HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND EDELMAN JJ

PAUL IAN LANE APPELLANT

AND

THE QUEEN RESPONDENT

Lane v The Queen
[2018] HCA 28
20 June 2018
S308/2017

ORDER

1. *Appeal allowed.*

2. *Set aside order 4 of the Court of Criminal Appeal of the Supreme Court of New South Wales dated 22 March 2017 and in lieu thereof order that:*

   (a) the appellant's appeal to that Court be allowed;

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

   (c) a new trial be had.

On appeal from the Supreme Court of New South Wales

Representation

S J Buchen with G E L Huxley for the appellant (instructed by Legal Aid NSW)

W J Abraham QC with H R Roberts for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Lane v The Queen

Criminal law – Appeal against conviction – Application of proviso – Where appellant convicted of manslaughter – Where either of two acts of appellant may have caused death of deceased – Where trial judge erred in failing to direct jury as to requirement that it be unanimous as to specific act causing death – Whether "no substantial miscarriage of justice has actually occurred" – Whether absence of unanimity direction precluded application of proviso.

Words and phrases – "fundamental defect", "nature and effect of the error", "presuppositions of the trial", "proviso", "reasonable doubt", "substantial miscarriage of justice", "unanimity direction", "unanimous".

Criminal Appeal Act 1912 (NSW), s 6(1).

1 KIEFEL CJ, BELL, KEANE AND EDELMAN JJ. At the appellant's trial for murder, the Crown relied on two physical interactions between the appellant and the deceased, each of which was alleged to have involved a blow by the appellant capable of having caused the death of the deceased. The appellant was acquitted of murder but convicted of manslaughter.

2 The Court of Criminal Appeal of the Supreme Court of New South Wales held that the trial judge erred in failing to direct the jury that it must be unanimous as to which actions on the part of the appellant caused the death of the deceased. Nevertheless, the Court of Criminal Appeal, by majority, dismissed the appeal on the basis that no substantial miscarriage of justice had actually occurred, as the jury could not have been satisfied beyond reasonable doubt that the first action of the appellant caused the death and it was not open to the jury to entertain a reasonable doubt of the appellant's guilt of manslaughter by the evidence of the second interaction.

3 The issue in the appeal to this Court is whether the Court of Criminal Appeal erred in concluding that no substantial miscarriage of justice actually occurred by reason of the failure of the trial judge to give the necessary unanimity direction.

4 The appeal to this Court must be allowed. The proviso to the common form criminal appeal provision in s 6(1) of the *Criminal Appeal Act* 1912 (NSW), which authorises the Court of Criminal Appeal to dismiss an appeal against conviction if it considers that no substantial miscarriage of justice has actually occurred, could not be applied to cure the uncertainty as to whether the jury's verdict in this case was unanimous that resulted from the trial judge's failure to give the specific unanimity direction that was required.

The trial

5 The appellant was arraigned on an indictment in the Supreme Court of New South Wales charging him with the murder of the deceased, Peter Morris. The offence with which he was charged was alleged to have occurred late on the evening of 15 September 2012. The appellant pleaded not guilty.

The evidence of the incident

6 The appellant and the deceased had been drinking at the Commercial Hotel in Casino. Each was in his mid-50s, intoxicated to some degree, and

previously unknown to the other. Each left the hotel with a companion, the deceased with Mr Schwager and the appellant with his son[1].

7 After the men left the hotel, there was an altercation between them occurring on the footpath and roadway outside a dental surgery near the hotel. Much of the altercation was captured by a CCTV security camera located nearby[2].

8 The CCTV footage captured four events. In the first, the deceased turned the appellant around and forced him against the shopfront of the dental surgery. In the second, the deceased retreated towards the roadway with the appellant in pursuit. The deceased fell backwards on the roadway and struck his head ("the first fall"). In the third, Mr Schwager approached the appellant, who then punched Mr Schwager, causing him to fall to the ground near a telegraph pole. In the meantime, the deceased had risen to his feet and faced the appellant. In the fourth, the deceased could be seen to fall to the road a second time ("the second fall"). At that point he lost consciousness[3]. He died while in care at the Southport Hospital nine days later[4].

9 The CCTV footage did not clearly depict the appellant punching the deceased before either fall. Although the CCTV footage did not show an actual striking of the deceased by the appellant, the CCTV footage was capable of sustaining a finding that the appellant delivered a powerful punch to the head of the deceased, causing him to fall and strike his head on the ground the second time.

10 A number of witnesses gave evidence about these interactions. Each was, to some extent, intoxicated. Each gave a somewhat different account of what he or she saw and heard.

11 Mr Perkins testified that his attention was first drawn by "a noise like of someone being hit". He turned around and the first thing he saw was a person getting hit and landing on the street. He could not recall where the hit landed, which hand was used, or whether he saw the person actually fall. He saw the

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1 *Lane v The Queen* [2017] NSWCCA 46 at [6].

2 *Lane v The Queen* [2017] NSWCCA 46 at [7].

3 *Lane v The Queen* [2017] NSWCCA 46 at [51]-[52].

4 *Lane v The Queen* [2017] NSWCCA 46 at [8].

appellant punch another man in the face, who fell backwards against the telegraph pole, albeit he could not remember if that occurred before or after the other punch.

12 Mr Armstrong was in the company of Mr Perkins. Mr Armstrong said that he saw the deceased and another man (who must have been Mr Schwager) sitting on the gutter. As the two men were starting to stand, Mr Armstrong claimed, he saw the appellant punch the deceased. He could not recall where the punch landed, and, under cross-examination, could not remember whether the deceased fell on this occasion. He then saw the appellant punch Mr Schwager's right cheek, and thought Mr Schwager went to the ground. Although his view was obstructed, he then heard sounds consistent with the appellant punching the deceased and the deceased hitting his head. The deceased fell to the ground.

13 The trial judge told the jury that the CCTV footage was "directly contradictory" of how Mr Armstrong described the events. The trial judge told the jury that "the only punch [Mr Armstrong] clearly describes is one on Mr Schwager."

14 Of the other witnesses, Mr Cupitt and Ms Livingstone said that they saw the appellant punch the deceased. Mr Marsh saw the appellant swing his arm at the deceased and then saw the deceased fall backwards and hit his head on the roadway, but he did not see the punch connect[5].

The Crown case

15 The Crown opened its case on the basis that it was a blow by the appellant to the head of the deceased that led to the second fall, and that it was that fall that was fatal[6].

16 In the course of the trial, the Crown called a forensic pathologist, Dr Little, who had conducted an autopsy on the deceased. Dr Little gave evidence of the following injuries found on an examination of the head of the deceased:

(a) An abrasion on the back of the scalp, five centimetres to the left of the midline, measuring 35 millimetres high by 25 millimetres wide. There was no bruising in this area nor any fracture of the skull. Dr Little said

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5 *Lane v The Queen* [2017] NSWCCA 46 at [53].

6 *Lane v The Queen* [2017] NSWCCA 46 at [115].

that this injury was typical of what "we would see in someone who falls backwards".

(b) A very large area of bruising across the left side of the scalp beginning in the area of the temple and extending 140 millimetres back toward the back of the scalp and 80 millimetres in height. Under this area of bruising was a horizontal fracture through the bone above the ear extending to adjacent bones of the skull at the back and the front. The total length of this fracture on the outside of the skull was 80 millimetres. The fracture penetrated through the full thickness of the skull. On the inside it went across the base of the skull almost to the midline of the front, then extended through the bone above the top of the nose.

(c) A fracture of the left cheekbone below the eye approximately seven millimetres long, projecting horizontally through the bone, and a fracture of the left upper jaw bone. There was a yellow bruise at the outer corner of the left eye 15 millimetres in diameter.

(d) Bruising on the inside lining of the mouth at the right corner.

(e) Bruising on the frontal and temporal lobes of the brain. There was diffuse cerebral swelling which indicated that intracranial pressure had been raised. Evidence of subdural haemorrhage further indicated intracranial pressure. This pressure had caused both haemorrhaging and ischaemia within the brain[7].

17 Dr Little could not relate the temporal sequence of these injuries to the two falls. Dr Little said: "I think – overall obviously it's a combination but … either injury could have led to death on its own."

18 After Dr Little gave her evidence, the case for the Crown changed. In the course of the Crown's final address, it was put to the jury that the actions of the appellant before each fall could found his liability for murder or manslaughter[8]. It was said in relation to the first fall by reference to the CCTV footage that there was a "blow" from the appellant. In relation to the second fall it was said that the CCTV footage and the eyewitness accounts established that the appellant landed a punch that caused the deceased to fall again[9]. The trial judge directed the jury

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7 *Lane v The Queen* [2017] NSWCCA 46 at [122].

8 *Lane v The Queen* [2017] NSWCCA 46 at [41], [125].

9 *Lane v The Queen* [2017] NSWCCA 46 at [30].

that it was open to it to find that a deliberate act by the appellant had caused the death of the deceased if it found that either fall was caused by the appellant[10].

19 By the conclusion of the trial it was accepted by both sides that each of the falls suffered by the deceased was sufficient to have caused his death[11]. Although the Crown had altered its case in response to the evidence of Dr Little that either fall could have been fatal to the deceased, the appellant did not seek to take advantage of the shift in the Crown case by raising an issue to the effect that any blow by the appellant that might have led to the second fall was not a sufficient cause of or contribution to the death of the deceased because he had suffered a fatal injury by reason of the first fall for which the appellant was not responsible, so that the second fall was not a legally sufficient cause of or contribution to the death.

20 As noted earlier, the jury returned a verdict of not guilty of murder, but guilty of manslaughter. The appellant was sentenced to a term of imprisonment with a non-parole period of six years and four months commencing 27 September 2013, with an additional two years and two months expiring on 26 March 2022.

Court of Criminal Appeal

21 The appellant appealed against his conviction on several grounds. Only one ground of appeal is now relevant. It was that:

> "The trial judge erred in failing to direct the jury that in their consideration of the charge of manslaughter they were to be unanimous in their deliberations as to the factual basis on which they might convict [the appellant] of manslaughter".

22 All three members of the Court of Criminal Appeal accepted that this ground of appeal was made out[12].

23 The majority (Meagher JA and Davies J) held that "the jury could not convict of murder or manslaughter unless they were agreed as to whether one or

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10 *Lane v The Queen* [2017] NSWCCA 46 at [37].

11 *Lane v The Queen* [2017] NSWCCA 46 at [8].

12 *Lane v The Queen* [2017] NSWCCA 46 at [44], [108].

both of [the acts said to cause the deceased to fall] was a criminal act of the appellant."[13] Their Honours explained that[14]:

> "in the absence of any direction to that effect it remained possible that some jurors might reason to a verdict of guilty of murder or manslaughter by being satisfied that the appellant's voluntary act caused the first fall while others might reason to the same conclusion by reference to his voluntary act having caused the second fall."

24 The majority accepted[15] that the failure of the trial judge to give a unanimity direction:

> "raised at least as a theoretical possibility that some members of the jury might determine [the appellant's] guilt by reference to the first fall, and others by reason of his having caused the second. Where there were two separate allegedly criminal acts left to the jury, the appellant was entitled to have the jury determine unanimously whether he was guilty in relation to one or other or both of those acts."

25 Under s 6(1) of the *Criminal Appeal Act*, the Court of Criminal Appeal is required to allow an appeal against conviction if the Court "is of opinion … that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law", "provided that the court may … dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

26 The majority applied the proviso, concluding that no substantial miscarriage of justice actually occurred[16]. The majority rejected the "theoretical possibility" which they had identified on the basis that it[17]:

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13 *Lane v The Queen* [2017] NSWCCA 46 at [42].

14 *Lane v The Queen* [2017] NSWCCA 46 at [43].

15 *Lane v The Queen* [2017] NSWCCA 46 at [57].

16 *Lane v The Queen* [2017] NSWCCA 46 at [61].

17 *Lane v The Queen* [2017] NSWCCA 46 at [58].

> "did not give rise to any miscarriage in this case because the evidence was not capable of supporting a finding beyond reasonable doubt that a deliberate act of the appellant caused the first fall."

27 The majority reasoned that "the jury *necessarily* should have entertained a doubt as to whether the deceased's first fall was caused by any voluntary act of the appellant."[18] In that regard, their Honours said that the only evidence of that incident was "the CCTV footage and, perhaps, the evidence of Mr Armstrong"[19], and their Honours' view was that the evidence of Mr Armstrong was "not at all consistent with the CCTV footage"[20].

28 In relation to the second fall, the majority concluded that[21]:

> "the CCTV footage, the evidence of the eyewitnesses … and the evidence of Dr Little … establishes beyond reasonable doubt that it was caused by a punch thrown by the appellant. We do not consider that it was open to the jury to have any reasonable doubt about that."

29 Their Honours went on to say that they were also satisfied beyond reasonable doubt that the appellant's punch was dangerous, and that the appellant did not act in self-defence[22].

30 The majority concluded that[23]:

> "[t]he absence of any specific unanimity direction did not prevent the jury from considering the appellant's guilt on the basis that his deliberate act caused the deceased's second fall; and acting reasonably and properly they should have done so, having necessarily entertained a doubt about the appellant's guilt with respect to the first".

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18 *Lane v The Queen* [2017] NSWCCA 46 at [50] (emphasis in original).

19 *Lane v The Queen* [2017] NSWCCA 46 at [50].

20 *Lane v The Queen* [2017] NSWCCA 46 at [51].

21 *Lane v The Queen* [2017] NSWCCA 46 at [52].

22 *Lane v The Queen* [2017] NSWCCA 46 at [55].

23 *Lane v The Queen* [2017] NSWCCA 46 at [60].

31 The third member of the Court of Criminal Appeal, Fagan J, concluded that a substantial miscarriage of justice had actually occurred; his Honour would have allowed the appeal on the basis that the error as to the absence of a specific unanimity direction "denied the appellant a trial by jury according to law of the charge against him."[24] That was so whether or not an appellate court might be satisfied of the appellant's guilt on its review of the evidence.

32 The appellant was granted special leave to appeal to this Court to challenge the conclusion of the majority in relation to the application of the proviso.

The appellant's submissions

33 The appellant submitted that the absence of a specific unanimity direction at trial is, in the circumstances of the case, an error of a kind that precludes the application of the proviso, notwithstanding that an appellate court may itself be satisfied of the appellant's guilt. The appellant relied upon the view of Fagan J that[25]:

> "It is difficult to conceive of a more serious error of [that] nature than one which resulted in the jury not having identified to them for their unanimous determination a factual question which was central to an element of the charge of murder and which the accused had put in issue."

34 The appellant argued that, in the present case, the failure by the trial judge to give the necessary unanimity direction left open the possibility that "there was no unanimity among the jurors as to which act founded the guilty verdict and, therefore, that [the appellant] was not lawfully convicted."[26]

35 It was argued that the majority in the Court of Criminal Appeal, having acknowledged that the appellant was entitled to have the jury determine unanimously whether he was guilty by reason of his conduct in one or other or both of the interactions which allegedly caused the death of the deceased[27], erred

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24 *Lane v The Queen* [2017] NSWCCA 46 at [194].

25 *Lane v The Queen* [2017] NSWCCA 46 at [175].

26 *R v Klamo* (2008) 18 VR 644 at 662 [77]. See also *Smith* [1997] 1 Cr App R 14; *Walsh* (2002) 131 A Crim R 299.

27 *Lane v The Queen* [2017] NSWCCA 46 at [57].

in acting upon their own view of the appellant's guilt when they had no basis for concluding that the jury was unanimous as to the basis of its verdict. This course was said to be beyond the scope of the proviso.

The respondent's submissions

36 The respondent submitted that the majority were correct to proceed on the footing that the failure of the trial judge to give the necessary unanimity direction was an error to which the proviso applied. It was said that the error in relation to the unanimity direction did not give rise to the possibility that the jury failed to perform its function of determining the appellant's guilt with respect to the alleged offence.

37 The respondent argued that there was no basis in the evidence upon which the jury could have found, in relation to the interaction leading to the first fall, a voluntary act on the part of the appellant for the purposes of satisfying an element of the offence of manslaughter. The jury was directed by the trial judge in terms of a "strike"; the required "voluntary act" was limited to a strike. It was to be assumed, it was said, that the jury followed the directions given by the trial judge in this regard. The respondent contended that, there being no reliable evidence of a strike or a blow by the appellant in respect of the first fall, the Crown prosecutor's assertions that there was "a blow" and "an act or acts" in relation to the first fall were not apt to mislead the jury to reason to guilt.

The nature and effect of the error at trial

38 In *Baiada Poultry Pty Ltd v The Queen*[28], French CJ, Gummow, Hayne and Crennan JJ said that while, as the Court held in *Weiss v The Queen*[29], the proviso cannot be applied "unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty", this negative proposition "states a necessary but not sufficient condition for applying the proviso." The course of authority establishes that an error at trial may be such as to preclude the application of the proviso in the sense of precluding a conclusion that there was no substantial miscarriage of justice, irrespective of the appellate court's view as to whether the evidence properly

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28 (2012) 246 CLR 92 at 104 [29]; [2012] HCA 14.

29 (2005) 224 CLR 300 at 317 [44]; [2005] HCA 81.

admitted at trial proved the appellant's guilt beyond reasonable doubt[30]. Put in a verbal formulation that amounts to the same assessment, some errors will establish a substantial miscarriage of justice even if the appellate court considers that conviction was inevitable.

39 A misdirection by a trial judge always involves an error of law, but "sometimes [it] will prevent the application of the proviso; and sometimes it will not."[31] It is necessary for the appellate court to consider the nature and effect of the error in every case[32].

40 At trial, the Crown put a case to the jury that the appellant's acts before the first fall supported liability for murder or manslaughter. It now submits that, because that case could not support a conviction, the proviso was properly applied. It must be said immediately that this is not an attractive argument. The likely effect upon the jury of the trial judge's failure to direct it that it must be unanimous in its conclusion as to the act of the appellant which caused the death of the deceased can only be understood in the context of the trial. That context included the Crown's reliance upon the appellant's conduct leading up to the first fall as a basis on which the jury might convict, and the circumstance that the trial judge left it open to the jury to find that the appellant's conduct leading up to that fall was a viable basis for a verdict of murder or manslaughter.

41 Nor is it persuasive to argue, as the respondent does, that it may be assumed that the jury acted in accordance with the trial judge's directions to act upon the evidence and, in doing so, ignored the Crown's submissions. In deciding whether the trial process miscarried in a way that, without more, will

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30 *Nudd v The Queen* (2006) 80 ALJR 614 at 617-618 [6]; 225 ALR 161 at 163; [2006] HCA 9; *Evans v The Queen* (2007) 235 CLR 521 at 552 [117]; [2007] HCA 59; *AK v Western Australia* (2008) 232 CLR 438 at 447-448 [23], 469 [87]; [2008] HCA 8; *Cesan v The Queen* (2008) 236 CLR 358 at 394 [124]; [2008] HCA 52; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 102-103 [22]; *Reeves v The Queen* (2013) 88 ALJR 215 at 223-224 [50]; 304 ALR 251 at 261; [2013] HCA 57.

31 *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 319 [57]; 352 ALR 1 at 18; [2018] HCA 7. See also *Reeves v The Queen* (2013) 88 ALJR 215 at 223-224 [50]-[51]; 304 ALR 251 at 261-262.

32 *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 312 [15]; 352 ALR 1 at 8. See also *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; *AK v Western Australia* (2008) 232 CLR 438 at 456 [55].

result in a substantial miscarriage of justice, one cannot leap from the evidence to the verdict of the jury, ignoring the Crown's case and the directions of the trial judge. How the case is left to the jury is apt to have a critical bearing on the performance by the jury of its task; and as Gleeson CJ said in *Doggett v The Queen*[33]:

> "The manner in which a trial is conducted, and in which the issues are shaped, … has a major influence upon the way in which the case is ultimately left to the jury".

42 It must be accepted, of course, as the respondent argues, that it is to be assumed that the jury followed the trial judge's directions[34]. But to say this is to accept the force of the appellant's submission. The absence of a specific unanimity direction in relation to the actus reus that caused the death of the deceased, coupled with the trial judge's direction that it was open to the jury to convict on the basis that a deliberate act of the appellant caused the death of the deceased if it found that either fall was caused by the appellant, means that it cannot be assumed that the jury was unanimous that it was the appellant's actions leading up to the second fall that established his guilt beyond reasonable doubt. As Fagan J said[35], it is quite possible that some jurors might have been satisfied that a voluntary act of the appellant caused the first fall and did not trouble to consider the circumstances of the second. And the jurors who found the actus reus made out in respect of the second fall may have pooled their conclusions with those who found the actus reus made out in respect of the first fall to reach their verdict. For a juror to reason in that way would not be to depart from the directions the jury had been given.

43 The possibility that some members of the jury might have concluded that the appellant's conduct leading up to the first fall established the appellant's guilt of manslaughter cannot be excluded by saying, as was said by the majority in the Court of Criminal Appeal, that the jury "*necessarily* should have entertained a doubt as to whether the deceased's first fall was caused by any voluntary act of the appellant."[36] The case was left to the jury on the basis that it was open to it to

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33 (2001) 208 CLR 343 at 346 [2]; [2001] HCA 46.

34 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13], 425-426 [31]-[32], 431 [52]; [2000] HCA 15.

35 *Lane v The Queen* [2017] NSWCCA 46 at [154].

36 *Lane v The Queen* [2017] NSWCCA 46 at [50] (emphasis in original).

convict the appellant by pooling individual jurors' conclusions of fact on issues in respect of which it was required to be unanimous. It was, as a matter of fact, distinctly possible that some of the jurors may have been disposed to convict on the basis only of the first fall. That is so regardless of whether an appellate court might conclude that the evidence in respect of the first fall was incapable of supporting a conviction. It is not permissible to speculate as to how the jury may have reasoned[37]. Nor would it have been open to the appellate court to hold that the jury should have reasoned by rejecting a basis then said by the Crown and the trial judge to be available to it.

A breach of the presuppositions of the trial?

44 To say it was not open to the jury to convict on a particular basis when the Crown invited the jury to do just that, and the trial judge allowed the case to go to the jury on the basis that it was open to it to do so, would impermissibly diminish the role of the jury as "the constitutional tribunal for deciding issues of fact."[38]

45 The appellant could not have been lawfully convicted by the jury unless it was agreed upon the action by the appellant that caused the deceased's fatal injury[39]. In the absence of a unanimity direction, the basis of the verdict is necessarily uncertain as to the act or acts of the appellant on which it was founded. The CCTV footage did not depict blows by the appellant connecting with the head of the deceased before either fall. An assessment of the reliability of the eyewitnesses was necessary. Further, there were live issues as to the dangerousness of the appellant's acts and as to self-defence raised in respect of the acts of the appellant leading up to the second fall[40]. As Fagan J recognised, the jury was not directed as to the different circumstances bearing upon these

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37 *Weiss v The Queen* (2005) 224 CLR 300 at 314 [35].

38 *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16; *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65]; [2016] HCA 35.

39 *Walsh* (2002) 131 A Crim R 299 at 316-317 [57]; *Fermanis v Western Australia* (2007) 33 WAR 434 at 454 [68]-[69], 456 [73]; *Chapman v The Queen* (2013) 232 A Crim R 500 at 505 [28].

40 *Lane v The Queen* [2017] NSWCCA 46 at [134].

issues that were relevant in relation to each of the potentially fatal interactions between the appellant and the deceased[41].

46 It has been said that "it is neither possible nor useful" to consider application of the proviso "by reference to some supposed category of 'fundamental defects' in a trial", as doing so distracts attention from the statutory requirement of considering whether there has been a "substantial miscarriage of justice" in the particular case[42]. While conclusionary labels such as "fundamental defect" may not be particularly useful as tools of analysis, to say that some errors at trial can be seen to breach the "presuppositions of the trial" so as to be beyond the reach of the proviso[43] does serve to focus attention upon the effect of the error in question upon the trial in order to determine whether a substantial miscarriage of justice has actually occurred.

47 Notwithstanding the inscrutability of the jury's verdict, because it must be assumed that the jury will act in accordance with the directions of the trial judge an appellate court would have been justified in concluding, if the required unanimity direction had been given, that the jurors had not impermissibly pooled their conclusions on the actus reus that led to the death of the deceased. The absence of the necessary direction means that it cannot be assumed that the jury discharged its function to reach a unanimous verdict as the tribunal of fact.

48 A misdirection that is apt to prevent the performance by the jury of its function, without more, will result in a substantial miscarriage of justice[44]. The proviso is cast in terms which permit the appellate court to dismiss an appeal from a judgment of the court which gives effect to the verdict of the jury: the proviso does not permit the appellate court to exercise the function of the jury. The language of the proviso cannot be understood as if it were to the effect that an appeal in which the possibility that the jury has not performed its function of reaching a unanimous verdict may be dismissed on the basis that the appellate court is satisfied of the guilt of the accused.

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41 *Lane v The Queen* [2017] NSWCCA 46 at [135], [142].

42 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 103 [23].

43 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46].

44 *Wilde v The Queen* (1988) 164 CLR 365 at 371-373; [1988] HCA 6; *Krakouer v The Queen* (1998) 194 CLR 202 at 226 [74]; [1998] HCA 43; *Handlen v The Queen* (2011) 245 CLR 282 at 298 [47]; [2011] HCA 51.

49 On the approach of the majority in the Court of Criminal Appeal, the effect of the absence of a specific unanimity direction to the jury was disregarded notwithstanding that it might well be that the jury did not reach a unanimous conclusion as to the necessary basis of the appellant's guilt. As Barwick CJ said in *Ryan v The Queen*[45]:

> "the choice of the act causing death is not for the presiding judge or for the Court of Criminal Appeal: it is essentially a matter for the jury under proper direction."

50 To dismiss the appeal as the majority did is to disregard the requirement of a unanimous verdict on the part of the jury and to "substitute trial by an appeal court for trial by jury."[46] Such an error is apt to deny the application of the proviso because it means that it cannot be said that no substantial miscarriage of justice has actually occurred[47].

Orders

51 The appeal should be allowed. The order of the Court of Criminal Appeal dismissing the appellant's appeal against his conviction should be set aside, and in its place it should be ordered that the appeal to that Court be allowed and the appellant's conviction be quashed. There should be an order for a new trial.

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45 (1967) 121 CLR 205 at 218; [1967] HCA 2. See also *Royall v The Queen* (1991) 172 CLR 378 at 386; [1991] HCA 27.

46 *R v Baden-Clay* (2016) 258 CLR 308 at 330 [66].

47 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46]. See also *Wilde v The Queen* (1988) 164 CLR 365 at 373.

52 GAGELER J. This is yet another case in which application of the proviso to the common form criminal appeal statute has proven problematic. Where an appellate court concludes in an appeal against a conviction that the trial judge made a wrong decision on a question of law or that there was some other irregularity at the trial which was capable of characterisation as a miscarriage of justice, the question raised by the proviso is whether "no substantial miscarriage of justice has actually occurred".

53 For the appellate court to conclude that no substantial miscarriage of justice "has actually occurred" is for the appellate court to conclude that, notwithstanding the error or other irregularity, no substantial miscarriage of justice "in fact" occurred[48]. And for the appellate court to conclude that "no substantial miscarriage of justice" in fact occurred is for the appellate court to conclude that the error or irregularity affected neither: (1) the outcome of the trial, such as to have denied the appellant "a chance of acquittal which was fairly open to him or her"; nor (2) the process of the trial, to an extent sufficient to warrant the conclusion that a substantial miscarriage of justice occurred without need of inquiry into its effect on the outcome of the trial[49].

54 Where, as here, the appeal is against a conviction entered on a verdict of guilty returned by a jury, the jury was at the trial and remains for the purpose of the application of the proviso the "constitutional tribunal for deciding issues of fact"[50]. *Weiss v The Queen*[51], whatever else it might mean, cannot mean that the appellate court in applying the proviso is authorised to "substitute trial by judge for trial by jury"[52].

55 Except where the appellate court concludes that the error or irregularity led to a failure of process so serious as to have amounted without more to a

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48 *Reeves v The Queen* (2013) 88 ALJR 215 at 224 [51], 226 [63]-[65]; 304 ALR 251 at 262, 264-265; [2013] HCA 57.

49 *Filippou v The Queen* (2015) 256 CLR 47 at 55 [15]; [2015] HCA 29. See also *Nudd v The Queen* (2006) 80 ALJR 614 at 617-618 [3]-[6]; 225 ALR 161 at 162-163; [2006] HCA 9; *Wilde v The Queen* (1988) 164 CLR 365 at 371-373; [1988] HCA 6.

50 *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 320 [64]; 352 ALR 1 at 19; [2018] HCA 7, quoting *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16. See also *Wilde v The Queen* (1988) 164 CLR 365 at 384.

51 (2005) 224 CLR 300; [2005] HCA 81.

52 *Quartermaine v The Queen* (1980) 143 CLR 595 at 601; [1980] HCA 29. See also *R v Baden-Clay* (2016) 258 CLR 308 at 330 [66]; [2016] HCA 35.

substantial miscarriage of justice, "deciding whether there has been no substantial miscarriage of justice necessarily invites [the] attention [of the appellate court] to whether the jury's verdict might have been different if the identified error [or irregularity] had not occurred"[53].

56 The ultimate question for the appellate court in considering the application of the proviso is then whether the error or irregularity denied the appellant a real chance of acquittal or, to put the same question another way, whether the jury's verdict would inevitably have been the same if the identified error or irregularity had not occurred. Only if the appellate court after reviewing the record of the trial confidently answers that ultimate question in the affirmative can the appellate court conclude that no substantial miscarriage of justice has actually occurred.

57 The trial judge's error in this case, in my opinion, did not lead to a failure of criminal process which was "such a serious breach of the presuppositions of the trial"[54] that it amounted without more to a substantial miscarriage of justice. The trial judge's error was one of omission. In a direction in which the overall need for the jury to be unanimous as to the verdict was explained, what the trial judge omitted to do was to give a specific direction explaining the need for unanimity to extend to finding which, if either, of two discrete potential criminal acts each capable of causing the death of the deceased had been committed by the appellant[55].

58 The omission was not of such a magnitude as to have resulted in the case being able to be characterised as one in which "a jury has returned a verdict of guilty of a particular crime without having considered whether that crime was committed"[56]. Rather, the case is one in which the omission of the trial judge left open the possibility that the verdict of guilty that was returned by the jury resulted from some jurors finding that the appellant had committed only one criminal act and some jurors finding that the appellant had committed only the other criminal act. The question was whether, in the context of the trial, that possibility was more than theoretical.

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53 *AK v Western Australia* (2008) 232 CLR 438 at 457 [59]; [2008] HCA 8.

54 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46].

55 *Lane v The Queen* [2017] NSWCCA 46 at [18]-[44], applying *Walsh* (2002) 131 A Crim R 299 at 316-317 [57].

56 Cf *Quartermaine v The Queen* (1980) 143 CLR 595 at 601; *Kalbasi v Western Australia* (2018) 92 ALJR 305 at 319 [56]; 352 ALR 1 at 18.

59 In considering the application of the proviso, the majority of the Court of Criminal Appeal therefore embarked on the correct inquiry in examining the record of the trial to determine whether the jury would inevitably have been unanimous in finding that the appellant committed one or both of the potential criminal acts[57].

60 Where the majority of the Court of Criminal Appeal went wrong, in my opinion, was in confining their attention to the conclusions of fact which were objectively open to the jury on the evidence adduced at the trial. Finding that the jury could not have been satisfied beyond reasonable doubt as to one criminal act and that the jury could only have been satisfied beyond reasonable doubt as to the other criminal act, the majority concluded that the omission of the trial judge could have had no effect on the verdict which the jury in fact returned[58].

61 That was to adopt too narrow an approach to what the jury might have done had the jury been properly directed at the trial which in fact occurred. What the approach left out of account was the way in which the prosecution case had been put in closing submissions on the basis of the evidence that had been adduced[59]. Whatever the strength of the evidence relative to the two potential criminal acts, it cannot be said that there was no evidence at all to support a finding that the appellant had committed either of them, and the prosecution case was in fact left to the jury on the basis that it was open to the jury to find that the appellant had committed one or other or both of those criminal acts.

62 The prosecution case having been so left, it "would be ignoring the realities of the matter"[60] to infer with the requisite degree of confidence that no member of the jury could in fact have chosen one pathway of reasoning pressed by the prosecution in closing submissions so as to have been satisfied that the appellant committed one criminal act and that all members of the jury must surely have chosen the other pathway of reasoning pressed by the prosecution in closing submissions so as to have been satisfied that the appellant committed the other criminal act.

63 Having regard to the way in which the case was left to the jury, it is impossible to be confident that the jury's verdict might not have been different if

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57 *Lane v The Queen* [2017] NSWCCA 46 at [45]-[48].

58 *Lane v The Queen* [2017] NSWCCA 46 at [50]-[61].

59 Cf *S v The Queen* (1989) 168 CLR 266 at 287-288; [1989] HCA 66; *KBT v The Queen* (1997) 191 CLR 417 at 424; [1997] HCA 54; *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; [2010] HCA 35.

60 Cf *Mraz v The Queen* (1955) 93 CLR 493 at 508; [1955] HCA 59.

the omission of the trial judge had not occurred. The verdict which the jury as a whole in fact returned cannot be concluded to have been necessarily the same as the verdict which the jury would have returned if the jury had been properly instructed.

64 For that reason, I agree that the appeal must be allowed, the conviction set aside, and a new trial ordered.