

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

DAMIEN JOHN SIMPSON

APPELLANT

AND

THE QUEEN

RESPONDENT

Simpson v The Queen (H5-1997) [1998] HCA 46
23 July 1998

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Tasmania

Representation:

C K Brown with R A Browne for the appellant (instructed by Director of Legal Aid, Hobart)

D J Bugg QC with J N Perks for the respondent (instructed by Director of Public Prosecutions, Tasmania)

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CATCHWORDS

Simpson v The Queen

Criminal law - Murder - Whether accused "ought to have known" that his unlawful act was likely to cause death - Whether sufficient evidence tendered of state of knowledge of accused - Inferential proof of accused's knowledge.

Whether judge failed to give direction in accordance with *Boughey v The Queen* (1986) 161 CLR 10 - Whether miscarriage of justice.

Words and phrases - "knew or ought to have known".

Criminal Code Act 1924 (Tas), s 157(1)(c).

1 GAUDRON AND McHUGH JJ. Damien John Simpson ("the accused") appeals against an order of the Court of Criminal Appeal of Tasmania¹ which dismissed his appeal against a conviction for murder. He contends that his conviction for murder should be quashed and a verdict of manslaughter substituted because the Crown failed to tender any evidence upon which the jury could reasonably find that he killed the deceased "by means of [an] unlawful act ... which [he] knew, or ought to have known, to be likely to cause death in the circumstances"². Alternatively, he contends that the conviction for murder should be quashed and a verdict of manslaughter substituted because the trial judge erred in failing to direct the jury as to the circumstances that could be taken into account in determining whether the accused ought to have known that his act was likely to cause death. He also contends that the judge's directions to the jury effectively reversed the onus of proof as to those circumstances.

2 The charge of murder was laid under s 157(1)(c) of the *Criminal Code Act* 1924 (Tas) ("the Criminal Code"). That paragraph provides:

"Subject to the provisions of section 160, culpable homicide is murder if it is committed -

...

(c) by means of any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person".

3 The accused was tried before a judge and a jury of 12 in the Supreme Court of Tasmania³. At the trial, the Crown tendered evidence that in June 1995, the accused killed Anthony William Smith by stabbing him in the neck with a pocket knife which had a 7 centimetre blade. From the evidence, the jury was entitled to conclude that, after an altercation had started between two groups, the accused ran across the road to the footpath and struck the deceased who was a member of one of the groups. Friends of the accused were in the other group. None of the eye witnesses saw the accused with a knife. One eye witness said that the accused "just raised his hand and it looked like he had hit one of the fellows"; another said that the accused "brought it down as in a hitting motion like he punched him". But in a record of interview and in his evidence the accused admitted that he had stabbed the deceased with the knife. Medical evidence established that the

1 Unreported, Supreme Court of Tasmania, 13 November 1996.

2 *Criminal Code Act* 1924 (Tas), s 157(1)(c).

3 Unreported, Supreme Court of Tasmania, 6 December 1995.

deceased had been stabbed in the left side of the neck just above the collarbone. The entry wound measured 7.8 centimetres by 1.8 centimetres and was deep enough to cut one of the major branches of the aorta and pierce the upper part of the left lung.

4 The accused's record of interview contained the following admission:

"Are you able to tell me where you stabbed the man?

No I wouldn't have a clue. I know it was on the upper part of the bo (sic), body though."

5 Later in the interview, the accused was asked:

"Did you, you said that you st, you st, (sic) you stabbed him in the upper part of the body?

Yeah.

And you realised that by stabbing somebody in that part of the body that you'd kill em?

Not if it's in the arm.

I'm talkin (sic) about the upper body not the arms.

I, yeah I did realise but I, I thought that it was probably around this area sort of, like from the arm to here. So I wasn't, I wasn't sure where I hit him, stabbed him at all."

While describing "this area sort of, like from the arm to here", the accused pointed to an area just below the neck running across the chest from arm to arm.

6 In evidence, the accused claimed, as he had during his record of interview, that he killed the deceased in self-defence. He said that he crossed the road in the direction that his father and some friends had gone and that, when he got to the footpath, the deceased pushed him in the chest. The accused said, "I freaked out. I pulled me knife out. It hit this young man." He explained that by "freaked out" he meant that he "was scared because [the deceased] was pushing me" and that he was frightened that he "was going to get beaten up". The accused said in evidence that he had no medical training, knew nothing about medicine, and had not heard of the "subclavium artery". Under cross-examination, he admitted that he knew that "in the upper part of the body between the heart and the face there are lots of arteries that carry blood" and that "blood vessels are going from the heart to various parts of the body ... taking blood around".

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7 The trial judge instructed the jury that there was no evidence that the accused knew "that what he was doing was likely to cause death". That being so, the accused contends that he should not have been found guilty of murder because the Crown failed to tender evidence of circumstances from which the conclusion could be drawn that he ought to have known that his unlawful act was likely to cause the death of the deceased. The accused contends that, when the Crown relies on the "ought to have known" limb of s 157(1)(c) to prove a charge of murder, the prosecution must fail unless the Crown establishes that the accused knew all the relevant facts which are relied on to give rise to the inference that he or she ought to have known that the unlawful act was likely to cause death. The accused argued that a charge under that limb of s 157(1)(c) is not proved if no more is shown than that ordinary persons - even ordinary 21 year old persons - know that the unlawful act was one that was likely to cause death.

8 *Boughey v The Queen*⁴ establishes that, when the prosecution relies on the "ought to have known" limb of s 157(1)(c), the Crown must prove beyond a reasonable doubt that the accused, and not some hypothetical person, ought to have known, if he or she had thought about it, that there was "a 'real and not remote' chance"⁵ that the unlawful act would bring about the death of the deceased⁶. That is to say, on the proven facts, the jury must be satisfied beyond reasonable doubt that this accused with his or her knowledge ought to have known that there was a real chance that the unlawful act would bring about the death of the deceased. In *Boughey*⁷, Mason, Wilson and Deane JJ, who gave the leading judgment, said that "the content of the knowledge laid at the door of an accused is [not] to be assessed by reference to the notional knowledge and capacity of some hypothetical person". Their Honours went on to say that what was relevant for the purpose of the "ought to have known" limb of s 157(1)(c) was "the knowledge, the intelligence and, where relevant, the expertise which the particular accused actually possessed."⁸

9 Counsel for the accused contended that the principles laid down in *Boughey* led to the conclusion that there was no evidence upon which the jury could find that the accused ought to have known that his act might kill the deceased. He contended that "without evidence of the particular expertise" of the accused, the jury could only apply an objective test which "was impermissible under *Boughey*". But nothing in that case requires the conclusion that a prosecution under the "ought

4 (1986) 161 CLR 10.

5 (1986) 161 CLR 10 at 21 per Mason, Wilson and Deane JJ.

6 (1986) 161 CLR 10 at 28-29 per Mason, Wilson and Deane JJ.

7 (1986) 161 CLR 10 at 28.

8 (1986) 161 CLR 10 at 28-29.

to have known" limb of s 157(1)(c) must fail unless the Crown proves the state of the accused's knowledge or "expertise" by direct evidence.

10 The issue in *Boughey* was whether the trial judge had misdirected the jury by referring to the extent that the medical training and experience of the accused should have alerted him "to the dangers of applying carotid artery pressure" and "to the desirability of studying medical literature in order to acquaint himself with the dangers, if any, of such a practice"⁹. Mason, Wilson and Deane JJ said¹⁰ that the trial judge's "remarks about the desirability of studying medical literature would ... have been mistaken if they meant that there was to be imputed to the [accused] the knowledge which he would have acquired if he had stopped to study such literature." However, they held that, read in the context of a long summing up, the "somewhat ambiguous remark" of the trial judge had not diverted the jury from examining the accused's actual knowledge as opposed to knowledge that could be imputed to him from the medical literature.

11 It was in that context that their Honours said that the starting point in the inquiry whether the accused ought to have known that his unlawful act was likely to cause death "must be the knowledge, the intelligence and, where relevant, the expertise which the particular accused actually possessed."¹¹ Nothing in that passage or in the decision itself gives any support for the notion that the Crown cannot prove the accused's knowledge inferentially or that the prosecution must fail unless the Crown directly proves the knowledge and expertise of the accused concerning the relevant circumstances.

12 The accused's knowledge of or "expertise" concerning those circumstances may be proved by his or her own evidence, by out-of-court-admissions or by inference. If the Crown relies on inference to prove that the accused knew the relevant circumstances, the Crown may establish the inference by proving other facts that make it logical to infer that the accused knew the circumstances. If the charge is that the accused ought to have known that defective premises were likely to cause death to those entering them, it may be sufficient to prove that the defect was obvious and that the accused had visited the premises regularly even though the Crown is unable to prove by direct evidence or admission that the accused was aware of the defects in the premises.

13 Moreover, knowledge of the circumstances may often be inferred without proof of additional facts. Some or all of the circumstances may be so well known

9 (1986) 161 CLR 10 at 28 per Mason, Wilson and Deane JJ.

10 (1986) 161 CLR 10 at 29.

11 (1986) 161 CLR 10 at 28-29.

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in a community or to a section of the community of which the accused is a member that it is open to a jury to conclude beyond a reasonable doubt that the accused knew of those circumstances. If a fact or circumstance is so well known that no reasonable person in the section or community would dispute it, a jury may safely infer that the accused knew it unless any denial by him raises a reasonable doubt about his or her knowledge. What facts or circumstances fall into this category will vary from one era to another and from one community to another. The category of such facts and circumstances will be as wide as the common experience of the relevant community of which the accused is a member and will expand as the frontiers of that community's general knowledge expands.

14 No doubt the category is narrower than the list of matters of which a court can take judicial notice. A judge called on to take judicial notice of a fact may have regard to any fact or matter that is within the knowledge of "every well-informed person in Australia"¹². Furthermore, in an appropriate case, the judge may cause "inquiries to be made by himself for his own information from sources to which it is proper for him to refer"¹³. When the issue is whether, in the absence of direct evidence, the jury can infer that the accused knew a particular fact or circumstance, however, the relevant community is that to which the accused belongs. The relevant knowledge of that community may be narrower or wider than that of well informed persons in Australia. If the accused is a doctor, for example, and the charge poses a medical issue, the Crown may prove the accused's knowledge by proving a fact or circumstance which no qualified practitioner could reasonably dispute. On the other hand, if the accused is a poorly educated youth in a remote area, the relevant body of knowledge will be that of youths of that class and may be much narrower than that of the general community.

15 The present case is concerned with the accused's knowledge of the likely result of stabbing a person with a knife. The consequences of using many common objects and substances are widely known in the Australian community. That guns kill, that acid burns, that flame ignites household gas and that driving on the wrong side of a road is likely to cause a collision, for example, are matters so well known in the Australian community that a jury can safely infer that the accused knew about such matters when they are relevant to a charge under s 157(1)(c) of the Criminal Code. Ordinary members of that community are also well aware of the consequences that can follow from most uses of knives, fire, gas, electricity and explosives. In cases where the accused has caused the death of a person by using

12 *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 806 per Evatt J. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 196 per Dixon J.

13 *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 at 212 per Lord Sumner.

such an object or substance, it will usually be open to a jury, acting reasonably, to infer that the accused knew what could follow from its use.

16 In the present case, the jury could find that the accused intended to stab the deceased somewhere in the upper chest area close to the neck and that he wielded the knife with considerable force. The question which then arises is whether the jury could reasonably find that the accused ought to have known that there was a real chance that his assault might cause the death of the deceased. That depends on whether he knew that forcefully stabbing a person in the upper chest area with a pocket knife which had a 7 centimetre blade might lead to the death of that person.

17 The accused was aged 21 when the events occurred. Nothing in the evidence indicated that he had less knowledge than other persons of his age concerning the consequences of stabbing a person in the upper chest area. That being so, the jury were entitled to be satisfied beyond a reasonable doubt that he knew that there was a real chance that plunging a knife into the upper chest area of a person might lead to death. From an early age, Australian children learn from films, television, comics, books and newspapers that stabbing a person in the stomach, chest, back or neck is likely to kill that person if the knife blade is sharp and long enough and wielded with sufficient force. They may not know why or how the knife blade causes death although no doubt many of them know from an early age that a stabbing will cause bleeding. But they do know that stabbing a person in the neck or body is almost as likely to result in death as shooting a person in those areas. In evidence, the accused did not assert that he knew nothing about the potential consequences of stabbing a person in the upper body. Indeed, he conceded in his record of interview that he "did realise" "that by stabbing somebody in *that part* of the body that you'd kill em" (emphasis added). Even if the accused's admission is read as confined to stabbing a person in the neck, it was evidence from which the jury could find that he ought to have known that attempting to stab the deceased in the upper body area might lead to that person's death, if by chance or misadventure the knife went into his neck.

18 Given that it was open to the jury to find that the accused knew that stabbing somebody in the neck might kill that person, it necessarily follows that it was also open to them to find that the accused ought to have known that his unlawful act could cause death. The question for the jury under the "ought to have known" limb was not whether the accused intended to kill the deceased or stab him in the neck. Nor was it whether the accused knew that the knife might transect one of the major branches of the aorta. It was whether the accused, if he "had stopped to think to the extent that he ought to have"¹⁴, would have realised that stabbing the deceased with this knife in the general area of the upper body gave rise to a real chance that

14 *Boughey* (1986) 161 CLR 10 at 29 per Mason, Wilson and Deane JJ.

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the stabbing would kill the deceased. The jury could reasonably find that, if the accused had thought about the matter, he would have realised that there was a real chance that, by bringing this knife down in the manner and in the direction that he did, the blade would enter the upper body of the deceased in or near the neck and inflict a fatal wound.

- 19 Moreover, in determining what the accused knew, the jury were entitled to, and no doubt did, act on the basis that an ordinary 21 year old person knows that, if he or she forcefully stabs a person in the upper body with a knife that has a 7 centimetre blade, there is a real chance that it will kill that person. Independently of the accused's admission that he did realise that stabbing somebody "in that part of the body" might kill the person, the jury were entitled to think that the chance that the accused did not know what an ordinary 21 year old knows was so remote that it could be safely disregarded. Consequently, even if the accused had made no admission, the jury would have been entitled to conclude that he ought to have known that his unlawful act gave rise to a real chance that it might cause the death of the deceased.

Misdirection

- 20 Alternatively, the accused contended that, even if the admissions made by him in his record of interview were evidence "as to [his] subjective state of mind", "the learned trial judge had a duty to warn the jury in the strongest possible terms that this evidence was not at all cogent in terms of its capacity to establish that state of mind in the subjective sense required by *Boughey*". He also contended that the trial judge had a duty "to ensure that the jury did not lapse into a review conducted in an objective manner."

21 In summing up to the jury on the "ought to have known" issue, the trial judge said:

"In what circumstances should a person have known that his act was likely to cause death. You have to consider this from the position of Mr Simpson, the accused. We're not talking about what some hypothetical person ought to have known or what you would have known, the question is what he ought to have known. So with his actual state of knowledge, his age, which is 21, we don't know much about him really we haven't really been told much about him. But you've heard him in the witness box you might be able to make some assessment of him and you've seen him on that video of course. But with his actual state of knowledge and capacity as you determine the[m] to have been, then you look at the circumstances he was placed in and you determine, you make a judgment and determine ought he to have known that his unlawful act, if there was one, was likely to cause death, even if he didn't want to cause it. You should consider had he stopped to think to the extent that you think he should have, would he have known or appreciated that death was likely to ensue from his act. I'll put it another way, to what extent do you consider that he ought to have stopped to think and if he had done so, would he have known or appreciated that if he stabbed Mr Smith, death was a likely result. Now that's what ought to have known involves. And let me go to the next bit, ought to have known that it was likely to cause death. The expression 'likely to cause death' is one you can probably understand but you might have difficulty defining it if you had to. However, it's something, if something is likely to happen or there is a good chance that it will happen it probably means the same thing. It is something that may well happen, you might say it may not happen, but there is a good chance that it will happen. It's likely to happen, these are all similar expressions. So likely to cause death is an ordinary expression which is meant to convey the notion of a substantial or real chance as distinct from what is a mere possibility. A good chance that it will happen, something that may well happen, something that is likely to happen, but not just a mere possibility. Now I hope that helps you but look at the words that are used in the memorandum 'likely' is the word that's used there. So did he know that death was likely to be caused or ought he to have known that death was likely to be caused by his act. That's the question for you. It's a question of fact for the Jury to determine."

22 The learned judge gave the jury no directions as to how they might determine the accused's state of knowledge; nor did he refer in terms to the admissions of the accused. However, his Honour was under no obligation to give such directions, and counsel for the accused at the trial sought no directions at the conclusion of the summing up. That being so, his Honour's directions cannot be faulted. There is no reason to think that the jury applied an objective test or that the directions permitted "the onus of proof to shift away from the Crown in respect to proving circumstances peculiar to the [accused] sufficient to allow a jury to find a

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subjective state of mind in the [accused]." Nor is there any reason to suppose that the trial miscarried in any way.

- 23 His Honour made it clear to the jury that they had to consider the "ought to have known" issue "from the position of ... the accused" and that it was his "actual state of knowledge" and not that of "some hypothetical person" that was relevant. The learned judge also told the jury that they had to consider that, if the accused had stopped to think about the matter "would he have known or appreciated that if he stabbed Mr Smith, death was a likely result." Given these directions, there is no ground for thinking that the jury would have applied an objective test in determining whether the accused "ought to have known" that death was the likely result of his unlawful act.

Order

- 24 The appeal must be dismissed.

- 25 KIRBY AND CALLINAN JJ. Mr Damien John Simpson ("the appellant") appeals against the order of the Tasmanian Court of Criminal Appeal dismissing his appeal against his conviction for murder. The victim, Mr Tony Smith, died of a single stab wound inflicted in his neck by the appellant.

Background facts and admissions to the police

- 26 The appellant, a man of 21 years at the time of the offence, spent about three hours in the evening of 10 June 1995 at an hotel in Launceston drinking beer and some whiskey. At about half past midnight, he left the hotel in company with five other people, including his father, to walk into the city. On the way, three men accosted one of the appellant's party, Mr Ivan Quarrell, and asked for a cigarette. In a police interview which was recorded on videotape and which commenced some seven or so hours after the events to be described, the appellant gave this account of what occurred:

"Um, Ivan was talkin to some blokes, three blokes an um, they asked for a cigarette, an Ivan gave em a cigarette and then we walked across the road an Ivan said that um he took me cigarettes, so me father went down across the road an um asked for the cigarettes and they were bein real smart an um ... then I ran, then I ran across the road to where me father was an then they started, this bloke started pushin me around and then um first thing I done was grab me knife, cos [he] was pushin me around."

- 27 A little later in the interview, the appellant enlarged upon that account:

"Q Do you normally carry a knife, do you normally carry this knife all the time?

A Yep.

Q And whereabouts did you have the knife?

A In my back pocket.

Q And was it open or was it closed when ...

A Yeah, it was closed.

Q Did you open it when you pulled it out of your pocket?

A Yep.

Q After this fi ... , this fellow was pushing you around ...

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A Mm.

Q ... and you've opened your knife, knife up, what did you do then?

A I leaned, I was tryin ta when he was pushin me, I was, I, all that I done was pulled out me knife an then he pushed me again an then I went like that an then ...

Q When did you open it then?

A When it was in me pocket I just went like that an then it flipped open, like as soon as I pulled it out of me, out of me pocket.

Q And how many times did you hit him with it?

A Once I think.

Q Whereabouts did you hit him with it?

A I wouldn't have a clue.

Q Was he facing you?

A Yeah he was cos [he] was pushing me so, yeah he woulda been facing me."

28 In the interview, the appellant was interrogated about his state of mind:

"Q Why did you do it?

A Why, cos I was frightened.

Q Frightened of what?

A Because that bloke was pushin me, like cos I thought he was gunna punch me head in (sniff).

Q What was your intention when you pulled your knife out and opened it up?

A No intentions cos I didn't think, I just, I was just tryina get away sorta thing.

Q Well, at the time of pulling the knife out and opening up, did you intend to use the knife?

A Not real, nah. Well as, the split, it happened in a split second that's all I know.

...

Q At the time that you pulled the knife out though did you intend to kill him?

A No I didn't. I didn't even intend to pull the knife out at all, I didn't, I didn't mean to stab him at all, just (sniff) somin that, it just happened."

29 Later, the appellant said that he was scared of his victim who was a "pretty big bloke" and was pushing him around. He also expressly denied the investigating police officer's direct assertion that he had intended to stab the deceased. He claimed that he was fairly drunk at the time but admitted, at one point at least, that he knew what he was doing. The Crown called as witnesses, other members of the two groups and an independent witness, a taxi driver who had witnessed the events. There were various differences in their testimony. However, they were remarkably consistent with respect to their observations of how the fatal blow was inflicted by the appellant: that he ran up to the victim, either with his hand raised, or that he raised it when he reached the victim, to strike at him and then, ran away.

30 The appellant gave evidence at his trial. No other evidence was called in his case. We do not read his evidence as being in substance any different from the account that he gave when he was interviewed by the investigating police officers. Although some of the witnesses' versions were vague, no doubt as a result, in part at least, of the consumption of alcohol, one matter was clear at the trial: that the appellant was not under any direct, serious, personal, physical threat before he struck the victim with his knife.

31 At trial, the appellant relied on self-defence¹⁵. Clearly this was rejected by the jury. No point now arises about that. Alternatively, the appellant submitted before the jury that, if the Crown had satisfied them that self-defence was negated, the proper verdict in the circumstances was one of manslaughter. This was so on the ground that the appellant neither knew, nor ought to have known, that death was likely to result from his actions.

15 *Criminal Code Act 1924* (Tas), s 46.

The Criminal Code

- 32 Relevantly, s 157 of the *Criminal Code Act* 1924 (Tas) ("the Criminal Code") provides:

"(1) Subject to the provisions of section 160, culpable homicide is murder if it is committed -

- (a) with an intention to cause the death of any person, whether of the person killed or not;
- (b) with an intention to cause to any person, whether the person killed or not, bodily harm which the offender knew to be likely to cause death in the circumstances, although he had no wish to cause death;
- (c) by means of any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person".

- 33 In its reference to what the offender "ought to have known", s 157(1)(c) is unique in Australia to Tasmania. Its history is discussed by Brennan J in *Boughey v The Queen*¹⁶. Once again it is necessary to elucidate its meaning.

Decision of the Court of Criminal Appeal

- 34 In the Court of Criminal Appeal, Zeeman J (with whom Cox CJ agreed) summarised the trial judge's directions on the requirements of s 157(1)(c) of the Criminal Code¹⁷:

"At the trial the Crown did not invite the jury to find that the appellant knew that his unlawful act was likely to cause death in the circumstances. The directions given to the jury by the learned trial judge effectively told the jury to put that matter aside. He invited them to direct their attention to the question of whether the appellant ought to have known that his unlawful act was likely to cause death."

¹⁶ (1986) 161 CLR 10 at 45.

¹⁷ Unreported, 13 November 1996 at 2.

35 Later¹⁸, his Honour Zeeman J quoted the following passage from *Boughey*¹⁹:

"[The trial judge's] comments clearly and properly made the point that, whatever may be the difficulties of precise definition, the expression 'likely to cause death' in s 157(1) is an ordinary expression which is meant to convey the notion of a substantial or real chance as distinct from what is a mere possibility: 'a good chance that it will happen'; 'something that may well happen'; something that is 'likely to happen'. In our view, those comments went as far as was desirable in the circumstances of the case. His Honour was correct in not introducing an added requirement either that the applicant directed his mind to, or attempted to calculate, the degree of mathematical probability that his acts would cause death in the circumstances or that the applicant knew or ought to have known that it was 'more likely than not' or an 'odds on chance' that his actions would cause death in the circumstances."

36 In the Court of Criminal Appeal the appellant argued that he could not, and did not, possess the requisite knowledge that a blow of the kind he inflicted was likely to cause death. In support of this, his counsel referred to a pathologist's evidence that some studies had showed that 10 per cent only of knife wounds to the chest (supposedly the intended target of the appellant's blow) resulted in death. With respect to this argument and in dismissing it, Zeeman J pointed to these circumstances²⁰:

"1. There was evidence which justified the conclusion that the appellant ran up to the deceased, raised the knife which he held in his hand and stabbed the deceased in the neck in a downward motion.

2. There was evidence from the pathologist that the wound inflicted was to the left side of the neck, measured 7.8cm x 1.8cm and had resulted in a complete transection of one of the major branches of the aorta, a cutting of the muscle and a piercing of the upper part of the left lung.

3. The appellant gave evidence that he directed the blow with the knife to the upper part of the body of the deceased and that he knew that the upper part of the body contained arteries."

37 All of the judges of the Court of Criminal Appeal were of the opinion that the appeal should be dismissed. Slicer J, although he had some reservations about

18 Unreported, 13 November 1996 at 3.

19 (1986) 161 CLR 10 at 22 per Mason, Wilson and Deane JJ.

20 Unreported, 13 November 1996 at 4.

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some aspects of the way in which the case on manslaughter had been put by both the prosecutor and the defence at the trial, found no error in the trial judge's summing up to the jury. He was satisfied that no miscarriage of justice had occurred. The other judges concluded that no error had been shown. The Court dismissed the appeal. By special leave, the appellant has now appealed to this Court.

Grounds of appeal

38 The grounds of appeal which were pursued during the hearing before this Court, as amended, alleged that the Court of Criminal Appeal had erred in failing to hold that the trial judge:

1. had failed to direct the jury in accordance with the judgment of this Court in *Boughey* as to the jury's task in determining if the appellant ought to have known his act [of stabbing the deceased] was likely to cause death in the circumstances; and

2. should have withdrawn the charge of murder from the jury pursuant to section 157(1)(c), in that there was insufficient evidence that the appellant knew or ought to have known that his act [of stabbing the deceased] was likely to cause death.

39 The two grounds of appeal are related. They may be dealt with together.

Complaints about the summing up

40 The relevant passage in the trial judge's summing up, complained of by the appellant, was as follows:

"In what circumstances should a person have known that his act was likely to cause death. You have to consider this from the position of Mr Simpson, the accused. We're not talking about what some hypothetical person ought to have known or what you would have known, the question is what he ought to have known. So with his actual state of knowledge, his age, which is 21, we don't know much about him really we haven't really been told much about him. But you've heard him in the witness box you might be able to make some assessment of him and you've seen him on that video of course. But with his actual state of knowledge and capacity as you determine them to have been, then you look at the circumstances he was placed in and you determine, you make a judgment and determine ought he to have known that his unlawful act, if there was one, was likely to cause death, even if he didn't want to cause it. You should consider had he stopped to think to the extent that you think he should have, would he have known or appreciated that death was likely to ensue from his act. I'll put it another way, to what extent do

you consider that he ought to have stopped to think, and if he had done so, would he have known or appreciated that if he stabbed Mr Smith, death was a likely result. Now that's what ought to have known involves. And let me go to the next bit, ought to have known that it was likely to cause death. The expression 'likely to cause death' is one you can probably understand but you might have difficulty defining it if you had to. However, it's something, if something is likely to happen or there is a good chance that it will happen it probably means the same thing. It is something that may well happen, you might say it may not happen, but there is a good chance it will happen. It's likely to happen, these are all similar expressions. So likely to cause death is an ordinary expression which is meant to convey the notion of a substantial or real chance ... that it will happen, something that may well happen, something that is likely to happen, but not just a mere possibility. Now I hope that helps you but look at the words that are used in the memorandum 'likely' is the word that's used there. So did he know that death was likely to be caused or ought he to have known that death was likely to be caused by his act. That's the question for you. It's a question of fact for the jury to determine."

- 41 The appellant contends that the directions given by his Honour fell short of what was required by *Boughey*. The argument was that the test was a subjective one and must be posed in relation to a particular person, the appellant. In support of these submissions the appellant relied on *R v Phillips*²¹ and *Boughey*²².
- 42 *Boughey* was something of a special case. The appellant there was a medical practitioner actually possessed of a special knowledge that the activities in which he and the victim were engaged and which lead to the latter's death were such as were likely to cause death in the sense in which "likely" was used in s 157(1)(c) of the Criminal Code. In this case it was not suggested that there was any special knowledge on the part of the appellant.
- 43 The appellant's submissions went so far as to contend that the prosecution, in order to satisfy s 157(1)(c), must prove by evidence, the actual state of knowledge and awareness of a particular accused. Such a submission would effectively deny the right of the jury to draw inferences as to matters of ordinary common sense and common awareness. Because the appellant was a 21 year old man, showing no apparent disability or want of ordinary experience, it was plainly open to the jury to infer that the appellant ought to have known that the striking of a blow with a knife in the vicinity of a person's chest or neck was likely to cause that person's death. Implicit in the appellant's submission was the proposition that, in any case

21 (1971) 45 ALJR 467 at 479 per Windeyer J.

22 (1986) 161 CLR 10 at 20, 28 per Mason, Wilson and Deane JJ.

in which detailed evidence of the actual knowledge of an accused as to a fairly precise relationship between an act and its physiological consequences was absent, the case should be taken from the jury. Such a construction of the provision is untenable. It is rejected.

- 44 In establishing the "knowledge" and "awareness" of an accused person, it is usually necessary (in the absence of clear admission) to rely on inference. This is normally the way in which such matters are established in a criminal trial. It can hardly be otherwise. Furthermore, knowledge and awareness do not necessarily involve any element of intention²³.
- 45 In *Doney v The Queen*²⁴, this Court discussed the role of a jury in drawing inferences in terms which bear repeating in the present context:

"The acceptance or rejection of evidence involves an inference as to its truth, which inference is, at least in part, based on 'a principle of faith in human veracity sanctioned by experience'²⁵. It is usual not to so categorize the inferences involved in the acceptance of direct or testimonial evidence and to treat the process of inference as confined to circumstantial evidence. But it is appropriate here to draw attention to the fact that the drawing of inferences extends beyond circumstantial evidence because the purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful."

Conclusion: no error or miscarriage

- 46 Measured against the Criminal Code, the trial judge's summing up was adequate in the circumstances. Clearly, it was open to the jury to conclude that a 21 year old person of ordinary understanding, such as the appellant, ought to have appreciated that his act of stabbing was likely to cause death. This is not a matter of deciding what the appellant objectively ought to have known as a hypothetical ordinary person. It is instead, a matter of inferring what, subjectively, this

23 Contrast *Cutter v The Queen* (1997) 71 ALJR 638; 143 ALR 498, in which the statutory provision (s 283 of the *Criminal Code* (WA)), required as an element of the offence, an intention on the part of the offender to cause death.

24 (1990) 171 CLR 207 at 214 per Deane, Dawson, Toohey, Gaudron and McHugh JJ.

25 Wigmore, *Evidence*, (1983), vol 1A at 954, referring to an unverified citation from Starkie's *Evidence* (1824).

particular accused ought to have known as derived from the facts objectively known about him, supplemented by common knowledge and experience. The jury in this case were not misled by the trial judge's directions. Those directions, and the conduct of the trial on the issue, were accurate and entirely fair to the appellant.

47 As to the second ground of appeal, alleging that the trial judge should have withdrawn from the jury the prosecution's contention that the appellant ought to have known that his act of stabbing the deceased was likely to cause death, it is sufficient to repeat that any person of the appellant's age and background having ordinary understanding, such as the appellant, ought to have appreciated that what he did was likely to cause death. As *Boughey* makes plain, the questions are:

1. whether the appellant, "with the knowledge and the capacity which he or she actually possessed, ought to have thought about the likely consequences of his or her action"²⁶; and
2. if the appellant "had stopped to think to the extent that he ought to have, the result would, as a matter of fact, have been that he ... would have known or appreciated that the relevant act or acts were likely to cause death"²⁷, "likely", being used in its ordinary meaning, namely, to convey the notion of a substantial - a "real and not remote" - chance whether it is less or more than 50 per cent²⁸.

48 There was, moreover, the appellant's own admission in the course of his interview by police during which the following questions were asked and answers given:

"Q Did you, you said that you st, you st, you stabbed him in the upper part of the body?

A Yeah.

Q And you realised that by stabbing somebody in that part of the body that you'd kill 'em?

A Not if it's in the arm.

Q I'm talkin about the upper body not the arms.

26 (1986) 161 CLR 10 at 29 per Mason, Wilson and Deane JJ.

27 (1986) 161 CLR 10 at 29 per Mason, Wilson and Deane JJ.

28 (1986) 161 CLR 10 at 21-22 per Mason, Wilson and Deane JJ.

A *I, yeah, I did realise* but I, I thought that it was probably around this area sort of, like from the arm to here ..." (emphasis added)

- 49 The video tape of the interview which was seen by the jury and viewed by this Court shows plainly that the area indicated by the appellant in giving the answer last quoted included the area of the upper body in which the fatal blow was struck. Even children in Australia know that the upper chest and neck areas of the human body are vulnerable. When stabbed, bleeding will ordinarily occur. When stabbed with force with a knife, there is a real chance that the victim will die as a consequence. It was therefore open to the jury, particularly with the admission made by the appellant, to conclude beyond reasonable doubt that the Crown had established that the appellant ought to have known that his action was likely to cause the death of the deceased. Under the Criminal Code, that was sufficient to sustain the appellant's conviction of murder.
- 50 It is arguable, on the appellant's admissions, that a case could have been left to the jury on the first limb of s 157(1)(c) of the Criminal Code, that is, that the appellant knew that his conduct was likely to cause death. However that may be, it was certainly open to the jury to conclude that the conduct proved fell within the second limb of the paragraph. No error occurred in the direction of the trial judge, nor in his failure to withdraw the count from the jury. No miscarriage of justice is shown in the appellant's conviction.

Order

- 51 The appeal should be dismissed.

52 HAYNE J. The circumstances giving rise to this appeal are set out in the reasons for judgment of other members of the Court. I do not repeat them. I agree that the appeal should be dismissed and do so generally for the reasons given by Kirby and Callinan JJ.

53 It was open to the jury at the appellant's trial to conclude that the appellant had admitted in his record of interview that he realised that to stab someone in the upper part of the body near the neck was likely to cause death. Even if this admission were disregarded, it was open to the jury to conclude that the accused ought to have known that to stab someone near the neck was likely to cause death.

54 It matters not that he may not have understood the mechanics of the process that led to such a wound being fatal. What matters is that it was well open to the jury to conclude that this accused, an apparently ordinary 21 year old, ought to have known that there was a real chance that stabbing a person as he did might cause death. That is, it was open to the jury to conclude that he ought to have thought about the likely consequences of his action and that if he had stopped to think he would have known or appreciated that there was a real and not remote chance of causing death.

55 I also agree that there was no misdirection about this issue. The trial judge told the jury that they must "consider [the matter] from the position of Mr Simpson, the accused" and emphasised that the inquiry was about his subjective state of mind. There was no occasion, in this case, to direct the jury to consider the accused's knowledge of the mechanics of the process that followed from the stabbing and caused the death.

