* [2016] QCA 124 at [44].

surprising because the offence of manslaughter involves the death of a person and is therefore "generally to be regarded as a much more serious offence" than the offence of unlawfully doing grievous bodily harm, and the Code recognises this by providing "a more severe maximum penalty for manslaughter than for unlawfully doing grievous bodily harm"[43]. However, the force of that concern is diminished once it is acknowledged that there are other offences not described in s 31(2) which attract a maximum penalty greater than the maximum penalty for unlawfully doing grievous bodily harm. The protection provided by s 31(1) extends also to those offences, despite their seriousness.

47 Moreover, "[f]or more than a hundred years, judges in all Australian jurisdictions, and in England, have observed that, of all serious offences, manslaughter attracts the widest range of possible sentences"[44]. That observation reflects the fact that the culpability of persons convicted of manslaughter varies widely depending on the circumstances. The proper construction of s 31 allows for the possibility that a person charged with manslaughter, whose culpability was very low, could be absolved of criminal responsibility under s 31(1).

The Crown's alternative construction

48 The alternative construction of s 31(2) urged by the Crown, and adopted by the Court of Appeal, asks in effect whether the relevant act would constitute one of the described offences *if* such an offence had been charged. That construction is not supported by the text, context or purpose of s 31(2).

49 Put simply, s 31(2) does not, in its terms or otherwise, ask if the act would constitute a given offence if that offence had been charged. And whether an offence is charged does not alter whether the act constitutes an offence in the sense that the accused is "liable to punishment" for the act[45].

50 What the charge on the indictment determines is whether the accused is in jeopardy of being convicted of a given offence. That is what s 31 is directed to: it provides a basis for exculpation in relation to that offence (and any statutory alternative), except where the charge on the indictment is for one of the offences described in s 31(2).

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43 See *Pickering* [2016] QCA 124 at [43].

44 *R v Lavender* (2005) 222 CLR 67 at 77 [22]; [2005] HCA 37.

45 s 2 of the Code.

51 The parties referred to a number of other provisions in the Code which may broadly be termed "defences"[46]. The Crown did not contend that any of those defences would expand the scope of the trial in the way that s 31(2), on the Crown's construction, would do. In particular, it was not contended that the availability of any of those defences turned on proof of the elements of a separate offence that was not charged. And there is nothing in the text of the Code or its drafting history[47] to suggest that s 31(2) was intended, in contrast to those other defences, to be engaged by proof of the elements of a separate offence that was not charged.

52 Moreover, the Crown's alternative construction, if adopted, would create substantial practical difficulties for the conduct of some criminal trials and, potentially, dramatically increase their complexity. That statement requires explanation.

53 In any trial, evidence is received by the court for the purpose of deciding the issues of fact that arise for determination, and to the extent that the evidence is relevant to those issues of fact. In a criminal trial of an indictable offence, the indictment identifies the alleged offence, and the elements of that offence (to the extent that they are disputed) define the facts in issue[48]. In short, the trial is directed at the offence that has been charged, and the evidence adduced is to be directed at the facts in issue arising out of that offence. And where there is a multiple-count indictment, it is usually necessary for the trial judge to give directions to the jury to consider separately the evidence relating to each count[49].

54 It follows that, ordinarily, evidence is not directed at offences which might hypothetically have been charged but were not in fact charged. In response to that issue, the Crown contended that, if its construction were adopted so that s 31(2) precluded exculpation regardless of the charge the subject of the indictment and trial, counsel at trial would simply operate on that basis from the start. But that contention does not fully grapple with the effects of the alternative construction on the criminal law process and, in particular, with how it could unnecessarily increase the complexity of a criminal trial. It would require the

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46 See ss 22-25, 270-279 of the Code.

47 See Griffith, *Draft of a Code of Criminal Law*, (1897) at 16.

48 See *HML v The Queen* (2008) 235 CLR 334 at 350-352 [4]-[5]; [2008] HCA 16.

49 See, eg, *KRM v The Queen* (2001) 206 CLR 221 at 234 [36], 257 [106], 260 [118], 263-264 [132]-[133]; [2001] HCA 11; *MFA v The Queen* (2002) 213 CLR 606 at 617 [34]; [2002] HCA 53.

prosecution to prove the elements of a separate, uncharged offence, effectively requiring a trial within a trial, for the sole purpose of determining whether s 31(2) was engaged; not for the purpose of proving the offence charged. That, in turn, would run the risk of undermining the forensic choices of defence counsel: a decision to rely on s 31(1) would have to take account of the possibility that the prosecution might in turn lead evidence to prove an offence not charged – or, indeed, multiple offences not charged. It may be accepted that the consequences of the alternative construction for the conduct of the trial might be less onerous in some cases than in others. But that does not reduce the force of the preceding observations. The proposition that s 31(2) was intended to have those large consequences should not be readily accepted.

Conclusion

55 For those reasons, the appeal should be allowed. The protection afforded by s 31(1)(c) was available to the appellant in relation to the offence of manslaughter, being a statutory alternative to the offence charged on the indictment.

56 We agree with the orders proposed by Kiefel CJ and Nettle J.