

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

MARJORIE HEATHER OSLAND

APPELLANT

AND

THE QUEEN

RESPONDENT

Osland v The Queen (M14-1998) [1998] HCA 75
10 December 1998

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation:

J A Scutt with A C Thacker and F G Phillips for the appellant (instructed by Hale & Wakeling)

M S Weinberg QC with B Kayser for the respondent (instructed by Solicitor for Public Prosecutions (Victoria))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Osland v The Queen

Criminal law – Murder – Acting in concert – Joint trial of two accused – Jury convicted one accused but unable to reach a verdict in respect of the other – Whether verdicts inconsistent such that conviction unsafe and unsatisfactory – Principles governing identification of inconsistency.

Criminal law – Complicity – Doctrine of concert – Understanding or arrangement between accused – Liability of one accused for acts performed by another – Whether dependent upon a common mental element – Whether affected by availability of a defence to, or other exculpatory feature in respect of, person performing the acts – Adequacy of trial judge's directions to jury.

Criminal law – Causation – Murder – Multiple acts contributing to death – Whether contribution of one accused sufficiently significant in own right to sustain causal link – Effect of *Crimes Act* 1958 (Vic), s 323 – Relevance of conduct of case.

Criminal law – Defences – "battered woman syndrome" – Whether a proper subject for expert evidence – Whether a sub-category of provocation or self-defence, or a separate defence – Appropriateness of directions given to jury.

Criminal law – Evidence – Lies told by accused – Use to which evidence of lies may be put – Appropriate direction to be given to jury – Whether failure to direct resulted in a miscarriage of justice.

Criminal law – Evidence – Intercepted telephone conversations – Whether sufficiently probative to be admitted into evidence – Whether probative value outweighed by prejudicial effect.

R v Demirian [1989] VR 97 at 123-124, disapproved.
Crimes Act 1958 (Vic), s 323.

1 GAUDRON AND GUMMOW JJ. Mrs Heather Osland and her son, David Albion, stood trial in the Supreme Court of Victoria charged with a single count of murder. They were charged that, on 30 July 1991, they murdered Frank Osland, Mrs Osland's husband and David Albion's step-father. The jury was unable to reach a verdict with respect to David Albion but convicted Mrs Osland of murder.

2 Mrs Osland appealed unsuccessfully to the Victorian Court of Appeal¹. By the time of her appeal, David Albion had been retried and acquitted. Mrs Osland now appeals to this Court. One aspect of her appeal relates to the failure of the jury to convict her son. On the prosecution case, it was he, alone, who struck the blow or blows that caused Mr Osland's death.

3 The prosecution case was that Mrs Osland and David Albion together planned to murder Mr Osland. It was put that, in furtherance of their plan, they dug a grave for their intended victim during the day of 30 July 1991. Later, on the evening of the same day and in furtherance of the plan alleged, Mrs Osland mixed sedatives² in with Mr Osland's dinner in sufficient quantity to induce sleep within an hour. According to the prosecution case, David Albion carried the plan to finality after Mr Osland went to bed by fatally hitting him over the head with an iron pipe in the presence of Mrs Osland. And later, he and Mrs Osland buried Mr Osland in the grave they had earlier prepared.

4 Mrs Osland and David Albion both gave evidence at the trial. Neither disputed that they dug a grave, although they called it "a hole"; that Mrs Osland mixed sedatives into her husband's dinner; that David Albion struck the blow or blows that killed Mr Osland; that they buried his body in "the hole" and, thereafter, acted as though he had simply disappeared. Neither denied that they then took various steps to make it appear that Mr Osland had left the area without communicating with anyone. To this end, Mrs Osland engaged in a series of deceptions, including reporting Mr Osland as a missing person. Another aspect of the appeal involves a complaint that, although not requested to do so by counsel for Mrs Osland, the trial judge should have instructed the jury as to the use it might properly make of the lies that she told in connection with her husband's "disappearance".

5 Mrs Osland and David Albion each relied on self-defence and provocation. Those defences were raised against an evidentiary background of tyrannical and violent behaviour by Mr Osland over many years but, according to evidence given

1 *R v Osland* [1998] 2 VR 636.

2 At trial, Dr Olaf Drummer testified to having found traces of the sedative Dothiepin, in the form of the prescription product Prothiaden, in the remains of the deceased.

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by Mrs Osland and her son, escalating in the days prior to his death. The prosecution accepted that Mr Osland had been violent and abusive towards Mrs Osland in the past but contended that that behaviour had ceased well before his murder. That contention was made on the basis of certain intercepted telephone conversations to which Mrs Osland was a party. In those conversations, which took place well after Mr Osland's death, Mrs Osland made statements to the effect that his violence had ceased some years before his "disappearance". Another aspect of the appeal relates to the admission of evidence of other intercepted conversations. Further reference will be made to those other conversations in due course.

6 Mrs Osland's evidence was that Mr Osland's violence, and her fear of it, continued up until the day of his death. She and her son both gave evidence that, in the days prior to his death, Mr Osland ordered David Albion out of the house and said he would kill him if he did not go. David Albion gave evidence that he thought of leaving, but feared for his mother's life if he did. And in support of Mrs Osland's case, expert evidence was led of "the battered wife syndrome". The use of that evidence and its relationship with self-defence and provocation are also in issue in this appeal.

7 In his evidence, David Albion claimed that he and his mother dug the hole on 30 July 1991 without any intention, at that stage, of killing Mr Osland. Mrs Osland's evidence, although less clear, was to the same effect. Mrs Osland and David Albion each gave different, but not necessarily inconsistent, accounts of what happened when Mr Osland came home that evening. Mrs Osland said there was verbal abuse but added, in the course of her evidence, "I can't hear his words." She said she later mixed the sedatives into Mr Osland's dinner to quieten him down.

8 On the other hand, David Albion recalled Mr Osland yelling at his mother, holding her against a wall and standing over her. When he, David intervened, Mr Osland said he was going to kill him and hit him on the side of the head causing him to fall to the floor. After that altercation, the atmosphere quietened somewhat. A little later, according to David Albion, Mrs Osland said that she would "calm [Mr Osland] down". Mr Osland, Mrs Osland and David Albion then had dinner together, although not harmoniously. David Albion gave evidence that he thought Mrs Osland put the sedatives in Mr Osland's coffee.

9 Both Mrs Osland and David Albion gave evidence that, when Mr Osland went to bed, they became afraid as to what he would do in the morning when he realised he had been drugged. They feared they would both be killed. There was some discussion as to what they should do. They apparently agreed to hit Mr Osland with a weapon of some kind. David Albion got a piece of pipe. Having told his mother that she was not strong enough to do it, David Albion then struck the fatal blow or blows in her presence. The medical evidence was that

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Mr Osland's death resulted from gross fractures to his skull. The case seems to have been conducted on the basis that death was instantaneous. Mrs Osland gave evidence that, after the blow or blows were struck, she held Mr Osland's body down to stop it twitching.

The jury's failure to convict David Albion

10 As already indicated, the prosecution case was that Heather Osland and David Albion were jointly responsible for Frank Osland's death. And in certain respects, their cases were conducted on the basis that, if one was responsible, the other was equally so. Thus, the trial judge instructed the jury that it did "not seem to be denied that it was the acts of the accused jointly that caused the death" of Frank Osland.

11 In other parts of his charge, the trial judge instructed the jury to consider the evidence against each accused separately and informed it that it might convict one and not the other. He did not indicate any process of reasoning or of fact finding that might lead to that result³. However, no objection was taken to the directions or to the absence of any indication as to how the jury might convict one accused and not the other. Nor was any complaint made with respect to these matters in the Court of Appeal. It was contended in this Court, for the first time, that Mrs Osland's conviction is inconsistent with the jury's failure to convict her son, or, alternatively, that the directions given by the trial judge were deficient.

12 Before turning to the detail of the inconsistency argument, it is convenient to note that, so far as concerns the actual killing of Frank Osland, the evidence against Mrs Osland and David Albion was substantially the same. With respect to self-defence and provocation, however, the evidence was different. Accordingly, the respondent contended that it must be taken that it was that difference that led the jury to convict Mrs Osland without reaching a verdict against her son. More precisely, it must be taken that the jury was satisfied that the prosecution had negated provocation and self-defence in the case of Mrs Osland but could not decide if that was so in the case of David Albion. Thus, the question to be determined is whether, in those circumstances, the jury's conviction of Mrs Osland was inconsistent with its failure to convict David Albion.

3 In the course of charging the jury, his Honour advised that it "should stand back and ... view the case against each accused separately, if for no other reason [than] that in the case of Mrs Osland a case has been put by her allied to self-defence and provocation that there are special features of her situation: battered woman syndrome." However, it was not then said that the jury might, because of that special feature of the case against Mrs Osland, convict one but not the other accused.

- 13 Initially, Mrs Osland's counsel put the inconsistency argument on the hypothesis that, though an accessory, she was charged as a principal offender pursuant to s 323 of the *Crimes Act* 1958 (Vic). That section provides:

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

- 14 The conviction of a person charged as accessory is not necessarily inconsistent with the acquittal or failure to convict the person charged as the principal offender. That is because the evidence admissible against them concerning the commission of the offence may be different⁴. Even so, an accessory cannot be convicted unless the jury is satisfied that the principal offence was committed⁵. Thus, if two people are tried together as principal and accessory and the evidence as to the commission of the crime is the same against both, acquittal of the person charged as principal is inconsistent with the conviction of the other⁶. However, that does not avail Mrs Osland. She was not tried as an accessory. Rather, she and David Albion were together tried as principals or as joint perpetrators of the murder of Frank Osland.

- 15 A person may be guilty of murder as principal even though his or her act is not the immediate cause of death. A person who, with intent to kill, does some act which substantially contributes⁷ to the death of another, may be guilty of murder

4 See *King v The Queen* (1986) 161 CLR 423 at 433-436 per Dawson J (with whom Gibbs CJ, Wilson and Brennan JJ agreed); *Sweetman v Industries and Commerce Department* [1970] NZLR 139 at 148 per Richmond J; *R v Andrews Weatherfoil Ltd, Sporle and Day* (1971) 56 Cr App R 31 at 40.

5 *Surujpaul v The Queen* [1958] 1 WLR 1050 at 1053; [1958] 3 All ER 300 at 301; *R v Anthony* [1965] 2 QB 189 at 192; *Sweetman v Industries and Commerce Department* [1970] NZLR 139 at 148; Turner, *Kenny's Outlines of Criminal Law*, 18th ed (1962) at 107; Gillies, *Criminal Law*, 4th ed (1997) at 158.

6 See *Surujpaul v The Queen* [1958] 1 WLR 1050 at 1053; [1958] 3 All ER 300 at 301; *R v Anthony* [1965] 2 QB 189 at 192; *Sweetman v Industries and Commerce Department* [1970] NZLR 139 at 148; *R v Darby* (1982) 148 CLR 668 at 685 per Murphy J; *King v The Queen* (1986) 161 CLR 423 at 434 per Dawson J; Smith and Hogan, *Criminal Law*, 8th ed (1996) at 152-153; Gillies, *Criminal Law*, 4th ed (1997) at 158.

7 *Royall v The Queen* (1991) 172 CLR 378 at 389 per Mason CJ, 398, 399 per Brennan J, 411, 412 per Deane and Dawson JJ, 423 per Toohey and Gaudron JJ, see discussion at 440, 442, 443-444 per McHugh J.

notwithstanding that the immediate cause of death is the act of another person⁸ or, even, the deceased's own act⁹. And the same is true if the person does the act, not with intent to kill, but with intent to inflict grievous bodily harm or with knowledge that it is probable that death or grievous bodily harm will result although indifferent to that consequence¹⁰.

16 There is no necessary inconsistency between the conviction of a person who substantially contributes to the death of another and the failure to convict or, even, the acquittal of the person whose act is the immediate cause of death. For example, if two people set upon another and one holds the victim down while the other, who is legally insane, inflicts wounds which cause death, the first may properly be found guilty of murder even though the other is found not guilty by reason of insanity¹¹.

17 Moreover, it is logically possible for a person to be found guilty of murder on the basis that his or her acts substantially contributed to the death of another even though the immediate cause of death was a wound inflicted by a person found

8 See *R v Macklin, Murphy and Others* (1838) 2 Lewin CC 225 [168 ER 1136]; *R v Haines* (1847) 2 Car & K 368 [175 ER 152]; *R v Jackson* (1857) 7 Cox CC 357 at 360 per Bramwell B; *R v Macdonald and Macdonald* (1904) St R Qd 151 at 169, 171 per Cooper CJ, 174 per Real J; Turner, *Kenny's Outlines of Criminal Law*, 18th ed (1962) at 105; cf *Mohan v The Queen* [1967] 2 AC 187 at 194-195; *R v Pagett* (1983) 76 Cr App R 279 at 285-288; *Royall v The Queen* (1991) 172 CLR 378 at 398 per Brennan J, 441, 444 per McHugh J; *R v Millward* [1994] Crim LR 527; Smith and Hogan, *Criminal Law*, 8th ed (1996) at 154, 157.

9 *Royall v The Queen* (1991) 172 CLR 378. In that case, this Court upheld a decision of the New South Wales Court of Appeal dismissing an appeal from a conviction for murder where the immediate cause of death was injuries sustained in a fall from an apartment bathroom window, the evidence supporting the conclusion either that the victim was trying to escape attack or that she jumped fearing life-threatening violence. *Royall* is a recent instance of a line of authority that a person is guilty of murder who intends, or is recklessly indifferent to the probability that his or her actions will cause grievous bodily harm or death, where death in fact results from an attempt by the deceased to escape violence feared to be life-threatening: *R v Pitts* (1842) Car & M 284 [174 ER 509]; *R v Grimes and Lee* (1894) 15 NSW(L) 209; *R v Curley* (1909) 2 Cr App R 96; see discussion in *Pagett* (1983) 76 Cr App R 279 at 289.

10 See *R v Crabbe* (1985) 156 CLR 464 at 469-470; *Royall v The Queen* (1991) 172 CLR 378 at 394-395 per Mason CJ, 400 per Brennan J, 415, 416-417 per Deane and Dawson JJ, 430-432 per Toohey and Gaudron JJ, 452, 454, 456 per McHugh J.

11 See *Matusевич v The Queen* (1977) 137 CLR 633 at 637-638 per Gibbs J.

not guilty of murder but guilty of manslaughter. Suppose that, while acting under provocation, one person strikes another and that another person, not acting under provocation, renders assistance by holding the victim down enabling the first person to inflict wounds which cause death. There is no necessary inconsistency in that situation if a jury finds the person who gave assistance guilty of murder yet finds the person who inflicted the wounds not guilty of murder but guilty of manslaughter¹². Nor is there any necessary inconsistency if the jury is unable to reach a verdict against the person who inflicted the wounds because it cannot agree whether he or she should be found guilty of murder or manslaughter - a consideration which may explain the failure of the jury to convict David Albion in this case.

- 18 To convict a person of murder on the basis that his or her act substantially contributed to the death of another, the jury must be satisfied beyond reasonable doubt that the act was done with intent to kill or with such other intention or state of mind as is necessary to constitute murder¹³. According to the evidence, the only act done by Mrs Osland which might be thought to have contributed to the death of her husband was the mixing of sedatives into his dinner. However, the jury was never asked to determine whether that act substantially contributed to his death. In fact, the trial judge excluded that possibility by directing that "it [could] only be a blow with the instrument [that] ... was [the] operative and substantial cause [of death]". Moreover, the jury was not asked to make any finding as to the intention with which Mrs Osland mixed the sedatives into her husband's dinner. The case was simply not conducted on the basis that Mrs Osland's acts substantially contributed to her husband's death.

- 19 It was suggested for the respondent that Mrs Osland's conviction is consistent with the jury's failure to convict her son on the basis that he was her "innocent

12 See in relation to provocation, *R v Pearson* unreported, Court of Appeal (UK), 11 November 1991; see also Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 373-374; *R v Bourne* (1952) 36 Cr App R 125, where the appellant was convicted of abetting the commission by his wife of bestiality with a dog, although the wife, having acted under duress, was not charged. The reasoning in *Bourne* has been described as suggesting "that there are cases in which a person may be liable for aiding and abetting another to commit a crime, although the actual perpetrator is not criminally responsible": *Matusevich v The Queen* (1977) 137 CLR 633 at 638 per Gibbs J.

13 *Royall v The Queen* (1991) 172 CLR 378 at 391 per Mason CJ, 400 per Brennan J, 415, 416-417 per Deane and Dawson JJ, 430-432 per Toohey and Gaudron JJ, 452, 454, 456 per McHugh J; Victoria retains the common law categories of murder, the *Crimes Act* 1958 (Vic) prescribing only punishment of the offence: s 3.

agent"¹⁴. It is not in doubt that a person may be convicted of murder and the person whose acts caused death acquitted if that second person was the "innocent agent" or "innocent instrument" of the first¹⁵. Again, however, the trial was not conducted on that basis. Nevertheless, it was argued that, if Mrs Osland's conviction could be sustained on the basis that David Albion was her "innocent agent", her appeal should be dismissed¹⁶. It was put that a similar course was taken by the English Court of Appeal in *R v Cogan and Leak*¹⁷. Whether or not that be so¹⁸, principle requires that neither this Court nor a court of criminal appeal adopt that approach.

20 If a trial has miscarried, a guilty verdict cannot be upheld on a basis not left to the jury because that would be to trespass on the constitutional function of the jury. Thus, in *Ross v The King*¹⁹, where the Full Court of the Supreme Court of Victoria had held that there had been a misdirection as to the elements of the offence of murder but that the misdirection did not vitiate the appellant's conviction because it could be sustained on another basis, Isaacs J said:

"... the [Full] Court ... now proceeds to hold that if the jury had asked, and had been directed, *on another ground altogether* which they had not in fact been asked to consider and cannot be presumed to have considered, they would necessarily have found the same verdict. And therefore it is held that the verdict - the totally different verdict - they *did* find is to stand ... [t]he conclusion assumes what I respectfully maintain a Court can never properly hold as a matter of law ... that, where a man says he had no intention of killing

14 Transcript of proceedings, Friday 24 April 1998 at 146, 168-169, 181.

15 *White v Ridley* (1978) 140 CLR 342 at 346 per Gibbs J, 353-354 per Stephen J (Aickin J agreeing at 363); *R v Hewitt* [1997] 1 VR 301 at 311-313 per Winneke P; Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 368-369; see commentary of Professor Sir John Smith QC accompanying *R v Millward* [1994] Crim LR 527 at 530; Smith and Hogan, *Criminal Law*, 8th ed (1996) at 128.

16 See transcript of proceedings, Friday 24 April 1998 at 146, 168-169, 181.

17 [1976] QB 217. See transcript of proceedings, Friday 24 April 1998 at 181.

18 Although the result in *R v Cogan and Leak* has been explained on the "innocent agent" basis by some commentators, it is to be observed that that proposition is not found expressed in the reasons for judgment. The reasoning attributed to *R v Cogan and Leak* has been described as "demonstrably unsound" (Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 371) and "contrary to principle" (Smith and Hogan, *Criminal Law*, 8th ed (1996) at 128).

19 (1922) 30 CLR 246.

but merely of stopping cries, he had nevertheless in fact the intention of doing bodily harm. That is essentially the function of a jury"²⁰.

21 It follows that Mrs Osland's conviction cannot be upheld either on the basis that her act of mixing sedatives in her husband's dinner substantially contributed to his death or on the basis that David Albion was her "innocent agent". If her conviction is to be upheld, it can only be upheld on the basis that was left to the jury, namely, that Mr Osland was killed by David Albion pursuant to an understanding or arrangement with his mother that, together, they would kill him.

22 It will shortly be necessary to turn to the principles that hold a person guilty for a crime committed pursuant to an understanding or arrangement with another that, together, they will commit the crime in question, or, as it is sometimes said, where they act in concert²¹ or pursuant to a common purpose²². For the moment, however, it is sufficient to note that those principles allow - as the respondent accepts - that Mrs Osland could only be convicted if the jury was satisfied that David Albion killed his step-father pursuant to an understanding or arrangement with her that, together, they would kill him. But if satisfied of that, how could it fail to convict David Albion?

23 It was contended for the respondent that the jury might convict Mrs Osland consistently with its failure to convict David Albion because it was open to it to find that, in killing his step-father, David Albion was carrying out an understanding or arrangement with his mother even if it was possible that he was also acting under provocation or in self-defence²³. To analyse that argument, it is necessary to turn to the principles which govern the liability of those who act in concert to commit a crime.

20 (1922) 30 CLR 246 at 268-269. See also to the same effect at 255-256 per Knox CJ, Gavan Duffy and Starke JJ.

21 *Matusevich v The Queen* (1977) 137 CLR 633 at 638 per Gibbs J, 645 per Mason J, 648 per Murphy J, 661 per Aickin J.

22 *McAuliffe v The Queen* (1995) 183 CLR 108. Note that "common purpose" may give rise to criminal liability in two distinct situations: (1) where the parties have a common purpose to commit a particular crime which purpose is carried into effect; (2) where one of the parties, in carrying out their common purpose, commits another crime and that other crime is within the scope of that purpose. As to the latter, see *Johns v The Queen* (1980) 143 CLR 108 and *McAuliffe* at 114-115.

23 Transcript of proceedings, Friday 24 April 1998 at 140-141.

24 In the joint judgment in *McAuliffe v The Queen*, it was said²⁴:

"The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission²⁵. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission²⁶."

It is to be observed that in this passage reference to presence at the scene was made with respect to the case of a principal in the second degree. The reference was not repeated when dealing with liability established by reason of a common purpose. Rather, in a footnote, the Court, by way of comparison, referred to the statement of principle by Smith J in *R v Lowery and King (No 2)*²⁷. Smith J did propound the principle in terms involving a presence at the scene of a crime.

25 It is necessary at the outset to note an argument made by counsel for Mrs Osland that the principle discussed above does not direct the conclusion that a person present when a crime is committed by another pursuant to their understanding or arrangement to commit that crime together is guilty as principal rather than as accessory. In this regard, counsel relied on a passage in the joint judgment of McGarvie and O'Bryan JJ in *R v Demirian*²⁸. In that case, which was decided before *McAuliffe*, their Honours referred to a number of cases, including

24 (1995) 183 CLR 108 at 113-114 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ.

25 See *Giorgianni v The Queen* (1985) 156 CLR 473.

26 cf *R v Lowery and King (No 2)* [1972] VR 560 at 560 per Smith J.

27 [1972] VR 560 at 560.

28 [1989] VR 97 at 123.

*Johns v The Queen*²⁹, in which, they said, some accused persons, who were "acting in concert at the scene of [a] crime", had been referred to as "principals in the second degree or accessories"³⁰. Their Honours added:

"No case was cited ... in which a person who did not actually perpetrate, or was not one of those who actually perpetrated, the crime, but who acted in concert with the actual perpetrator at the time and place of the crime, was held to be a principal offender. None of the cases described by Lanham³¹ as cases in which those acting in concert while present at the offence were 'in effect' treated as principals in the first degree, decide that as a matter of law such persons are necessarily principals in the first degree."³²

- 26 It was not necessary in any of the cases to which McGarvie and O'Bryan JJ referred in *Demirian* to decide whether the person present at the scene of the crime was guilty as principal or as accessory. And the cases in this area have to be read with an understanding that, as a result of provisions such as s 323 of the *Crimes Act* 1958 (Vic)³³, it is rarely necessary to determine that question. Moreover, in *Matusevich v The Queen*, Gibbs J apparently proceeded on the basis that a person

29 (1980) 143 CLR 108.

30 The cases cited are *R v Kalinowski*; *R v Timbury* (1930) 31 SR (NSW) 377; *R v Surridge*; *R v Surridge*; *R v Harris* (1942) 42 SR (NSW) 278; *R v Smith* [1963] 1 WLR 1200; [1963] 3 All ER 597; *R v Vandine* [1970] 1 NSW 252.

31 Referring to Lanham, *Complicity, Concert and Conspiracy*, (1980) 4 *Criminal Law Journal* 276.

32 [1989] VR 97 at 123-124.

33 Section 323 of the *Crimes Act* 1958 (Vic) provides:

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

Provisions of substantially equivalent operation are in force in each State and Territory: *Crimes Act* 1900 (NSW), ss 345-346; *Criminal Law Consolidation Act* 1935 (SA), s 267; *Criminal Code Act* 1899 (Q), ss 7-9, 10A; *Criminal Code Act Compilation Act* 1913 (WA), ss 7-9; *Criminal Code Act* 1924 (Tas) ss 3-5; *Criminal Code Act* 1983 (NT), ss 8-10, 12; *Crimes Act* 1900 (ACT), s 345.

who is present when another commits a crime pursuant to a common design that they commit it together is guilty as principal not as accessory³⁴.

27 More to the point, principle dictates the conclusion that those who form a common purpose to commit a crime together are liable as principals if they are present when the crime, or any other crime within the scope of the common purpose³⁵, is committed by one or more of them. The crime having been committed in accordance with the continuing understanding or arrangement, all are equally guilty as principals regardless of the part played by each³⁶. That result follows from the reasoning in *McAuliffe v The Queen*³⁷. Indeed, that reasoning would appear not to require presence at the scene of all parties to the continuing common purpose if the criteria specified in that reasoning otherwise are satisfied. The appellant's submissions on this aspect of the case proceeded upon a false basis.

28 In this case, the evidence clearly permitted of a finding that Mrs Osland and David Albion entered into an "understanding or arrangement that together" they would kill Mr Osland. It also permitted of a finding that Mrs Osland was present when Mr Osland was killed. Thus, the question to be determined is whether it was open to the jury to find that when he killed his step-father, David Albion was acting pursuant to an understanding or arrangement with his mother that, together, they would kill Frank Osland even though unable to decide whether he may have acted in self-defence or as a result of provocation.

29 A similar question arose in *R v Pearson*³⁸, the facts of which are a little like those in this case. In *Pearson*, two brothers were charged with murdering their father, a violent and abusive man. The father assaulted the younger son and, shortly afterwards, fell asleep. The brothers then decided to kill him. The elder brother struck him twice around the head with a sledgehammer, probably without killing him. The younger brother then struck two further blows. The father died

34 (1977) 137 CLR 633 at 636-637.

35 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

36 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

37 (1995) 183 CLR 108 at 113-114.

38 Unreported, Court of Appeal (UK), 11 November 1991.

later that night. Both brothers raised provocation³⁹. In the result, the jury convicted the elder brother of murder and the younger of manslaughter⁴⁰.

30 In *Pearson*, the Court of Appeal declined to take the view that provocation rendered the notion of joint enterprise inapplicable in that case. Rather, it was said that it was possible for the "jury to find that the joint enterprise that undoubtedly existed was ... one where one defendant might have been provoked to the requisite extent whilst another was not."⁴¹

31 Reference was made in *Pearson* to *R v McKechnie, Gibbons and Dixon*⁴², another decision of the Court of Appeal involving a joint enterprise. In that case, the victim died as the result of the acts of one of the persons charged with his murder⁴³. That person raised provocation⁴⁴ and was convicted of manslaughter⁴⁵. It was said that the others, who had been parties to the destruction of the victim's property but not to the attack on his person, could not be guilty of any offence relating to the physical attack because "the jury's finding that [the assailant] was or may have been provoked ... render[ed] impossible any notion of joint enterprise"⁴⁶.

32 It was said in *Pearson* that "whilst [the proposition in *McKechnie*] was no doubt appropriate to the facts of [that case] it [was] not to be taken as a pronouncement of general effect"⁴⁷. It is suggested in a commentary on *Pearson*⁴⁸ that the point of distinction between *Pearson* and *McKechnie* is that, in *Pearson*,

39 *R v Pearson* unreported, Court of Appeal (UK), 11 November 1991 at 1-2.

40 *R v Pearson* unreported, Court of Appeal (UK), 11 November 1991 at 1.

41 *R v Pearson* unreported, Court of Appeal (UK), 11 November 1991 at 2-3.

42 (1992) 94 Cr App R 51.

43 The immediate cause of death was an ulcer which could not be treated surgically because of the head injuries inflicted on the victim: (1992) 94 Cr App R 51 at 53.

44 *R v McKechnie, Gibbons and Dixon* (1992) 94 Cr App R 51 at 54.

45 *R v McKechnie, Gibbons and Dixon* (1992) 94 Cr App R 51 at 56.

46 *R v McKechnie, Gibbons and Dixon* (1992) 94 Cr App R 51 at 60.

47 Unreported, Court of Appeal (UK), 11 November 1991 at 2.

48 [1992] Crim LR 193 at 194. See, also, to the same effect, Smith and Hogan, *Criminal Law*, 8th ed (1996) at 150.

the provocation "had been given before the parties embarked on the enterprise."⁴⁹ It is also suggested in that commentary that provocation brings a joint enterprise to an end⁵⁰.

33 The point of distinction, in our view, between *Pearson* and *McKechnie* is that *McKechnie* was, whereas *Pearson* was not, a case in which it was argued that criminal liability attached to a person who did not participate in the actus reus of the offence. In *Pearson*, both accused participated in the acts causing death. Alternatively, the acts of the elder brother substantially contributed to his father's death. As already explained, there is no inconsistency if, in either of those situations, one person is found guilty of murder and the other, who acted under provocation, is found guilty of manslaughter. However, different considerations apply when it is sought to attach criminal liability to a person who did not actively participate in the act causing death. He or she is guilty of murder as principal only if the person whose acts caused death acted pursuant to an understanding or arrangement with the first person that, together, they would kill the deceased.

34 A person cannot act pursuant to an understanding or arrangement with another that, together, they will kill a third person and, at the same time, act under provocation. That is because provocation only arises where there is some act of the deceased which results in the loss of self-control to the point of committing the act which caused death. In that situation, the accused cannot also be taken to have acted so as to give effect to some prior understanding or arrangement with respect to the victim's death. A fortiori, if he or she is acting in self-defence in response to some threat or attack by the deceased.

35 As already indicated, the jury's failure to convict David Albion is to be taken to have resulted from its inability to reach a decision whether or not the prosecution had negated self-defence and provocation. Unless both were negated, there was no basis on which the jury could determine that, in killing his step-father, David Albion was acting pursuant to an understanding or arrangement with his mother that, together, they would kill him. And only if it made that finding, could it convict Mrs Osland. It follows that the jury's failure to convict David Albion reveals a flaw in reasoning which requires that Mrs Osland's conviction be set aside.

David Albion's subsequent acquittal

36 Had the jury acquitted David Albion or, even, found him guilty of manslaughter when he stood trial with his mother, consistency may have required

49 [1992] Crim LR 193 at 194.

50 [1992] Crim LR 193 at 194.

that a verdict of acquittal now be entered with respect to Mrs Osland. However, the jury simply failed to convict David Albion and consistency with that outcome requires only that her conviction be set aside. It was nevertheless contended by counsel for Mrs Osland that, consistent with her son's acquittal at his subsequent trial, a verdict of acquittal should now be entered for Mrs Osland.

37 In earlier times, consistency of verdicts was a matter to be determined solely by reference to the court record⁵¹. Were that still the case, Mrs Osland's conviction on the basis of the joint enterprise alleged by the prosecution could not stand consistently with David Albion's acquittal. In *DPP v Shannon*⁵², however, Lord Salmon expressed the view that, as "courts are no longer obliged to approach a conviction in blinkers with their eyes directed to nothing but the record", the old consistency rule had "outlived its usefulness and should ... be swept away"⁵³. In his Lordship's view the question of consistency should be approached on the basis that an acquittal may mean either that the accused is innocent or that the evidence is insufficient to lead to a finding of guilt, and, that its only effect, in law, "is that the accused can never again be brought before a criminal court and tried for the same offence."⁵⁴

38 The approach taken by Lord Salmon in *Shannon* was adopted by this Court in *R v Darby*⁵⁵ in relation to the offence of conspiracy. It was held in that case that "the conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person."⁵⁶

39 In point of principle, there is no difference between conspiracy and any other offence where criminal liability is said to attach by reason of an agreement to commit the crime, as distinct from participation in the actus reus of the offence⁵⁷. That being so, there is no necessary inconsistency between Mrs Osland's

51 *DPP v Shannon* [1975] AC 717 at 770 per Lord Salmon.

52 [1975] AC 717.

53 [1975] AC 717 at 771.

54 [1975] AC 717 at 772.

55 (1982) 148 CLR 668.

56 (1982) 148 CLR 668 at 678 per Gibbs CJ, Aickin, Wilson and Brennan JJ.

57 See *R v Darby* (1982) 148 CLR 668 at 685 per Murphy J.

conviction, in the event of a further trial, and her son's acquittal. It follows that his acquittal provides no basis for the entry of a verdict of acquittal for Mrs Osland.

40 Because there must be an order for a new trial, it should be emphasised that, if there is a retrial, the jury should be instructed that Mrs Osland can be convicted of murder on the basis of a joint enterprise with David Albion only if the jury is satisfied beyond reasonable doubt that he killed his step-father pursuant to an understanding or arrangement with his mother that, together, they would kill him and not while he was acting under provocation or in self-defence. Of course, if Mrs Osland raises provocation or self-defence in relation to her actions, the jury will need to be instructed appropriately with respect to those issues.

41 As there must be an order for a new trial, it is appropriate to say something of some other matters raised in other grounds of appeal. However, it is unnecessary to express a view whether any of those matters could have constituted a miscarriage of justice, in the sense of depriving Mrs Osland of a chance of acquittal that was fairly open⁵⁸.

Lies as to Mr Osland's "disappearance"

42 As already indicated, Mrs Osland engaged in a series of deceptions to conceal her husband's death and give the impression that he had simply disappeared. The jury was not directed that it might treat her conduct as evidence of guilt. Accordingly, it was not directed in the manner required by *Edwards v The Queen*⁵⁹.

43 Although the jury was not instructed that Mrs Osland's lies might be evidence of her consciousness of guilt, there was a real risk that it might reason that, because she lied about her husband's disappearance, she must have known he had been the victim of premeditated murder. Indeed, the prosecution suggested as much,

58 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

59 So far as is presently relevant, it was held in *Edwards* that, where a lie is relied on to prove guilt, the trial judge must first identify the lie, and the circumstances and events relied on by the Crown to indicate that it constitutes an admission against interest. Secondly, the jury must be told it may take the lie into account only if satisfied, having regard to those circumstances and events, that the lie reveals the accused's knowledge of the offence charged or an aspect of it. Thirdly, the jury must be told that there may be reasons other than realization of guilt why the accused told the lie. Fourthly, the jury should then be told that if it accepts the lie was told for a reason other than realization of guilt, it cannot regard the lie as an admission against interest: (1993) 178 CLR 193 at 210-211 per Deane, Dawson and Gaudron JJ.

inviting the jury to find that her conduct was not that "of a person who had killed somebody with lawful justification or excuse."

44 Where, as here, there is a risk that a jury might treat lies as evidence of guilt, the preferable course is for the trial judge to ascertain precisely what use the prosecution contends may be made of the evidence in question. And if the evidence is to be left to the jury as evidence of guilt, it should be instructed as required by *Edwards v The Queen*⁶⁰. If not, it should be instructed that the evidence is relevant only to the credit of the accused. Only by adopting that course can a trial judge guard against "a perceptible risk of injustice"⁶¹.

45 Although it is not necessary to express a view on the matter, it is difficult, if not impossible, to conclude that the trial judge's failure to follow the course indicated above could have resulted in a miscarriage of justice in this case. Counsel for Mrs Osland did not seek any clarification as to the use that might be made of the evidence of Mrs Osland's conduct. And she sought no direction with respect to it. It is difficult to resist the inference that she took the view that there was nothing to be gained by raising the matter.

The intercepted telephone conversations

46 It was argued that the evidence of intercepted conversations between Mrs Osland and her daughter, Erica, on 22 and 23 December 1994 should not have been admitted because those conversations were not probative of any matter in issue. Alternatively, it was put that they were of such little probative value they should have been excluded.

47 The first conversation in question took place in a context in which Mrs Osland believed that her son, Paul, who had been told of the events surrounding Mr Osland's death by David Albion, had provided that information to police. In that conversation, Erica informed her mother that she had told Paul that, if he stood up in court against his mother, "he's gonna get knocked". In the second conversation, they returned to that subject and this exchange occurred:

Erica: "... I could then turn around and well, you say anything incriminating against mum and David, I know for a fact that you are going to get knocked Paul."

60 (1993) 178 CLR 193 at 210-211 per Deane, Dawson and Gaudron JJ.

61 See, for example, *McKinney v The Queen* (1991) 171 CLR 468 at 480 per Brennan J; *BRS v The Queen* (1997) 71 ALJR 1512 at 1525 per Gaudron J; 148 ALR 101 at 119. See also *Bromley v The Queen* (1986) 161 CLR 315 at 325 per Brennan J.

17.

Mrs Osland: "And you're going to get bashed and you are also going to get the shit bashed out of you now for even speaking against your mother."

Erica: "Yeah I know cause he is."

Mrs Osland: "I know he is. If I had the contacts I'd do it myself ..."

Erica: "It's lucky I know people."

Mrs Osland: "I know, but I would have it done myself as well."

48 The parts quoted from those conversations are capable of constituting evidence of consciousness of guilt. As such, however, they should have been the subject of a direction similar to that required where lies are relied upon to prove guilt. In particular, the jury should have been instructed that it might take those parts of the conversations into account in proof of Mrs Osland's guilt only if satisfied that they revealed her knowledge that her husband had been murdered in cold blood and not as she had claimed. Moreover, it should have been told that there might be other reasons for Mrs Osland's statement to her daughter, including, perhaps, family loyalty, and that if it accepted that the statement was made for a reason unconnected with Mrs Osland's consciousness of her guilt of the premeditated murder of her husband, the statement should not be taken into account. The failure to give a direction would ordinarily constitute a miscarriage of justice. But as we have earlier indicated, it is not necessary to decide that issue in this case.

49 In the second conversation, Mrs Osland also gave an account of the digging of "the hole". This exchange occurred:

Mrs Osland: "The chook was crowin' all the time. We spent all day. We sat and planned it for a week."

Erica: "Did ya?"

Mrs Osland: "Yep. And then he goes and tells fucken Paul."

That exchange was clearly admissible, being directly relevant to the existence of the joint plan alleged by the prosecution. And it was not necessary for the trial judge to give any special direction as to the use to which it might be put. There was, thus, no error in the trial process in relation to that conversation.

Battered wife syndrome, provocation and self-defence

50 Evidence as to what has come to be known as "the battered wife syndrome" was given by Dr Kenneth Byrne, a clinical and forensic psychologist. That evidence was led without objection. Dr Byrne deposed as to characteristic patterns of behaviour in relationships involving physical, psychological or sexual abuse and characteristic reactions on the part of women in those relationships. Dr Byrne, who interviewed Mrs Osland on a number of occasions, read the transcript of her evidence-in-chief and was present in court when she was cross-examined, also testified that her evidence of her relationship with her husband was consistent with it having been a battering relationship. And he expressed the opinion that Mrs Osland fitted within the battered wife syndrome.

51 It is important to note some matters which, according to Dr Byrne's evidence, are characteristic of battered women, but not necessarily present in all cases:

1. they are ashamed, fear telling others of their predicament and keep it secret.
2. they tend to relive their experiences and, if frightened or intimidated, their thinking may be cloudy and unfocussed.
3. they have an increased arousal and become acutely aware of any signal of danger from their partner.
4. they may stay in an abusive relationship because they believe that, if they leave, the other person will find them or take revenge on other members of the family.
5. in severe cases, they may live with the belief that one day they will be killed by the other person.

Dr Byrne also gave evidence that abusive relationships are not likely to change without outside help.

52 Counsel for Mrs Osland contended that the trial judge should have related Dr Byrne's evidence to the law of provocation. Additionally, it was argued that, self-defence having been raised, the jury should have been instructed that the "evidence may be of use in understanding ... why an abused woman might remain in an abusive relationship ... the nature and extent of the violence that may exist in a battering relationship ... the accused's ability to perceive danger from her abuser,

and ... whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm."⁶²

53 Before turning to the argument put by counsel for Mrs Osland, it is convenient to consider the admissibility of Dr Byrne's evidence. Expert evidence is admissible with respect to a relevant matter about which ordinary persons are "[not] able to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience in the area" and which is the subject "of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience"⁶³.

54 The evidence of Dr Byrne was that there is a reliable body of knowledge and experience with respect to persons living in abusive relationships based on research initially undertaken in the United States of America by Dr Lenore Walker⁶⁴. And it was Dr Byrne's evidence that that knowledge reveals a pattern of responses or reactions on the part of battered women, including those to which reference has already been made. Certain of those responses are contrary to what an ordinary person might expect. For example, an ordinary person would very likely reason that, if the woman concerned did not report the violent and abusive behaviour or stayed in the relationship, it was not one involving violence or abuse - or, at least, not violence or abuse of the severity claimed. And, in this case, the prosecution suggested exactly that of the later part of the relationship between Mrs Osland and her husband.

55 Quite apart from reactions bearing on the truthfulness of an accused person's account of an abusive relationship, the ordinary person is not likely to be aware of the heightened arousal or awareness of danger which may be experienced by battered women. And that is a matter that may bear directly on the defence of provocation. An act "which might not be insulting or hurtful to one person might

62 Quoting the headnote to *R v Malott* (1998) 155 DLR (4th) 513. The quoted part of the headnote summarises the judgment of Major J (with whom Lamer CJC, Cory, McLachlin and Iacobucci JJ agreed) at 521-522.

63 *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ. See also *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ; *R v Turner* [1975] QB 834 at 841, approved in *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J, 130 per Dawson J; *Farrell v The Queen* (1998) 72 ALJR 1292 at 1295 per Gaudron J; 155 ALR 652 at 655.

64 See Walker, *The Battered Woman*, (1979); Walker, *The Battered Woman Syndrome*, (1984). The reasons for judgment of Wilson J in *R v Lavallee* [1990] 1 SCR 852 summarise the research collected by Dr Walker in those texts: at 878-880, 882, 887-888.

be extremely so to another because of that person's ... personal relationships or past history"⁶⁵, including, of course, a history of abuse by the deceased. It does not require expert evidence for a jury to understand that some slight insult may, in context, constitute "the last straw", a consideration addressed in the summing up in this case. However, there may be cases in which a matter of apparently slight significance is properly to be regarded as evidence of provocation when considered in light of expert evidence as to the battered woman's heightened arousal or awareness of danger. And evidence of that may also be relevant to the gravity of the provocation, as may the history of the abusive relationship.

56 So, too, expert evidence of heightened arousal or awareness of danger may be directly relevant to self-defence, particularly to the question whether the battered woman believed that she was at risk of death or serious bodily harm and that her actions were necessary to avoid that risk⁶⁶. And, of course, the history of the particular relationship may bear on the reasonableness of that belief⁶⁷.

57 Given that the ordinary person is likely to approach the evidence of a battered woman without knowledge of her heightened perception of danger, the impact of fear on her thinking, her fear of telling others of her predicament and her belief that she can't escape from the relationship, it must now be accepted that the battered wife syndrome is a proper matter for expert evidence. Such evidence has been received in South Australia, New South Wales, Tasmania, the Northern Territory, as well as in New Zealand, England and the United States of America⁶⁸. And in R

65 *Masciantonio v The Queen* (1995) 183 CLR 58 at 67 per Brennan, Deane, Dawson and Gaudron JJ.

66 As to self-defence, see *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 661-662 per Wilson, Dawson and Toohey JJ (Mason CJ agreeing at 654), 683 per Gaudron J.

67 As to reasonableness, see *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 661-662 per Wilson, Dawson and Toohey JJ (Mason CJ agreeing at 654), 683, 687, 688 per Gaudron J.

68 South Australia: *R v Runjanjic*; *R v Kontinnen* (1991) 56 SASR 114; New South Wales: *R v Chhay* (1994) 72 A Crim R 1; Tasmania: *R v Gunnarsson-Wiener* unreported, Supreme Court of Tasmania, 13 August 1992 at pars 104-105 per Zeeman J; Northern Territory: *R v Secretary* (1996) 107 NTR 1; New Zealand: *R v Oakes* [1995] 2 NZLR 673; *Ruka v Department of Social Welfare* [1997] 1 NZLR 154; England: *R v Thornton (No 2)* [1996] 1 WLR 1174; [1996] 2 All ER 1023; United States: see survey of United States Courts which have accepted evidence of battered woman's syndrome, collected in *Bechtel v State* 840 P 2d 1 at 7, fn 5 (Oklahoma 1992); see also *Fennell v Goolsby* 630 F Supp 451 (Pennsylvania 1985); (Footnote continues on next page)

v Lavallee the Supreme Court of Canada accepted that the battered wife syndrome was a proper matter for expert evidence⁶⁹.

58 As with expert evidence generally, a trial judge should direct the jury that it should decide whether it accepts evidence given with respect to the battered wife syndrome. As was pointed out in *R v Lavallee*, however, the issue is not simply whether the accused is a battered woman⁷⁰. Rather, the issue is usually whether she acted in self-defence and, if not, whether she acted under provocation. They are issues which arise in the factual context of the particular case. If it is not otherwise obvious as to how the evidence of battered wife syndrome may be used, it should be related to those issues in the factual context in which they occur.

59 It does not follow from what has been said that the argument for Mrs Osland with respect to Dr Byrne's evidence should be accepted. In the first place, it is likely that the significance of the expert evidence as it related to the credibility of Mrs Osland's account of her relationship with her husband was obvious to the jury. Moreover, that question was not the subject of detailed submissions in this Court. Of greater significance to the argument put in this Court is that much of Dr Byrne's evidence was given in general terms and not linked to Mrs Osland's actions, to the events which were said to raise provocation and self-defence or to the issues raised by those defences.

60 It need hardly be said that there is an obligation on counsel to make clear to the jury and the trial judge the precise manner in which they seek to rely on expert evidence of battered wife syndrome and to relate it to the other evidence and the issues in the case. In circumstances where evidence of battered wife syndrome is given in general terms, is not directly linked to the other evidence in the case or the issues and no application is made for any specific direction with respect to that evidence, it cannot be concluded that the trial judge erred in not giving precise directions as to the use to which that evidence might be put.

Other grounds of appeal

61 The appellant relied on other grounds of appeal. In the main, those grounds are concerned with the application of settled principle to the circumstances of this

People v Torres 488 NYS 2d 358 (New York 1985); *State v Gallegos* 719 P 2d 1268 (New Mexico 1986); *Arcoren v US* 929 F 2d 1235 (8th Cir 1991); *US v Simpson* 979 F 2d 1282 (8th Cir 1992); *US v Johnson* 956 F 2d 894 (9th Cir 1992); *Knock v Knock* 621 A 2d 267 (Connecticut 1993); *Soutiere v Soutiere* 163 Vt 265 (Vermont 1996).

69 [1990] 1 SCR 852. See also *R v Malott* (1998) 155 DLR (4th) 513 at 521 per Major J.

70 [1990] 1 SCR 852 at 890-891 per Wilson J.

case, including with respect to provocation⁷¹ and self-defence⁷². One ground is also concerned with the trial judge's direction to the jury that an accused person may have an interest in being less than frank in his or her evidence, a matter the subject of recent decisions by this Court in *Robinson v The Queen*⁷³ and *Stafford v The Queen*⁷⁴. Another ground raises the question of the admissibility of evidence to counter an allegation of recent invention. Other grounds of appeal relate to the approach taken by the Court of Appeal and have no direct bearing on

71 As to which, see *Stingel v The Queen* (1990) 171 CLR 312 and *Masciantonio v The Queen* (1995) 183 CLR 58.

72 As to which, see *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.

73 (1991) 180 CLR 531.

74 (1993) 67 ALJR 510.

23.

the issues involved in this case. It is unnecessary to say anything with respect to any of these matters.

Orders

- 62 The appeal should be allowed. The order of the Victorian Court of Appeal should be set aside and, in lieu of that order, the appeal to that court should be allowed, the conviction quashed, and a new trial ordered.

63 McHUGH J. The facts and issues in this appeal are set out in the judgment of Kirby J. Subject to the comments which follow concerning the issue of inconsistency, I agree with his Honour's reasons and the order that he proposes.

64 All members of the Court agree that the appeal must fail except for the issue of inconsistency. All members of the Court also agree that the conviction of Mrs Osland is not inconsistent with the subsequent acquittal of her son, David Albion, at a later trial. When persons alleged to have committed a crime jointly are tried separately, it can often happen that one will be acquitted and the other convicted. One reason for that occurring is that the evidence admissible against one accused may not be admissible against the other. For that reason, it can often happen that, even when both persons are tried together, one may be convicted and the other acquitted without there being any inconsistency in the verdicts of the jury⁷⁵. That being so, the fact that in a subsequent trial the jury acquitted Mrs Osland's son is not a legal ground for setting aside her conviction⁷⁶.

65 However, Gaudron and Gummow JJ would allow the appeal on the ground that an inconsistency exists between the conviction of Mrs Osland on the charge of murder and the failure of the same jury to reach a verdict in respect of the charge of murder against her son. They hold that, because the jury failed to agree that Mrs Osland's son was guilty of murder, her conviction is contrary to a basic principle of causation. The principle of causation to which they refer applies in cases such as the present where an accused person is charged jointly as a principal in respect of the crime of murder though he or she did not perform the act or acts causing death. In that situation, the principle declares that the accused person cannot be convicted of murder unless the co-accused whose act or acts caused the death was acting pursuant to the understanding or arrangement that together they would kill the deceased⁷⁷. As a result, Gaudron and Gummow JJ have found that Mrs Osland's conviction is inconsistent with the failure to agree concerning her son.

66 If there is any possibility in a joint trial that the accused whose acts caused the death was not, at the relevant time, acting pursuant to the understanding with the co-accused, it is ordinarily necessary for the trial judge to direct the jury in accordance with the principle of causation explained above. In such a case, the

75 *R v Jones* [1971] 1 NSWLR 613.

76 *cf Hui Chi-ming v The Queen* [1992] 1 AC 34 (The fact that the actual perpetrator was acquitted of murder was no bar to a conviction for murder in a later trial of a person acting in concert with the perpetrator).

77 Acting pursuant to the understanding or arrangement includes doing those acts which were contemplated as a possible incident of the planned behaviour (*Johns v The Queen* (1980) 143 CLR 108).

agreement or understanding between the accused is not causally connected to the death and the accused who did not perform the act or acts causing death cannot be held responsible for the killing. The learned trial judge did not direct the jury in accordance with that principle in this case. But for reasons which I later develop, the principle had no application in the circumstances of this case. Accordingly, the failure to give a direction to that effect did not constitute a miscarriage of justice.

67 At no stage before the case reached this Court was it suggested that Mrs Osland could not be convicted of murder unless the jury first found her son guilty of that crime or that the judge erred in failing to direct the jury to that effect. Counsel for Mrs Osland did not seek any such direction at the trial. Both the Crown and counsel for Mrs Osland conducted their cases on the basis that Mrs Osland could be convicted of murder even though her son was acquitted of both murder and manslaughter. That was because, at the trial, counsel for Mrs Osland accepted that the death of Frank Osland was the result of both accused acting in concert to kill him – notwithstanding that one or both of them may at the same time have been acting in self-defence or under provocation. That being so, her counsel, correctly in my opinion, accepted that Mrs Osland, who was present at the killing, was equally responsible *for the act or acts of her son that brought about her husband's death* and that her criminal liability was not dependent upon him being convicted. Each accused alleged that he or she had a justification for those acts – self-defence. It is clear that the jury rejected Mrs Osland's claimed justification. The most likely reason that the jury failed to agree in respect of her son was that one or more jurors were not satisfied that the Crown had negatived his claimed justification.

68 When the issues that were left to the jury are examined, it becomes apparent that the causation principle to which I have referred does not compel the conclusion that the conviction of Mrs Osland is inconsistent with the jury's failure to reach a verdict in respect of her son. Nor did the failure of the judge to direct the jury in accordance with that principle bring about any miscarriage of justice.

Criminal complicity

69 Much of the argument for Mrs Osland in this Court was characterised by a failure to distinguish between, on the one hand, the criminal liability of a person who is present at the scene of a crime and is acting in concert with another and, on the other, the criminal liability of one who is present but not acting in concert with that person. Much of the criticism – express and implied – of the trial judge's directions, and most of the argument that was relied on to urge that the conviction and the failure to agree were inconsistent, resulted from the failure to accept the existence of that distinction. Because that is so, it is first necessary to refer briefly to the principles of criminal liability applicable when a crime is committed by persons acting in concert.

70 At common law, a person who commits the acts which form the whole or part⁷⁸ of the *actus reus* of the crime is known as a "principal in the first degree". There can be more than one principal in the first degree⁷⁹. However, a person may incur criminal liability not only for his or her own acts that constitute the whole or part of the *actus reus* of a crime but also for the acts of others that do so. The liability may be primary or derivative. In earlier times, when it was alleged that a person should be held criminally liable for the acts of another, it mattered whether the crime was a felony or a misdemeanour. In Victoria, the distinction between felonies and misdemeanours has been abolished⁸⁰. There is no longer any need to draw a distinction between the two categories of crime⁸¹.

71 Those who aided the commission of a crime but were not present at the scene of the crime were regarded as accessories before the fact or principals in the third degree. Their liability was purely derivative and was dependent upon the guilt of the person who had been aided and abetted in committing the crime⁸². Those who were merely present, encouraging⁸³ but not participating physically⁸⁴, or whose acts were not a substantial cause of death⁸⁵, were regarded as principals

78 *R v Bingley* (1821) Russ & Ry 446 [168 ER 890] (Bingley's part was to impress the date lines and numbers on forged bank notes; other associates were responsible for the printing and signatures); *R v Ferguson* (1916) 17 SR (NSW) 69 at 76 (assisting in making a plate to be used for printing counterfeit notes).

79 *Errington and Others' Case* (1838) 2 Lewin 217 [168 ER 1133]; *R v Clarke* [1959] VR 645.

80 *Crimes Act* 1958 (Vic), s 322B.

81 *Crimes Act* 1958 (Vic), s 323.

82 *R v Higgins* (1801) 2 East 5 at 19 [102 ER 269 at 274-275]; *R v See Lun* (1932) 32 SR (NSW) 363 at 364; *Howell v Doyle* [1952] VLR 128 at 133; *Jackson v Horne* (1965) 114 CLR 82 at 94.

83 *Kupferberg* (1918) 13 Cr App R 166; *R v Clarkson* [1971] 1 WLR 1402; [1971] 3 All ER 344.

84 *R v Coney* (1882) 8 QBD 534; *Wilcox v Jeffery* [1951] 1 All ER 464.

85 *Mohan v The Queen* [1967] 2 AC 187.

in the second degree⁸⁶. They could only be convicted of the crime of which the principal offender was found guilty. If that person was not guilty, the principal in the second degree could not be guilty⁸⁷. Their liability was, accordingly, also derivative.

72 However, there is⁸⁸ a third category where a person was not only present at the scene with the person who committed the acts alleged to constitute the crime but was there by reason of a pre-concert or agreement with that person to commit the crime⁸⁹. In that category, the liability of each person present as the result of the concert is not derivative but primary. He or she is a principal in the first degree. In that category each of the persons acting in concert⁹⁰ is equally responsible *for the acts* of the other or others. The general principle was clearly stated in *R v Lowery and King (No 2)*⁹¹ by Smith J who directed the jury in the following terms:

"The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime."

86 Lanham, "Limitations on Accomplice Liability", (1982) 6 *Criminal Law Journal* 306 at 313.

87 *R v Dunn* (1930) 30 SR (NSW) 210 at 213.

88 I say "is" because it may be that this third category is a late development of the common law which owes its impetus to the enactment of the *Accessories and Abettors Act* 1861 (UK) and its counterparts in other jurisdictions, such as s 323 of the *Crimes Act* 1958 (Vic), and the abolition of the distinction between felonies and misdemeanours.

89 *R v Lowery and King (No 2)* [1972] VR 560.

90 *R v Hulse* (1841) 2 M & Rob 360 at 361 [174 ER 316 at 317], which was a case of misdemeanour, Erskine J directed the jury "that if two persons, having jointly prepared counterfeit coin, plan the uttering, and go on a joint expedition and utter in concert and by previous arrangement the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering."

91 [1972] VR 560 at 560.

73 In that case, his Honour directed the jury that "they are all equally guilty of that crime". But as subsequent cases show, and as principle requires, the correct statement is that they are all equally liable for the acts that constitute the *actus reus* of the crime. The principle is accurately stated by Brett, Waller and Williams in the 8th edition of their work on *Criminal Law*⁹²:

"[E]ven if only one participant performed the acts constituting the crime, each will be guilty *as principals in the first degree* if the acts were performed in the presence of all and pursuant to a preconceived plan. In this case, the parties are said to be acting in concert." (emphasis added)

So far as is presently relevant, these principles were accurately and more fully stated by the New South Wales Court of Criminal Appeal in *Tangye*⁹³. The Court said⁹⁴:

- "(1) The law is that, where two or more persons carry out a joint criminal enterprise, *each is responsible for the acts of the other or others in carrying out that enterprise*. The Crown must establish both the existence of that joint criminal enterprise and the participation in it by the accused.
- (2) A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.
- (3) A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed". (emphasis added)

92 (1997) at 465.

93 *Tangye* (1997) 92 A Crim R 545.

94 *Tangye* (1997) 92 A Crim R 545 at 556-557.

74 In accordance with the New South Wales practice, the Court referred to "carrying out a criminal enterprise" rather than acting in concert. The principles, however, are the same.

75 As a result, a person may be found guilty of murder although he or she did not commit the acts which physically caused the death of the victim and the person who did is found guilty only of manslaughter⁹⁵. In *R v Howe*⁹⁶, all their Lordships were of the opinion that *R v Richards*⁹⁷, which had held that the person who did not perform the acts could not be guilty of a more serious charge than the actual perpetrator, was wrongly decided. Lord Mackay said⁹⁸:

"[W]here a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not, in my opinion in any way, result in a compulsory reduction for the other participant."

This statement is conclusive in England, at all events, in showing that it is the acts, and not the crime, of the actual perpetrator which are attributed to the person acting in concert. If the latter person has the relevant *mens rea*, he or she is guilty of the principal offence because the *actus reus* is attributed to him or her by reason of the agreement and presence at the scene. It is irrelevant that the actual perpetrator cannot be convicted of that crime because he or she has a defence such as lack of *mens rea*, self-defence, provocation, duress or insanity.

76 That was almost certainly the view of the Judicial Committee of the Privy Council in *Hui Chi-ming v The Queen*⁹⁹. In *Hui Chi-ming*, a number of people went "to look for someone to hit."¹⁰⁰ One of them wielded the actual blow that caused the death of the victim. That person was acquitted of murder and convicted of manslaughter, notwithstanding that his defence was that he had nothing to do with the incident¹⁰¹. Presumably, the jury thought that he lacked the requisite murderous intent. Subsequently, the appellant, who was one of the group, was

95 *R v Howe* [1987] AC 417 at 426, 436, 438, 446, 458.

96 [1987] AC 417.

97 [1974] QB 776.

98 [1987] AC 417 at 458.

99 [1992] 1 AC 34.

100 [1992] 1 AC 34 at 41.

101 [1992] 1 AC 34 at 42.

convicted of murder even though it was never suggested that he was anything other than a person acting in concert and present at the commission of the killing pursuant to an agreement. He complained to the Judicial Committee that his conviction for murder should be quashed on two grounds. First, the trial judge had misdirected the jury. Second, it was an abuse of process to indict him for murder when the actual perpetrator of the killing had been acquitted of murder and convicted only of manslaughter. His appeal was dismissed.

77 In its advice, the Judicial Committee set out the trial judge's directions to the jury. They included the following¹⁰²:

"2. The Crown in this case relies on the well known doctrine of acting in concert, and the law on that is this: where two or more persons embark upon a joint unlawful enterprise ... *each is liable for the consequences of such acts of the others as are done in the pursuance of that joint enterprise* and also for the unusual consequences of such acts if these arise from the execution of the agreed joint enterprise.

.....

6. It is not only the person who inflicts the fatal blow or blows who is criminally responsible. The law says that if two or more persons reach an understanding or arrangement that they will commit a crime ... and whilst the arrangement is still in being, they are both present and one or other of them does, or they do between them, in accordance with their arrangement all the things necessary to constitute the crime, then they are all equally guilty of it provided the crime does not go beyond their understanding or arrangement.

.....

8. The Crown may establish the count of murder against the [defendant] by proving the [defendant] was present and that the deceased was killed in accordance with an understanding or arrangement to which the [defendant] was a party and that that understanding or arrangement included the intent charged, that is either to kill or to cause grievous bodily harm." (emphasis added)

78 The Judicial Committee held that the trial judge had not misdirected the jury and that the prosecution was not an abuse of process. It is true that the above directions were not those that were the subject of criticism by the appellant¹⁰³. But it is difficult to believe that their Lordships would not have criticised these

¹⁰² [1992] 1 AC 34 at 45.

¹⁰³ That in itself suggests that they were not regarded as controversial.

directions if they had thought that they contained error or said, as they did¹⁰⁴, that they "reject all the criticisms of the judge's directions to the jury on joint enterprise." Nor could their Lordships have found that the conviction was not an abuse of process unless the true theory of persons acting in concert is as I have suggested, that is, it is the *acts* of the actual perpetrator which are attributed to a non-participant who is acting in concert and is present at the scene.

79 The principle that those who act in concert and are present at the scene are responsible for the acts of the actual perpetrator operates to make a person guilty of the principal crime, even though the actual perpetrator is acquitted completely. Thus, the person who did the act may be legally insane. Yet as long as that person had sufficient mental capacity to enter into the arrangement or common understanding, the other participant present at the scene will be guilty of committing the principal crime if he or she has the relevant *mens rea*¹⁰⁵. In *Matusевич v The Queen*¹⁰⁶, this Court decided that, when two persons are said to be acting in concert, the fact that the actual perpetrator is legally insane does not necessarily mean that the conviction of the other, who was present at the scene, should be quashed. If the actual perpetrator has sufficient capacity to enter into the agreement or understanding, the person present at the scene who was acting in concert may be convicted of the offence.

80 Professor Lanham in his article "Complicity, Concert and Conspiracy"¹⁰⁷ is critical of *Matusевич*, but he accepts that it is an authority for the proposition that, in cases of concert, a non-participant present at the scene of the *actus reus* may be convicted as a primary and not as a derivative offender. He says¹⁰⁸:

"The overall result of *Matusевич v The Queen* is that the High Court has left open whether an aider and abettor's liability is dependent on that of the perpetrator, [which] has thrown some doubt on the use of innocent agency as a solution but "*has given clear approval to the use of the principle of acting in concert to convict secondary parties when the principal is not personally liable.*" (emphasis added)

104 [1992] 1 AC 34 at 53.

105 *Matusевич v The Queen* (1977) 137 CLR 633.

106 (1977) 137 CLR 633.

107 (1980) 4 *Criminal Law Journal* 276 at 282.

108 Lanham, "Complicity, Concert and Conspiracy", (1980) 4 *Criminal Law Journal* 276 at 282.

He also notes that¹⁰⁹:

"Australian cases which in effect treat those acting in concert as principals in the first degree stress the requirement of presence and show no disposition to extend the concept to those absent from the offence."

81 *Markby v The Queen*¹¹⁰ also supports the conclusion that it is the wrongful acts of the perpetrator which are attributed to the person acting in concert and present at the scene. *Markby* establishes that if violence is one of the contemplated incidents of a joint criminal enterprise and one of the accused kills a person, the other accused can be convicted of manslaughter even though the killer is guilty of murder. This decision is consistent only with the conclusion that it is the acts constituting the *actus reus*, and not the crime, of the actual offender which are attributed to the other party. The liability is direct or primary, not derivative.

82 This was the view of the Judicial Committee in *Chan Wing-Siu v The Queen*¹¹¹ where Sir Robin Cooke, giving the advice of the Judicial Committee, said¹¹²:

"The case must depend rather on the wider principle whereby a secondary party is criminally liable for *acts* by the primary offender of a type which the former foresees but does not necessarily intend.

That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight." (emphasis added)

¹⁰⁹ Lanham, "Complicity, Concert and Conspiracy", (1980) 4 *Criminal Law Journal* 276 at 287.

¹¹⁰ (1978) 140 CLR 108.

¹¹¹ [1985] AC 168.

¹¹² [1985] AC 168 at 175.

83 The principle was recently reaffirmed by the House of Lords in *R v Powell*¹¹³.

84 This Court had earlier applied the principle to the case of an accessory before the fact engaged in a joint criminal enterprise. In *Johns v The Queen*¹¹⁴ Mason, Murphy and Wilson JJ said¹¹⁵:

"In our opinion these decisions support the conclusion reached by Street CJ, namely, 'that an accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention – an act contemplated as a possible incident of the originally planned particular venture'. Such an act is one which falls within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise."

85 In cases where the person who performed the act the subject of the arrangement or understanding escapes liability, it is often said that that person has been the "innocent agent" of the other participant or participants. But that description merely records the result that the person who performed those acts is not criminally liable. It is more accurate to describe the person, who escapes liability in a concert case where the other person is convicted, as a non-responsible¹¹⁶ agent. No doubt there are cases where the person who does the harm-causing act is innocent in a moral sense. For example, the accused may have induced a child of tender years to do the act which constitutes the *actus reus* of the crime¹¹⁷, or imported drugs via an airline carrier¹¹⁸. In that case, the agent is innocent of any wrong doing and the accused is regarded as a principal in the first degree. The acts of the innocent person are attributed to the accused who is guilty of the crime because the latter has the necessary *mens rea*. The fact that the innocent agent is not guilty of the crime is of no relevance.

113 [1997] 3 WLR 959 at 971; [1997] 4 All ER 545 at 556-557.

114 (1980) 143 CLR 108.

115 (1980) 143 CLR 108 at 130-131.

116 This was the term used in argument by Mr Weinberg QC who appeared for the Crown in this Court.

117 cf *R v Manley* (1844) 1 Cox CC 104.

118 *White v Ridley* (1978) 140 CLR 342.

- 86 But in other cases, it is more accurate to describe the actual perpetrator as a non-responsible agent, rather than an innocent agent. Thus, in *R v Bourne*¹¹⁹ a husband was held guilty of bestiality after compelling his wife to have sexual intercourse with a dog. The husband was guilty even though his wife was never charged, presumably because the duress meant that she was not guilty of the offence.
- 87 Innocent is not a term that fairly can be used in respect of the actual perpetrator in *R v Cogan*¹²⁰ although the English Court of Appeal in that case did refer to a possible argument of there being "an 'innocent' agent". In *Cogan*, a husband forced his wife to have intercourse with Cogan in the presence of the husband. In accordance with *R v Morgan*¹²¹, the Court of Appeal acquitted Cogan of rape because the jury found that he believed that the wife was consenting although he had no reasonable grounds for the belief. The Court of Appeal nevertheless upheld the conviction of the husband for aiding and abetting the rape of his wife. The Court thought that he could have been indicted and convicted as a principal in the first degree. It said¹²² that "it would be an affront to justice and the common sense of ordinary folk" if the husband could not be convicted merely because the person he had aided and abetted could not be convicted. Similarly, in *R v Austin*¹²³, the actual perpetrator could hardly be regarded as an innocent agent. There a husband in the company of, and acting pursuant to an agreement with, four other men, forcibly snatched his child from his wife. They were all charged with unlawfully taking away a child with intent to deprive the mother of possession, contrary to s 56 of the *Offences against the Person Act* (1861) (UK). The husband was protected from prosecution by a proviso to the section. The English Court of Appeal held that the others were nevertheless properly convicted of the offence.
- 88 In *Matusevich* Gibbs J said¹²⁴ that *Bourne*¹²⁵ suggested that a person acting in concert may be liable although the actual perpetrator was not criminally

119 (1952) 36 Cr App R 125.

120 [1976] QB 217 at 223.

121 [1976] AC 182.

122 [1976] QB 217 at 224.

123 [1981] 1 All ER 374.

124 (1977) 137 CLR 633 at 638.

125 (1952) 36 Cr App R 125.

responsible. The same can be said of *Cogan*¹²⁶ and *Austin*¹²⁷, both of which can be explained only on the basis that the person acting in concert with the actual perpetrator has attributed to him or her the acts of the actual perpetrator.

89 *Matusevich* itself acknowledges that the doctrine of innocent agency does not explain all the situations where a person acting in concert is liable as a principal in the first degree even though the actual perpetrator cannot be held criminally responsible. In *Matusevich*, the actual perpetrator was found not guilty of murder on the ground of insanity. But this Court held that, by reason of the doctrine of concert and presence at the scene, the appellant in that case could be convicted of murder if the actual perpetrator was capable of entering into the concert. Aickin J, who gave the leading judgment, said that the evidence at the trial "would not have justified the view that there was anything in the nature of innocent agency in the present case."¹²⁸ Mason J expressly agreed with the reasons of Aickin J in relation to concert¹²⁹. Stephen J agreed generally with the reasons of Aickin J¹³⁰. I have already referred to Professor Lanham's comment that *Matusevich* "has given clear approval to the use of the principle of acting in concert to convict secondary parties when the principal is not personally liable."¹³¹

90 Furthermore, the statements of the House of Lords in *Howe*¹³² and the decision of the Judicial Committee in *Hui Chi-ming*¹³³ are inconsistent with the notion of the "innocent agent" being the reason why the person acting in concert and present at the scene can be guilty of murder although the actual perpetrator is acquitted.

91 Counsel for the appellant relied on *R v Demirian*¹³⁴ where a majority of the Full Court of the Supreme Court of Victoria said that, even if it could have been

126 [1976] QB 217.

127 [1981] 1 All ER 374.

128 *Matusevich* (1977) 137 CLR 633 at 663.

129 *Matusevich* (1977) 137 CLR 633 at 645.

130 *Matusevich* (1977) 137 CLR 633 at 639.

131 Lanham, "Complicity, Concert and Conspiracy", (1980) 4 *Criminal Law Journal* 276 at 282.

132 [1987] AC 417.

133 [1992] 1 AC 34.

134 [1989] VR 97 at 123-124.

established that the accused in that case was present at the scene of a bomb explosion and was acting in concert with the person who exploded the bomb, the accused could not have been convicted as a principal in the first degree. Upon the facts of that case, the statement may be correct. However, it is plain that their Honours were seeking to lay down a general proposition. In my opinion it is not an accurate statement of the modern law. Moreover, the proposition was not necessary for the decision. Curiously, the majority of the Full Court preferred to follow the decision of the English Court of Appeal in *Richards*¹³⁵ notwithstanding that in *Howe*¹³⁶ the House of Lords said that *Richards* was wrongly decided. The majority in *Demirian*¹³⁷ also appears to have treated *Matusevich*¹³⁸, wrongly in my opinion, as a case of innocent agency.

- 92 In my opinion, the statement in *Demirian* is inconsistent with the principles which underly the decisions in *R v Hurse*¹³⁹, *Bourne*¹⁴⁰, *Lowery and King*¹⁴¹, *Matusevich*¹⁴², *Markby*¹⁴³, *Hui Chi-ming*¹⁴⁴, *Johns*¹⁴⁵ and *Chan Wing-Siu*¹⁴⁶ and

135 [1974] QB 776.

136 [1987] AC 417.

137 [1989] VR 97 at 124.

138 (1977) 137 CLR 633.

139 (1841) 2 M & Rob 360 [174 ER 316].

140 (1952) 36 Cr App R 125.

141 [1972] VR 560.

142 (1977) 137 CLR 633.

143 (1978) 140 CLR 108.

144 [1992] 1 AC 34.

145 (1980) 143 CLR 108.

146 [1985] AC 168.

the statements of principle in *Howe*¹⁴⁷ and *Tangye*¹⁴⁸. And there is no policy reason why *Demirian* should be followed in preference to the statements in *Howe*.

93 Where the parties are acting as the result of an arrangement or understanding, there is nothing contrary to the objects of the criminal law in making the parties liable for each other's acts and the case for doing so is even stronger when they are at the scene together. If any of those acting in concert but not being the actual perpetrator has the relevant *mens rea*, it does not seem wrong in principle or as a matter of policy to hold that person liable as a principal in the first degree. Once the parties have agreed to do the acts which constitute the *actus reus* of the offence and are present acting in concert when the acts are committed, the criminal liability of each should depend upon the existence or non-existence of *mens rea* or upon their having a lawful justification for the acts, not upon the criminal liability of the actual perpetrator. So even if the actual perpetrator of the acts is acquitted, there is no reason in principle why others acting in concert cannot be convicted of the principal offence. They are responsible for the acts (because they have agreed to them being done) and they have the *mens rea* which is necessary to complete the commission of the crime.

94 In my opinion, the statement in *Demirian* should not be followed in the common law jurisdictions in this country. It may be that the statement accurately reflects the early common law. It is not, however, possible to reconcile it with the modern cases.

95 Counsel for Mrs Osland also relied on *Surujpaul*¹⁴⁹ as authority for the proposition that when persons are jointly charged with murder they cannot be convicted as accessories unless one or more of them has been convicted as a principal. But the conviction in that case was as an accessory before the fact. As I pointed out earlier, the liability of an accessory before the fact is derivative. There can be no conviction as an accessory before the fact unless there is a principal offender. In *Surujpaul*, all the co-accused were acquitted both as principals and as accessories before the fact. That case has no bearing on the criminal responsibility of a person for the acts of the actual perpetrator when the former is alleged to be acting in concert and present at the scene with the latter.

The explanation of the conviction and the failure to agree

96 I have already indicated that it is likely that the jury found beyond reasonable doubt that Mrs Osland and her son killed the deceased in accordance with a

147 [1987] AC 417.

148 (1997) 92 A Crim R 545.

149 (1958) 42 Cr App R 266.

common understanding or arrangement and that they also found that Mrs Osland was not acting in self-defence or as the result of provocation when she participated in the killing. I have also suggested that one or more jurors may have had a reasonable doubt as to whether her son was acting in self-defence. If the jury so reasoned, they reached their verdict of conviction in respect of Mrs Osland in accordance with the way that the Crown and the accused persons conducted the case and in accordance with the directions of the trial judge.

The conduct of the trial

97 From beginning to end, the trial of Mrs Osland and her son was conducted on the basis that they were *jointly* responsible for the death of Frank Osland and that the only issues for determination were whether both or either of them should be acquitted *by reason of self-defence or have the murder charge reduced to manslaughter by reason of provocation*. The learned trial judge directed the jury that it "[did] not seem to be denied that it was the acts of the accused jointly that caused the death" of Frank Osland. His Honour also effectively directed the jury that they could convict one accused of murder while acquitting the other or bringing in a verdict of manslaughter:

"However, if you find either or both accused not guilty of murder, you will also have to decide whether either or both are guilty or not guilty of manslaughter."

98 The transcript of the proceedings confirms that Mrs Osland's defence was conducted on the basis that she could be convicted although her son was acquitted. Each accused conceded, inferentially if not expressly, that he or she was responsible for the acts which caused Mr Osland's death. However, each of them sought to justify the killing by reason of acts done by the deceased to each of them over a long period. No one, least of all the experienced counsel appearing for Mrs Osland, sought to contend that Mrs Osland was not jointly responsible for Mr Osland's death or that her conviction was dependent upon her son also being convicted. At no stage of the trial did counsel for Mrs Osland suggest or ask for a direction that she could not be convicted unless her son was also convicted. And the reason for counsel's omission to do so is obvious.

99 That Mrs Osland and her son killed Frank Osland pursuant to a joint enterprise was never denied. It is true that they alleged that their agreement to kill arose much later than the time when the Crown alleged that they had agreed to kill him. But they did not deny that it was a joint killing – that he was killed pursuant to an understanding between them and that they were present together at the time of the killing. At no stage did counsel for Mrs Osland contend that the case turned on what act had killed Frank Osland or who had performed that act. Their case was that they agreed to kill him because that was the only way they could save themselves from being killed by him. To that end, they both took steps which eventually resulted in the death of Frank Osland.

100 From the outset of the joint trial, the Crown's case was that the two accused had together murdered Frank Osland. According to the Crown, the only issues of substance facing the jury concerned the availability, to either accused, of a "defence" that the killing was justified or provoked. This view of the case was accepted by Mrs Hampel, Mrs Osland's counsel at the trial. Though Mrs Hampel's opening address appears to have been omitted from the appeal books lodged in this Court, she does refer at a later stage in the transcript to what she had said about the case in the course of her opening address:

"The issues in this trial as I told you at the start when I opened, are still the same so far as Heather Osland [is] concerned, that is, can the prosecution satisfy you beyond reasonable doubt that the killing of Frank Osland was so far as Heather Osland was concerned without lawful justification or excuse, that is whether the Crown can satisfy you that Heather Osland did not act in self-defence as the law defines it, or was not provoked."

101 Again, in her closing address to the jury, Mrs Hampel described the case against her client as follows:

"Heather Osland: somebody who is guilty of murder, or somebody who had what the law, or what you as the jury will ultimately decide, is a lawful justification or excuse for killing Frank Osland[?] That is the issue, really, for you at the end of these three weeks [of evidence] that we have had."

102 Mrs Hampel told the jury that the presence or absence of self-defence or provocation were "the two questions that really have been thrown up in this trial". This analysis is consistent with the evidence led for Mrs Osland, evidence which was almost exclusively directed to making out either or both of those defences.

The complicity issue

103 By reason of the conduct of the trial and the evidence, the trial judge's direction to the jury contained a detailed explanation of the doctrine of concert:

"[T]he law says if two or more persons reach an understanding or arrangement that together they will commit a crime, and then while that understanding or arrangement is still on foot, and hasn't been called off, and they're both present at the scene of the crime, and one or other of them does or they do between them in accordance with their understanding or arrangement, all the things that were necessary to constitute the crime, they are equally guilty of that crime, regardless of what part each played in its commission."

104 Because of this focus upon the two accused acting in concert, the summing up paid little attention to the individual contributions of each accused. However, it was never disputed at the trial that the acts causing Frank Osland's death were

the result of Mrs Osland and David Albion acting in concert while they were present at the scene. Mrs Hampel's submissions throughout the trial conveyed an acceptance that Mrs Osland's acts had caused Frank Osland's death, referring in several places to her having "killed him".

- 105 Despite counsel's seeming disinterest in the precise identification of the act or acts causing death, the learned judge's summing up referred in several places to the "cause" of death having been the blows to the head. His Honour said that, so far as counsel were concerned:

"[I]t does not seem to be denied that it was *the acts of the accused jointly* that caused the death. It is not likely, having heard counsel's submissions, that you will be troubled by that." (emphasis added)

No objection was taken to this direction.

- 106 It is clear to the point of near certainty that the Crown, counsel for Mrs Osland, and the learned trial judge conducted the case on the basis that Mrs Osland was equally responsible with her son for the acts that killed Frank Osland. Their criminal liability, however, was not regarded as joint. It depended on their individual claims of justification for the killing. For that reason, the trial judge directed the jury that, in respect of each accused, they could convict of murder or manslaughter or acquit.

- 107 The learned trial judge told the jury:

"It is not argued by the defence [that the killing] was not an act of the will, nor that it was involuntary nor that it was not deliberate.

As I say, it is the defence case that it was done to defend themselves against a violent act or death."

Later his Honour directed the jury:

"Let me first turn to the defence of self-defence which has here been raised as one of the central issues. Not all homicides are unlawful. Before either accused can be convicted of murder it is necessary for the Crown to prove that this homicide was unlawful, that is, each accused acted without lawful justification or excuse. The law is this. Such lawful justification exists if the acts of the accused were done by her or him believing upon reasonable grounds that they were necessary to be done in order to defend herself or himself from the actual or threatened violence of another person. In this case, of course, that is claimed to be the actual or threatened violence of Frank Osland."

The differences in evidence

108 Each accused conducted a separate defence case of justification for the killing, and the evidence against each accused was different. In particular, evidence was admissible against Mrs Osland that was not admissible against David Albion. Much of this evidence was obtained through the interception of telephone conversations between Mrs Osland and several of her children and friends. In the course of these conversations, she denied that her husband had been violent in the later years of their marriage and told her daughter Erica that the killing had been planned for a week. A conversation between Mrs Osland and Erica also showed that Mrs Osland was prepared to use the threat of violence against Paul, her son, to prevent him giving evidence that would incriminate her. The following record of the conversation was before the jury:

"Osland I know. I just I don't trust him [Erica]. I have to be one step ahead of him too.

Erica Yeah, that's why I would have though Paul One step ahead of him as well and I know what he is going to say. But the first thing I want [to say] to him is do you realise when all this is finished, at the end of it when all this goes to court, that he has to get up and say what he said in his statement. And if he says yes, I could then turn around and [say] well, you say anything incriminating against mum and David, I know for a fact that you are going to get knocked Paul.

Osland And you're going to get bashed and you are also going to get the shit bashed out of you now for even speaking against your mother.

Erica Yeah I know cause he is.

Osland I know he is. If I had the contacts I'd do it myself. ...

Erica It's lucky I know people.

Osland I know, but I would have it done myself as well."

109 It was open to the jury to regard this evidence as having no probative value. It was open to them to regard it, as the trial judge told the jury, as "words that just bubbled out of [Mrs Osland's] mouth." But it was also open to the jury to regard this evidence in a much more sinister light. The jury could conclude that it was evidence of a consciousness or admission of guilt and that it showed that Mrs Osland was a woman who would not hesitate to use criminal means to prevent the truth about her involvement in Frank Osland's death coming before the court.

If the jury took that view about this evidence, it might well take the view that she was also prepared to invent the story that she killed Frank Osland because it was necessary to do so to protect herself.

110 Further evidence that was admissible only against Mrs Osland suggested that she had, in previous years, made approaches to Paul Albion and another man offering them money to kill her husband and that she stood to gain financially from the death of her husband. There was also evidence based on her police interviews, during which she could not recall there having been any violence on the day when the killing took place. Nor did she mention to the police that she killed Frank Osland to save herself. Importantly, she conceded in one of those interviews that she administered the drugs to her husband at a time when he was not in a violent mood and with the intention of herself strangling him while he slept. If accepted by the jury, much, if not all of this evidence was inconsistent with her defences of provocation and self-defence. Coupled with the admitted fact that the "hole" in which the accused was buried had been dug many hours before the killing, it provided a firm basis for the jury being satisfied beyond doubt that so far as Mrs Osland was concerned the killing was unprovoked and not done in self-defence.

111 Except to the extent that Mrs Osland adopted her out-of-court statements in her evidence, none of them was admissible against David Albion. Even then they did not conclusively show that he was not acting in self-defence or under provocation at the time of the killing. He had, what is more, the benefit of his own uncontested evidence that the deceased had felled him with a punch to the head and threatened to kill him and his mother on the evening of the killing. He also gave evidence that he believed that Frank Osland would kill him and his mother when he woke from his drugged sleep. One or more members of the jury may have had a reasonable doubt as to whether the Crown had proved that he did not believe on reasonable grounds that it was necessary to kill Frank Osland to protect himself.

112 It is well established that, in joint trials, it is a jury's duty to decide the case against each accused by reference only to that portion of the total evidence that is properly admissible against him or her. Indeed the judge in this case made it clear to the jury that, although the accused were charged jointly, they had to consider the case against each accused separately. There were many significant differences in the evidence admissible against each accused. It is not surprising, therefore, that, in considering whether the Crown had successfully negated the defences raised, the jury was able to reach different conclusions in respect of each co-accused.

Inconsistency

113 In their judgment, Gaudron and Gummow JJ say¹⁵⁰:

"A person cannot act pursuant to an understanding or arrangement with another that, together, they will kill a third person and, at the same time, act under provocation. That is because provocation only arises where there is some act of the deceased which results in the loss of self-control to the point of committing the act which caused death. In that situation, the accused cannot also be taken to have acted so as to give effect to some prior understanding or arrangement with respect to the victim's death. A fortiori, if he or she is acting in self-defence in response to some threat or attack by the deceased.

As already indicated, the jury's failure to convict David Albion is to be taken to have resulted from its inability to reach a decision whether or not the prosecution had negatived self-defence and provocation. Unless both were negatived, there was no basis on which the jury could determine that, in killing his step-father, David Albion was acting pursuant to an understanding or arrangement with his mother that, together, they would kill him. And only if it made that finding, could it convict Mrs Osland. It follows that the jury's failure to convict David Albion reveals a flaw in reasoning which requires that Mrs Osland's conviction be set aside."

114 If the jury should have applied the principle of causation to which Gaudron and Gummow JJ refer and not convicted Mrs Osland unless they first convicted her son, the error lies not in what the jury has done but in the way that the case was conducted and in the directions or omissions to direct of the learned trial judge.

115 This is not a case of inconsistent verdicts in the sense that appellate courts usually encounter. There is only one verdict – the conviction of Mrs Osland for murder. But the principles applicable to cases of inconsistent verdicts are clearly relevant to this case. And, in my respectful view, those principles prevent the conviction being set aside for a "flaw in reasoning" derived from a principle which the jury were never asked to apply.

116 When an appellate court sets aside a jury's verdict of guilty on the ground that it is inconsistent with a verdict of acquittal, it usually does so for one of two reasons. First, the verdict of acquittal may necessarily demonstrate that the jury did not accept evidence which they had to accept before they could bring in the verdict of guilty¹⁵¹. Second, in acquitting the accused on one count, it may follow

150 [1998] HCA 75 at [34-35].

151 cf *Jones v The Queen* (1997) 72 ALJR 78; 149 ALR 598.

that the jury must have accepted evidence that required them to acquit on the count on which they convicted the accused. Sometimes, however, the verdicts may indicate that, if the jury did accept the evidence, it has misapplied or misunderstood the directions of law that it was given¹⁵².

117 Whatever category fits the case, the setting aside of a conviction on the ground of inconsistency of verdicts is a recognition that the jury has erred in its conclusions either in evaluating the facts or in giving effect to the directions of law in the judge's charge. When the verdicts are in accordance with the evidence and the directions of the trial judge, inconsistency of verdicts is not a ground of appeal. In such a case, a successful appeal must be based on the decision of the trial judge to admit or reject evidence or on his or her giving or failing to give directions to the jury. If the appeal succeeds, the error is that of the judge, not the reasoning process of the jury. To hold that a conviction should be set aside because the verdicts of the jury are inconsistent with some standard or principle which they should have applied, but were never told to apply, is insupportable in principle.

118 There are some highly technical cases, to which I will refer, where the inconsistency of verdicts *ipso facto* requires the quashing of a conviction. But ordinarily, where an appeal concerns inconsistent verdicts, the issue is whether the apparent inconsistency indicates that the conviction is unsafe. That issue is determined by examining the evidence and the directions to the jury, not by comparing the verdicts to some principle, rule or standard that was never part of the case.

119 The present case is not one where there were verdicts that were legally or technically inconsistent with each other on the face of the record. Verdicts are inconsistent in that sense where, for example, a person is convicted of being both thief and receiver or of attempting to commit an offence and committing that offence¹⁵³. In earlier times, verdicts in a conspiracy case would be inconsistent in this technical sense if one of two alleged conspirators was found not guilty and the other convicted¹⁵⁴. But it is now established that there is no necessary inconsistency in a verdict of conviction and one of acquittal in such cases¹⁵⁵.

120 When there is no legal or technical inconsistency in the verdicts, a conviction can only be set aside where the inconsistency in the verdicts demonstrates that no reasonable jury who had applied their minds to the evidence could have arrived at

152 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.

153 *R v Roach* [1948] NZLR 677.

154 *R v Manning* (1883) 12 QBD 241 at 245.

155 *R v Darby* (1982) 148 CLR 668; *DPP v Shannon* [1975] AC 717.

the two different verdicts¹⁵⁶. In such a case, the Court of Criminal Appeal sets aside the conviction because it is unsafe or unsatisfactory¹⁵⁷.

121 In determining whether the inconsistency points to an unsatisfactory conviction, the appellate court must consider the evidence, the issues, and the *directions* which the jury were given. In a case where the accused claimed that his conviction should be set aside because of the inconsistency of verdicts, McGarvie J said "[i]n considering this question it is vital to consider the way in which the trial Judge charged the jury"¹⁵⁸. An examination of the directions, issues and evidence may confirm that apparently inconsistent verdicts are in fact inconsistent and demonstrate that the conviction is unsafe¹⁵⁹. Just as frequently, however, examination of the issues, evidence and directions may show that apparently inconsistent verdicts are not inconsistent and that there has been no failure in the reasoning process of the jury¹⁶⁰.

122 However, Gaudron and Gummow JJ do not approach the question of inconsistency in this way. Their Honours do not examine the way in which the case was conducted by the Crown and the two accused persons, together with the evidence and the directions, to determine whether a reasonable jury could have convicted Mrs Osland and at the same time failed to agree in respect of David Albion's guilt. They find "a flaw in reasoning" by the jury, by testing what

156 *Durante* (1972) 56 Cr App R 708 at 714; *R v Bacash* [1981] VR 923 at 929; *R v Nanette* [1982] VR 81 at 83. This may include cases which suggest a compromise: *MacKenzie* (1996) 190 CLR 348 at 368.

157 *Jones v The Queen* (1997) 72 ALJR 78 at 87; 149 ALR 598 at 610; *R v Hunt* [1968] 2 QB 433 at 438; *R v Cicio* (1968) 87 WN(NSW) (Pt 1) 449 at 453; *R v Andrews-Weatherfoil Ltd* [1972] 1 WLR 118 at 126; [1972] 1 All ER 65 at 71-72; *Bacash* [1981] VR 923 at 929; *Nanette* [1982] VR 81 at 83; *Sweetman v Industries and Commerce Department* [1970] NZLR 139 at 149.

158 *Bacash* [1981] VR 923 at 929. This statement was applied in *R v Vollmer* [1996] 1 VR 95 at 170.

159 *Christ* (1951) 35 Cr App R 76 at 78; *Sweetland* (1957) 42 Cr App R 62 at 67, 68; *Warner* (1966) 50 Cr App Rep 291 at 294; *R v Lovett* [1972] VR 413 at 421; *Andrews-Weatherfoil Ltd* [1972] 1 WLR 118 at 126; [1972] 1 All ER 65 at 71-72; *Durante* (1972) 56 Cr App R 708 at 712-715; *Jones v The Queen* (1997) 72 ALJR 78 at 87; 149 ALR 598 at 610.

160 *Hunt* [1968] 2 QB 433 at 438-439; *Cicio* (1968) 87 WN(NSW) (Pt 1) 449 at 453; *Sweetman* [1970] NZLR 139 at 148-149; *R v Jones* [1971] 1 NSWLR 613 at 617, 619; *R v Venna* [1976] QB 421 at 426-427; *Bacash* [1981] VR 923 at 929, 933; *Nanette* [1982] VR 81 at 87; *King v The Queen* (1986) 161 CLR 423 at 436; *MacKenzie* (1996) 190 CLR 348 at 369-370.

the jury has done by reference to an abstract principle of law which the jury were never asked to apply.

123 The jury were never directed that they could not convict Mrs Osland unless the Crown had negatived David Albion's defences. With great respect, setting aside a jury's verdict on the ground of inconsistency when the verdict is in accordance with the evidence and directions is, so far as I am aware, without precedent. There can be no "flaw in reasoning" by the jury when they do what the judge's directions require or permit them to do.

124 If the judge's directions permit a jury to reach its conclusions by a process which is contrary to law, it is the directions which are wrong, not the jury's process of reasoning. If the judge's directions or failure to direct are wrong, the question then is whether that fact requires the conviction to be set aside. That question raises issues as to how the case was conducted by counsel for the accused and whether at the trial the judge was asked to give or withdraw the relevant direction. It raises questions as to whether the direction or failure to direct was in the circumstances a legal error and, if so, whether it gave rise to a miscarriage of justice in the circumstances of the case. Their Honours' approach necessarily avoids determining these important issues. It permits the conviction to be set aside by reference to an abstract principle of law without considering whether, having regard to the conduct of the case, it was applicable and whether the failure to direct the jury in accordance with that principle constituted a miscarriage of justice. This process is surely contrary to s 568 of the *Crimes Act* 1958 (Vic) which provides:

"[T]he Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

125 At no stage of the trial did counsel for Mrs Osland ask the judge for a direction that the jury could not convict Mrs Osland unless they first found that the Crown had negatived the defences of provocation and self-defence raised by David Albion. That was because all parties at the trial conducted the case on the basis that, having regard to the part that Mrs Osland played in bringing about the death of her husband, it was immaterial whether or not the act or acts of David Albion was or were the more immediate physical cause of that death.

126 Moreover, no ground of appeal was taken in the Court of Appeal that the conviction should be set aside by reason of the trial judge's failure to direct the jury that Mrs Osland's conviction was dependent upon the conviction of her son.

127 When the conviction and the failure to agree are examined in accordance with the principles which, hitherto, have determined whether inconsistent findings require a conclusion that a conviction is unsafe or unsatisfactory, the present appeal must fail. To that examination, I now turn.

The causation issue

128 It was never suggested at any stage of the trial that, when David Albion struck the blow or blows which killed Frank Osland, he was not acting pursuant to an understanding with his mother. Nor was there anything in the evidence that could possibly suggest it. Gaudron and Gummow JJ take the view, however, that unless the Crown negated David Albion's claimed defences of self-defence and provocation, the jury could not find that he was acting pursuant to an understanding or arrangement. With great respect, I cannot agree with that proposition. Its premise appears to be that, when the actual perpetrator pleads self-defence, a person acting in concert cannot be convicted unless the jury reject that defence by convicting the actual perpetrator. Neither as a matter of law or logic is there any inconsistency in finding that David Albion was acting in self-defence or under provocation and at the same time acting pursuant to an understanding or arrangement. After all, the whole basis of their case was that they agreed to kill Frank Osland because that was the only way that they could defend themselves from the attack that they feared would kill one or both of them. Moreover, as I have pointed out, the doctrine of acting in concert permits the conviction of the person present at the scene even if the actual perpetrator is acquitted. Nor would there be any inconsistency in finding that David Albion was acting under provocation and acting pursuant to the agreement¹⁶¹. Instant retaliation is no longer part of the law of provocation.

129 Nor is there any inconsistency in the jury failing to agree on whether David Albion was acting in self-defence while convicting Mrs Osland. His act or acts are consistent with him acting in self-defence and in accordance with the agreement or understanding even though Mrs Osland was not acting in self-defence when she entered into the understanding and was present at the scene while David Albion struck the fatal blow or blows.

130 The jury's conviction of Mrs Osland was consistent with the trial judge's directions that they could convict Mrs Osland of murder even though they acquitted David Albion. Having regard to the directions, I find it impossible to say that the conviction and failure to agree are inconsistent in the sense that no reasonable jury acting on the directions could arrive at them.

131 Even if it were permissible to examine the question of inconsistency by reference to the principle of causation referred to by Gaudron and Gummow JJ, notwithstanding that the jury were not asked to apply it, the conviction of Mrs Osland would not necessarily be inconsistent with the failure to agree in

161 This point can be illustrated by reference to the facts in *Parker v The Queen* (1964) 111 CLR 665. There, if Frank Parker and his brother-in-law had set out together to catch up with Kelly and kill him, it would have been open to the jury to find that Parker was acting under provocation and also pursuant to the agreement to kill.

respect of her son. Because this was a case of presence at the scene and acting in concert, the jury were entitled to convict Mrs Osland and fail to reach an agreement in respect of David Albion whose criminal responsibility was independent of his mother's. The case was conducted from beginning to end on the basis of joint concert and that both accused were responsible for each other's acts. Whether those acts resulted in criminal liability depended on the individual reasons of each accused for joining in the killing. There was no suggestion at the trial that the conviction of Mrs Osland would be inconsistent with any result other than David Albion's conviction for the same offence. Having regard to the trial judge's directions, it was open to the jury to convict Mrs Osland while not convicting her son. The conviction and the failure to agree show no "flaw in reasoning."

The interruption of the plan

- 132 However, in this Court counsel for Mrs Osland contended that, according to the evidence of David Albion, on the evening of the killing an episode of violence intervened which interrupted the plan to kill the deceased. According to his evidence, he heard his mother screaming and found Frank Osland grabbing her. He said that he intervened and that both he and his mother were threatened with death and that he was told to leave the house. On this basis, counsel for Mrs Osland contended in this Court that it was open to the jury to find that David Albion killed Frank Osland in defence of himself or his mother or both and not pursuant to any understanding with his mother. However, this does not mean that the conviction and the failure to agree were inconsistent. As I will explain, the jury could still find that David Albion was acting pursuant to an agreement or understanding with his mother even if they accepted his evidence that he was assaulted on this night. In that event, it was open to the jury to convict Mrs Osland while failing to agree whether the Crown had negatived his defence of self-defence.

The need for a direction

- 133 The question arises, however, whether, because of the evidence given by David Albion, the trial judge was required to direct the jury that it could not convict Mrs Osland of anything if it found that her son was acting in his own or her defence and not pursuant to an agreement or understanding that they would kill him. Mrs Osland made no reference in her evidence to the incident about which her son gave evidence. But that does not matter. His evidence was evidence in the trial. It is necessary, therefore, to consider whether the trial judge was bound to direct the jury to the above effect.

- 134 In my opinion the judge was not bound to give such a direction, particularly in the light of the conduct of the case and the evidence. The doctrine of concert applies even if the understanding between the accused is reached only moments before the acts forming the *actus reus* take place. Even if it was a possible view of the evidence that the plan alleged by the Crown – which commenced no later than the digging of the "hole" – came to an end with the conduct of Frank Osland

on this night, the only *reasonable* view of the evidence is that he was killed as the result of an understanding between Mrs Osland and her son. It is not a rational view of the evidence to suppose that, as a result of the alleged conduct of Frank Osland that night, David Albion suddenly abandoned the understanding with his mother and killed Frank Osland for his own reasons quite divorced from any understanding with his mother. It is not a possible view of the evidence that he was, so to speak, on a venture of his own. Rather, David Albion's evidence indicated that the incident to which he deposed was merely another episode in a long history of violence inflicted on him and his mother which confirmed for him the need to carry out their joint intention to kill him.

135 David Albion said that after the threats were made he went to his bedroom for about an hour. After Frank Osland had left the house and gone to a shed, his mother came to his room. They spoke for 10 or 15 minutes. Mrs Osland asked him not to leave home because she was worried that she was going to be killed. She said that she would calm down her husband with tablets. They all had their evening meal. David Albion and his mother cleaned up after the meal and sat in the lounge room. Frank Osland, who went back to the shed after dinner, came back and sat in a chair for 10 or 20 minutes. He was angry. He went into the bedroom. David Albion said that he and his mother talked "about just getting rid of him". His mother suggested using "a bit of rope", but he thought that would not work. He went down to the shed and got a piece of pipe. It was "fencing pipe, two inch diameter." His mother "was saying she should do it, and I was just saying she wasn't strong enough." He said that they discussed the fact that, if Frank Osland woke up, his mother was likely to be killed. He said that he would not let that happen. When asked by his counsel what he was "going to do if you hit him", David Albion said that he was going to "knock his block off". His counsel asked, "[y]ou mean kill him?", to which David Albion replied, "[y]es, but the way I thought at the time was I was going to knock his block off." He said that when he got into the bedroom "I hadn't even decided to do it yet, and it was just sort of a big discussion, and that's basically we were coming to terms that that's what we were going to use." He said that his mother went into the bedroom first and told him that Frank Osland was asleep. He was standing in the doorway. He said that he "[w]ent into the bedroom, and we were saying like gotta do it, you've got no choice now, type of thing." He said that he started shaking and could not do it. Then they went to a bathroom or alcove and he and his mother "were discussing that we had to do it basically." He said that he was saying, "[g]ot to do it, because he'll kill us in the morning."

136 David Albion said that they went into the bedroom again and he stood over Frank Osland. He said that he lifted the pipe up and then put it down because he could not do it. He said "just all the things that sort of happened in our life just came back and I just picked the pipe up and I hit him." They took the body of Frank Osland away in a Laser vehicle and buried him in the "hole" which they had dug earlier that day.

137 The jury were not bound to believe all or any of this account. But nothing in this evidence required the judge to direct the jury that, in killing Frank Osland, David Albion may have been acting on a frolic or venture of his own. His account made it plain that, although his justification for the killing was that he feared for the life of himself and his mother, he killed because he and his mother had agreed that it had to be done.

138 By reason of the violent incident on this night or other evidence of the past conduct of Frank Osland, some jurors may have accepted that David Albion killed because he genuinely feared on reasonable grounds that his or his mother's life was in danger. By reason of his age and relationship with Frank Osland, some members of the jury may not have been convinced that he did not believe on reasonable grounds that his life was in danger. But the jurors were also entitled to conclude that self-protection was not Mrs Osland's justification for the killing to which she had agreed, had encouraged and had taken steps to achieve. They were entitled to act on the statement contained in the intercept of a conversation with her daughter, Erica, which the trial judge left to the jury: "We gave him sleeping tablets, bashed him on the head, put him in the car, took him out, kicked him into the hole, and covered him and drove off." In a context where in none of the intercepts or in the police interviews had Mrs Osland claimed that she was acting in self-defence and where she had disclaimed any recent violence by Frank Osland, this statement was cogent evidence of her having murdered Frank Osland.

The failure to raise the causation point

139 The whole conduct of the case up to the hearing of the special leave application in this Court confirms that Mrs Osland's case was that she was equally responsible for the acts of her son. It confirms that it was no part of her case at trial that any conviction of her was dependent upon the conviction of her son.

140 The issue of an inconsistency in the conviction of Mrs Osland and the failure to agree in respect of her son went unmentioned by counsel for Mrs Osland in submissions before the Victorian Court of Appeal. Nor was there any mention of a need for the trial judge to have directed the jury that they could not convict Mrs Osland if they found that David Albion was not acting pursuant to a joint understanding. Her case before that Court focused upon the trial judge's directions concerning the evidence as to "battered woman's syndrome", provocation, and upon certain other alleged misdirections and errors during the course of the trial. It is clear from the Court of Appeal's judgment that that Court (Winneke P, Hayne and Charles JJA) heard no argument on the issue of inconsistency or the presence or absence of concert. In the course of summarising the argument at trial, their Honours said¹⁶²:

162 *R v Osland* [1998] 2 VR 636 at 661; (1997) 95 A Crim R 479 at 504.

"[A]fter the defence opening, there was no dispute at the trial that the applicant had participated in the killing; the questions to be resolved were whether the Crown had shown that the killing was unprovoked and ... not in self-defence."

Further passages in their Honours' judgment confirm that both parties approached the proceedings in the Court of Appeal from a common standpoint: that the validity of Mrs Osland's conviction was unchallengeable if there were no error or misdirection by the trial judge in respect of matters unrelated to the doctrine of concert¹⁶³.

- 141 The possibility that the degree of Mrs Osland's participation had been in issue at trial was not even considered by the Court of Appeal in giving its judgment. Indeed, when summarising the argument at trial level their Honours said¹⁶⁴:

"It was the applicant's case that the evidence put before the jury should lead them to the conclusion that they could not be satisfied that, *when she participated in killing* the deceased, she was not acting in [self-defence] ... [or] under provocation

On the other hand the Crown submitted to the jury that the evidence could not, and should not, lead them to any conclusion other than that *the act of the applicant in killing* the deceased was wilful murder." (emphasis added)

- 142 It was not until shortly before the hearing of the special leave application in this Court that the issue of inconsistency arose. It arose only when this Court directed Mrs Osland's counsel that it wished to hear argument on the point. The submissions for Mrs Osland were then amended to include submissions on inconsistency. That was the first time in these proceedings that her legal advisers had raised the point.

- 143 It is, in my view, unremarkable that at the trial counsel for Mrs Osland was not prepared to raise the issue that she could not be convicted of murder unless her son was convicted of that charge. Even if she had thought that the *dictum* in *Demirian*¹⁶⁵ governed the case and that the statement in Brett, Waller and Williams' *Criminal Law*¹⁶⁶ was wrong, raising the issue would have created other, perhaps worse, problems for the defence. If such a "defence" had been raised, there was ample evidence upon which the Crown could have asked the jury to

163 *R v Osland* [1998] 2 VR 636 at 644; (1997) 95 A Crim R 479 at 487.

164 *R v Osland* [1998] 2 VR 636 at 643-644; (1997) 95 A Crim R 479 at 486.

165 [1989] VR 97 at 123-124.

166 8th ed (1997) at 465.

convict Mrs Osland because of her own acts independently of what her son had done.

144 Mrs Osland by her own admission played a significant part in the sequence of events that brought about Frank Osland's death. She administered the drugs that rendered him unable to defend himself against the fatal blow or blows. She went into the bedroom to see whether he was asleep so that he could be hit with the pipe. She told her son that she would use the pipe. She plainly encouraged her son when he said that he could not do it. She was present as he struck the blow or blows that killed her husband. The fact that she held his body down on the bed during his death throes was also evidence which, combined with other evidence, indicated that she could be regarded as a principal in the first degree in her own right rather than simply as an accessory present at the scene of death and acting in concert. That these actions were not the only factor contributing to the death of Frank Osland is immaterial, for it is clear that "[t]o constitute a cause for the purposes of the criminal law, it is not necessary that an act or omission be the sole or main cause of a wrong"¹⁶⁷.

145 The presence or absence of causation is first and foremost a question of fact. It is a question to be determined by reference to "common sense" notions of causation supplemented with legal principles only in so-called "hard cases". The leading Australian authority on causation principles in the murder context is *Royall v The Queen*¹⁶⁸. In that case I attempted to outline, in general terms, the considerations relevant in determining causation in cases such as the present¹⁶⁹:

"In most criminal cases, the issue of causation is not controversial. ... But there are two cases where the invocation of common sense principles of causation often provides little assistance to the jury. The first is the case where an accused's act would not have brought about the event or occurrence without the intervention of a subsequent act of the victim or a third party. ... In these cases, common law judges have sought to use more specific tests for determining whether 'but for' acts or omissions of the accused were 'causally responsible' for the event or occurrence. The common law judges have used at least four tests for this purpose. They are: (1) the operating and substantial cause test; (2) the natural consequence test; (3) the reasonable foresight of the consequences test; and (4) the novus actus interveniens test, which is used

¹⁶⁷ *Royall v The Queen* (1991) 172 CLR 378 at 441 citing *Pagett* (1983) 76 Cr App R 279 at 290.

¹⁶⁸ (1991) 172 CLR 378.

¹⁶⁹ (1991) 172 CLR 378 at 441-442.

sometimes in conjunction with and sometimes independently of one of the other three tests."

- 146 It is unnecessary to reproduce here the discussion that followed this passage. It is sufficient to recite my conclusions as to the preferable approach where issues of causation arise in a criminal case¹⁷⁰:

"[I]n a criminal case, a person should not be held liable for a wrongful act or omission which has caused harm in a 'but for' sense if that harm was the product of a novus actus interveniens or was not a reasonably foreseeable consequence of the act or omission. It goes almost without saying, however, that a person should be held liable for harm which is causally linked with his or her conduct and which he or she intended should be brought about by that conduct".

- 147 There was ample evidence on which a reasonable jury could have found that Mrs Osland's acts substantially caused her husband's death and upon which the jury could therefore find that she was a principal offender, rather than an accessory acting in concert and present at the scene but not the actual perpetrator of the killing.

- 148 Moreover, as Hart and Honoré point out in *Causation in the Law*¹⁷¹, a person will be a principal to murder where his or her only "act" is to incite a person over whom he or she exercises, as a matter of fact, a degree of power to kill the victim¹⁷². On the evidence, it was open to the jury to conclude that Mrs Osland was in just such a position of influence over her son David Albion and that she exercised that power. The fact that her involvement in the killing was considerably greater than mere incitement can, I think, only strengthen the conclusion that she was in her own right a principal in the first degree. Having regard to the alternative case that could have been made against Mrs Osland, it is hardly surprising that her experienced counsel did not raise any point as to whether Mrs Osland's acts had contributed to her husband's death or whether she could be convicted if her son was not convicted.

- 149 Moreover, given the risk of the Crown putting its case against Mrs Osland in the alternative, it would have been tactically unwise to persist in a claim that she was not responsible for her husband's death. To have claimed in the face of the overwhelming Crown case that Mrs Osland was not jointly responsible for her husband's death would have been forensically preposterous. More importantly,

¹⁷⁰ (1991) 172 CLR 378 at 449.

¹⁷¹ 2nd ed (1985).

¹⁷² Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 363-364.

that approach would have made it more difficult to run her real defences of self-defence and provocation. It would have required the trial judge to direct the jury with more precision and detail as to the law of complicity and causation and as to the part each accused played in bringing about the death of Mr Osland. Such amplified directions would necessarily have emphasised those acts and combinations of acts of the accused that the Crown relied on to prove that this was a case of cold-blooded murder. Inevitably, such amplified directions would have focused on the acts of the accused, rather than the acts of the deceased. That would have tended to undermine the defence strategy which was to put the conduct of Frank Osland, rather than the conduct of Mrs Osland and David Albion, on trial.

150 Even if I had thought that the law of acting in concert was accurately stated in *Demirian*¹⁷³ and that the trial judge should have directed the jury that they could not convict Mrs Osland without convicting her son, it would have been proper to hold that the failure to give the direction was not a miscarriage of justice. The case was conducted at the trial on the basis that she could be convicted although her son was acquitted. No direction to the contrary was sought at the trial, and the point was not raised in the Court of Appeal. Moreover, there was an alternative basis on which the case against her could have been put, which would have entitled the jury to convict her although they acquitted her son. Indeed, it is a possible view of the summing up that the trial judge, in using terms such as "jointly", was intending to direct the jury that Mrs Osland at the material times was a principal in the first degree in her own right, independently of her responsibility for the acts of her son.

151 When the evidence, the directions to the jury and the conduct of the case are examined, there is no ground for setting aside the conviction of Mrs Osland on the basis that the judge did not direct the jury that they could not convict her unless they first convicted her son. That direction was not sought at the trial and the giving of it would be quite inconsistent with the way that Mrs Osland's defence was conducted. Furthermore, the evidence did not require such a direction and the conduct of the defence case confirms that this was so.

152 Having regard to the doctrine of acting in concert and its consequences and the evidence and the conduct of the case, there was no inconsistency in the jury's findings and no miscarriage of justice.

Order

153 The appeal must be dismissed.

173 [1989] VR 97 at 123-124.

- 154 KIRBY J. The Court of Appeal of Victoria dismissed an application for leave to appeal brought by Mrs Heather Osland (the appellant)¹⁷⁴. She had sought leave to challenge her conviction and sentence for the murder of her husband, Mr Frank Osland (the deceased). At her trial, the appellant's son by an earlier marriage, Mr David Albion (Mr Albion), was presented with the appellant on a single count charging them both with the murder. Each accused pleaded not guilty. A trial lasting 22 days ensued. The jury in that trial returned a verdict of guilty in the case of the appellant. They could not agree on a verdict in respect of Mr Albion. At a second trial for murder, the jury acquitted Mr Albion and he was discharged. Now, by special leave, the appellant appeals to this Court contesting her conviction of murder.

The issues

- 155 The issues arising out of the amended notice of appeal were essentially as follows:

1. *Suggested inconsistency of the verdicts:* The second trial of Mr Albion had been concluded prior to the hearing of the appellant's application for leave to appeal to the Court of Appeal. The outcome was therefore known¹⁷⁵. No ground was argued in that Court complaining about any suggested inconsistency between the conviction of the appellant and the outcomes in the successive trials of her son. However, in this Court, a major part of the appellant's argument concerned the suggested inconsistency between the verdicts on the record. The appellant's submissions were put in three essential ways: (a) that the jury's conviction of the appellant was irreconcilable with their failure to convict Mr Albion; (b) that the jury's conviction of the appellant was irreconcilable with Mr Albion's acquittal at his subsequent trial; and (c) that the disagreement of the first jury and acquittal of Mr Albion by the second jury drew attention to the inadequacy or inaccuracy of the instruction given by the judge at the first trial concerning the respective parts which the appellant and Mr Albion had played in the acts causing the death of the deceased. As those acts had been identified at the trial as the blow or blows administered to the skull of the deceased whilst he was sleeping, as such blows were actually occasioned by Mr Albion and not by the appellant and as, therefore, the appellant's part in the immediate cause of the deceased's death was limited, the inconsistency between her conviction and the acquittal of Mr Albion was shown in stark relief. The person who had actually administered the fatal blows had been acquitted and walked free.

174 *R v Osland* [1998] 2 VR 636 (Winneke P, Hayne and Charles JJA).

175 *R v Osland* [1998] 2 VR 636 at 638.

The appellant, who administered no such blows, had been convicted. This required correction.

2. *Directions on lies:* That since the Crown's case had relied on the conceded fact that the appellant had lied about the whereabouts of the deceased in the period immediately following his death (and about the violence which the appellant later deposed had been inflicted upon her by the deceased), the jury should have been instructed about the use which they could make of the evidence of lies. They should have been directed in accordance with the decision of this Court in *Edwards v The Queen*¹⁷⁶.
3. *Admissibility of telephone intercepts:* That certain tapes and transcripts of intercepted telephone conversations conducted between the appellant and her daughter should have been ruled inadmissible and excluded from the trial. They should have been excluded either on the basis that they were not sufficiently relevant to the issues or that any probative value in them was outweighed by the prejudicial effect which would result from their admission¹⁷⁷.
4. *Motivation to self-serving evidence:* That the trial judge had erred in suggesting that, since the appellant had an interest in the outcome of the trial, her testimony might be "partial" or "less than frank"¹⁷⁸.
5. *Provocation:* That the trial judge had erred in his summing up to the jury by: (a) referring to what an ordinary person in the accused's situation "would" have done, instead of what such a person "might" or "could" have done; (b) directing the jury at several points that provocation, to be made out, required a "specific triggering incident"; and (c) failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of provocation.
6. *Self-defence:* That the trial judge had erred in: (a) refusing to admit hearsay evidence of what the appellant had told others about the violence inflicted upon her by the deceased and threats allegedly made by him to her; (b) the directions which he gave in relation to the relevance of the fact that the appellant, with Mr Albion, had on the morning on which the deceased was

¹⁷⁶ (1993) 178 CLR 193.

¹⁷⁷ *Driscoll v The Queen* (1977) 137 CLR 517 at 541; *R v Christie* [1914] AC 545 at 560.

¹⁷⁸ cf *Robinson v The Queen* (1991) 180 CLR 531; *Stafford v The Queen* (1993) 67 ALJR 510.

killed (or perhaps earlier¹⁷⁹) dug a grave (described as a "hole") to receive the body of the deceased; and (c) failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of self-defence.

7. *Aggregation of errors:* That the aggregate of the errors at the trial was sufficient to have caused the trial to miscarry.
8. *The proviso:* That, in the circumstances, the case was not suitable for the application of the proviso to s 568(1) of the *Crimes Act* 1958 (Vic) – a consideration upon which the judges in the Court of Appeal relied in case they were wrong in their treatment of the various complaints about the conduct of the trial as those complaints then stood¹⁸⁰.

156 In the Court of Appeal, each of the issues save the first was argued but without success. In this Court, issue 1 was added.

157 For the reasons given both by Gaudron and Gummow JJ and by Callinan J, the appellant's complaints, in so far as they raise issues 2, 3 and 4, should be rejected. The outcome of issues 7 and 8 depends upon the conclusion reached in relation to the remaining substantive points argued. These concern the alleged inconsistency of the verdicts involving the appellant and Mr Albion (issue 1) and the complaint about the adequacy and accuracy of the instruction given concerning provocation and self-defence (issues 5 and 6). Neither Gaudron and Gummow JJ nor Callinan J would uphold the complaints directed to the latter issues. I agree with them. However, I wish to add some comments of my own concerning "battered woman syndrome" or "battered woman reality" as the appellant preferred to express it. As the other members of the Court agree that this part of the appellant's argument does not warrant disturbance of the appellant's conviction, and as I concur in that conclusion, it is appropriate to deal with that issue first. It will then be necessary to turn to the point upon which a difference has arisen in this Court. That point arises out of the allegedly inconsistent verdicts and requires examination of the criticisms of the directions of the trial judge which the appellant belatedly says misdirected the jury on an element of the crime of which she stood charged and of which she was convicted.

179 *R v Osland* [1998] 2 VR 636 at 638.

180 *R v Osland* [1998] 2 VR 636 at 664-665.

Abusive relationships

158 *Avoiding stereotypes:* Care needs to be taken in the use of language and in conceptualising the problem presented by evidence tendered to exculpate an accused of a serious crime on the ground of a pre-existing battering or abusive relationship. As evidence of the neutrality of the law it should avoid, as far as possible, categories expressed in sex specific or otherwise discriminatory terms¹⁸¹. Such categories tend to reinforce stereotypes. They divert application from the fundamental problem which evokes a legal response to what is assumed to be the typical case.

159 There is now a substantial quantity of writing in legal literature concerning battered woman syndrome (BWS)¹⁸². It exists both in Australia¹⁸³ and overseas¹⁸⁴. Although this appeal represents the first time that this Court has been asked to consider the relevance of BWS, other Australian courts have addressed its

181 See, for example, the recent decision of the Supreme Court of the United States in which sexual harassment, which began as a phenomenon of male conduct addressed to women, has been held applicable to same-sex harassment: *Oncale v Sundowner Offshore Services Inc et al* 118 S Ct 998 (1998) discussed Tinaglia, "Same-Sex Harassment in Illinois after *Oncale v Sundowner Offshore Services*", (1998) 86 *Illinois Bar Journal* 310; cf *Garcia v National Australia Bank Ltd* (1998) 72 ALJR 1243 at 1246, 1247, 1256-1261; 155 ALR 614 at 619, 620, 633-639.

182 The working hypothesis of the battered woman syndrome was first introduced in Lenore Walker's 1979 book, *The Battered Woman*.

183 For example, Sheehy, Stubbs and Tolmie, "Defending Battered Woman on Trial: The Battered Woman Syndrome and its Limitations", (1992) 16 *Criminal Law Journal* 369; Stubbs and Tolmie, "Race, Gender and the Battered Woman Syndrome: An Australian Case Study", (1995) 8 *Canadian Journal of Women and the Law* 122; Beri, "Justice for Women Who Kill: A New Way?", (1997) 8 *Australian Feminist Law Journal* 113; Australia, Committee of the Standing Committee of Attorneys-General, Discussion Paper, Model Criminal Code, Ch 5, *Fatal Offences Against the Person*, June 1998 at 89.

184 For example, Edwards, "Battered women who kill", (1990) *New Law Journal* 1380; O'Donovan, "Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome", (1993) 20 *Journal of Law and Society* 427; Wells, "Battered woman syndrome and defences to homicide: where now?", (1994) 14 *Legal Studies* 266; Chan, "A Feminist Critique of Self-Defence and Provocation in Battered Women's Cases in England and Wales", (1994) 6 *Women & Criminal Justice* 39; Griffith, "Battered Woman Syndrome: A Tool for Batterers?", (1995) 64 *Fordham Law Review* 141; Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee*", (1997) 47 *University of Toronto Law Journal* 1.

implications for criminal trials¹⁸⁵. Expert evidence about BWS has been admitted in criminal trials overseas on the ground of its suggested relevance to the issues¹⁸⁶. Some commentators have resisted a proposition that BWS should be expressed in terms which are neutral as to the sex of the alleged victim¹⁸⁷. They argue that BWS is one of those social facts which, like conception and child bearing, is peculiarly specific to women and therefore properly described in such terms. It is true that the scientific and empirical research presents an issue which is overwhelmingly one affecting women¹⁸⁸. In the current and foreseeable social circumstances of Australia, it seems likely to remain so. However, unlike conception and childbirth, there is no inherent reason why a battering relationship should be confined to women as victims. Instances exist where the reverse is the case, including in some same-sex relationships of analogous dependence and prolonged abuse¹⁸⁹. Moreover, it is important to be wary of the effects that BWS can have on the perception of women as fully independent and responsible individuals. What is at stake in reflecting the reality which may accompany long-term abusive

185 For example, *R v Runjanjic*; *R v Kontinnen* (1991) 56 SASR 114; *R v Hickey* unreported, Supreme Court of New South Wales, 14 April 1992; *R v Gunnarsson Wiener* unreported, Supreme Court of Tasmania, 13 August 1992; *R v Woolsey* unreported, Supreme Court of New South Wales, 19 August 1993; *R v Kina* unreported, Queensland Court of Appeal, 29 November 1993; *Chhay* (1994) 72 A Crim R 1; *Secretary* (1996) 86 A Crim R 119.

186 For example, self defence: *R v Lavalley* [1990] 1 SCR 852; *R v Wang* [1990] 2 NZLR 529; *R v Oakes* [1995] 2 NZLR 673; provocation: *R v Ahluwalia* (1992) 96 Cr App R 133.

187 For example, Evatt, Foreword to Graycar and Morgan, *The Hidden Gender of Law*, (1990) at vii. As to evidence of violence by female partners on male partners, see Levinger (ed), *Divorce and Separation: Conditions, Causes and Consequences*, (1979); Steinmetz, "The Battered Husband Syndrome", (1978) 2 *Victimology* 499 and other studies cited Scutt, *Even in the Best of Homes - Violence in the Family*, (1990) at 98, 109.

188 See eg Walker, *The Battered Woman*, (1979); Walker, *The Battered Woman Syndrome*, (1984).

189 Simone, "'Kill(er) man was a Battered Wife' the application of Battered Woman Syndrome to Homosexual Defendants: *The Queen v McEwen*", (1997) 19 *Sydney Law Review* 230.

relationships of dependence is not "gender loyalty or sympathy" but ethical and legal principle¹⁹⁰.

160 There are particular reasons why "battered wife syndrome" is a complete misnomer. In my view that expression should not be used. Many women subjected to long-term battering are not wives. Although in an individual case a relationship of marriage might reinforce an abuser's notions of dominance, control and justification, the problem described in the literature extends beyond married couples. In the present case, for example, according to the appellant's evidence, it existed in her relationship with the deceased before their marriage. However understandable it may be, in its provenance and typical manifestations, to confine the notion involved in BWS to women in general, and to wives in particular, it is erroneous from the point of view of legal principle. What is relevant is not the sex or marital status of the victim of long-term abuse. Nor whether that abuse has been physical (battering) or otherwise. It is whether admissible evidence establishes that such a victim is suffering from symptoms or characteristics¹⁹¹ relevant in the particular case to the legal rules applicable to that case.

161 To this extent, I have sympathy for the appellant's criticism of the word "syndrome" in BWS. On analysis, it appears to be an "advocacy driven construct"¹⁹² designed to "medicalise"¹⁹³ the evidence in a particular case in order to avoid the difficulties which might arise in the context of a criminal trial from a conclusion that the accused's motivations are complex and individual: arising from personal pathology and social conditions rather than a universal or typical pattern of conduct sustained by scientific data¹⁹⁴. As a construct, BWS may misrepresent many women's experiences of violence¹⁹⁵. It is based largely on the experiences

190 Heller, "Ill-founded outrage", *The Times Literary Supplement*, 13 August 1993 at 11 cited in *Garcia v National Australia Bank* (1998) 72 ALJR 1243 at 1259; 155 ALR 614 at 636.

191 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 at 173-174.

192 Goodyear-Smith, "Re Battered Woman's Syndrome [1997] NZLJ 436-438", (1998) *New Zealand Law Journal* 39.

193 McDonald, "Battered Woman Syndrome", (1997) *New Zealand Law Journal* 436 at 437.

194 Budrikis, "Note on *Hickey*: The Problems with a Psychological Approach to Domestic Violence", (1993) 15 *Sydney Law Review* 365.

195 Stubbs and Tolmie, "Race, Gender, and the Battered Woman Syndrome: An Australian Case Study", (1995) 8 *Canadian Journal of Women and the Law* 122; Faigman and Wright, "The Battered Woman Syndrome in the Age of Science", (1997) 39 *Arizona Law Review* 67 at 111-113; Shaffer, "The Battered Woman
(Footnote continues on next page)

of caucasian women of a particular social background¹⁹⁶. Their "passive" responses may be different from those of women with different economic or ethnic backgrounds¹⁹⁷. This was recognised by the Supreme Court of Canada in *R v Malott*¹⁹⁸:

"It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman."

Similarly, Suzanne Beri has observed that¹⁹⁹:

"BWS evidence interacts with cultural, gender stereotypes with the result that women, who kill abusers, now have to fit within an 'abused woman' straightjacket. This corresponds to a stereotype of a white, middle-class woman and stresses passivity, docility and helplessness. It excludes the experience of Maori women ... whose experience of abuse is also shaped by racism."

162 These observations suggest that, in each case, where it is alleged that an accused's action can be explained by reference to BWS or its gender neutral equivalent, the court should focus its attention upon the relevance, if any, to the conduct of the particular accused of evidence explaining commonly observed

Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee*", (1997) 47 *University of Toronto Law Journal* 1 at 13-14, 25-33.

196 Stubbs and Tolmie, "Race, Gender, and the Battered Woman Syndrome: An Australian Case Study", (1995) 8 *Canadian Journal of Women and the Law* 122.

197 Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering", (1986) 9 *Women's Rights Law Reporter* 195; Freckelton, "Battered Woman Syndrome", (1992) 17 *Alternative Law Journal* 39; Volpp, "(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'", (1994) 17 *Harvard Women's Law Journal* 57 at 93; Moore, "Battered Woman Syndrome: Selling the Shadow to Support the Substance", (1995) 38 *Howard Law Journal* 297.

198 (1998) 155 DLR (4th) 513 at 528.

199 Beri, "Justice for Women Who Kill: A New Way?", (1997) 8 *Australian Feminist Law Journal* 113 at 123.

responses of people living in an abusive relationship of dependency. So much was acknowledged by Thomas J in *Ruka* in words which I would endorse and expand to apply to all such abusive relationships²⁰⁰:

"There is a danger that in being too closely defined, the syndrome will come to be too rigidly applied by the Courts. Moreover, few aspects of any discipline remain static, and further research and experience may well lead to developments and changed or new perceptions in relation to the battering relationship and its effects on the mind and will of women in such relationships. ... [Th]e syndrome, where it is found to exist, is not in itself a justification for the commission of a crime. It is the effects of the violence on the battered woman's mind and will, as those effects bear on the particular case, which is pertinent. It is not, therefore, simply a matter of ascertaining whether a woman is suffering from battered woman's syndrome and, if so, treating that as an exculpatory factor. What is important is that the evidence establish that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case."

163 Having said this, it was the appellant, at trial, who raised BWS. She called expert evidence about it and argued that it was relevant, in her case, to self-defence and provocation. It is therefore unsurprising that this was the way in which, until now, the issue has been addressed in these proceedings. It is too late in this case to adopt a change of course.

164 *Need for reliable evidence:* A second consideration is the controversy which surrounds the reliability of the "syndrome" and its relevance for legal purposes. Critics of the scientific foundation of BWS have described it as having "no medical legitimacy"²⁰¹, as failing to meet established criteria for "scientific reliability"²⁰², as being an "unsubstantial concept" increasingly doubted in United States courts

200 [1997] 1 NZLR 154 at 173-174.

201 Goodyear-Smith, "Re Battered Woman's Syndrome [1997] NZLJ 436-438", (1998) *New Zealand Law Journal* 39.

202 Goodyear-Smith concludes that BWS fails to meet the *Daubert* test for scientific reliability in the United States law courts: scientific testability; error criteria; support in peer review journal publications; and general scientific acceptance. She concludes that while BWS might be considered valid by clinical psychologists who work in the field of domestic violence and hence have an interest, there would be "few experimental psychologists who would consider it a valid entity": Goodyear-Smith, "Re Battered Woman's Syndrome [1997] NZLJ 436-438", (1998) *New Zealand Law Journal* 39. See also Faigman and Wright, "The Battered Woman Syndrome in the Age of Science", (1997) 39 *Arizona Law Review* 67 at 107-111.

where it originated²⁰³ and likely soon to "pass from the American legal scene"²⁰⁴. Such critics argue that the pressure to "medicalise" the response of a victim in a prolonged violent relationship, and to attribute that response to the manifestation of an established psychological or psychiatric disorder, distracts attention from conduct which may constitute a perfectly reasonable response to extreme circumstances. BWS denies the rationality of the victim's response to prolonged abuse and instead presents the victim's conduct as irrational and emotional²⁰⁵. This undercuts the very purpose which BWS was meant to serve: to show how a victim's actions in taking lethal self-help against the abuser was reasonable in the extraordinary circumstances which the victim faced²⁰⁶. Local critics have suggested that BWS invites curial tinkering with the notion of provocation which is much more commonly invoked to excuse male

203 Faigman and Wright, "The Battered Woman Syndrome in the Age of Science", (1997) 39 *Arizona Law Review* 67.

204 Goodyear-Smith, "Re Battered Woman's Syndrome [1997] NZLJ 436-438", (1998) *New Zealand Law Journal* 39.

205 Shaffer, "*R v Lavallee*: A Review Essay", (1990) 22 *Ottawa Law Review* 607; Grant, "The 'Syndromization' of Women's Experience" in Martinson et al, "A Forum on *Lavallee v R*: Women and Self Defence", (1991) 25 *University of British Columbia Law Review* 23 at 53-54; Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation", (1991) 90 *Michigan Law Review* 1 at 42; Yeo, "Resolving Gender Bias in Criminal Defences", (1993) 19 *Monash University Law Review* 104 at 111; Manning, "Self Defence and Provocation: Implications for battered women who kill and for homosexual victims", NSW Parliamentary Library Research Service (Briefing Paper No 33/96), December 1996 at 19-20; Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee*", (1997) 47 *University of Toronto Law Journal* 1.

206 Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering", (1986) 9 *Women's Rights Law Reporter* 195 at 199; Moore, "Battered Woman Syndrome: Selling the Shadow to Support the Substance", (1995) 38 *Howard Law Journal* 297 at 301-302.

violence upon women than vice versa²⁰⁷. Other critics, on the basis of empirical evidence, suggest that there is no need to distort the elements of provocation because Australian juries, in fact, commonly accept claims of provocation made by female defendants, often in circumstances arising out of domestic violence²⁰⁸.

165 I record these controversies as a warning of the need for caution in the reception of testimony concerning BWS. It is not a universally accepted and empirically established scientific phenomenon. Least of all does the mere raising of it, in evidence or argument, cast a protective cloak over an accused, charged with homicide, who alleges subjection to a long-term battering or other abusive relationship. No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts²⁰⁹. The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances. Whilst these circumstances may be affected by contemporary conditions and attitudes, there is no legal *carte blanche*, including for people in abusive relationships, to engage in premeditated homicide²¹⁰. Nor in my view should there be. To the extent that evidence about BWS is tendered in a trial to sustain that conclusion, judges must firmly bring the jury back to the limited use to which such evidence may be put. This is, and is only, as it bears upon the legal issues in the trial such as self-defence and provocation. As Wilson J commented in *R v Lavallee*²¹¹:

"Obviously the fact that the appellant was a battered woman does not entitle her to an acquittal. Battered women may well kill their partners other

207 Australia, Committee of the Standing Committee of Attorneys-General, Discussion Paper, Model Criminal Code, Chapter 5, *Fatal Offences Against the Person*, June 1998 at 89. The authors conclude that provocation is gender biased and unjust. For this and other reasons, they recommend its abolition. They state that the theory underlying BWS does not comfortably co-exist with the "partial defence" of provocation as it has developed in common and statute law in Australia (at 103); cf Bradfield, "Comment on *Green v The Queen*", (1998) 5 *Criminal Law Journal* 296 at 302.

208 Victoria, Law Reform Commission, *Homicide* (Report No 40), (1991) at pars 164-168. For criticism, see Women's Coalition Against Family Violence, *Blood on whose hands?*, (1994) at 117-118.

209 cf *Green v The Queen* (1997) 191 CLR 334 at 393.

210 *Green v The Queen* (1997) 191 CLR 334 at 407.

211 [1990] 1 SCR 852 at 890.

than in self-defence. The focus is not on who the woman is, but on what she did."

Similarly, in *Malott*, L'Heureux-Dubé J remarked²¹²:

"The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the *reasonableness* of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from 'battered woman syndrome'."

166 Phyllis Crocker has made a similar point²¹³:

"The issue in a self-defence trial is not whether the defendant is a battered woman, but whether she justifiably killed her husband. The defendant introduces testimony to offer the jury an explanation of reasonableness that is an alternative to the prosecution's stereotypic explanations. It is not intended to earn her the status of a battered woman, as if that would make her not guilty."

167 *Utility of expert evidence:* A third consideration concerns the actual way in which expert evidence about responses in battering relationships may be used to assist a jury. Although BWS does not enjoy universal support, there is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert. The greatest relevance of such evidence will usually concern the process of "traumatic bonding" which may occur in abusive relationships. This phenomenon has been observed in the circumstances to which evidence of BWS may relate. But it has also been described as between battered children and their parents, hostages and their captors and prisoners in a concentration camp and their guards²¹⁴. In the context of a case where BWS was alleged, the Supreme Court of Canada, in *Lavallee*, said²¹⁵:

"Expert evidence on the psychological effect of battering on wives and common law partners must ... be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven

212 (1998) 155 DLR (4th) 513 at 529.

213 Crocker, "The Meaning of Equality for Battered Women Who Kill Men In Self-Defense", (1985) 8 *Harvard Women's Law Journal* 121 at 149.

214 *Lavallee* [1990] 1 SCR 852 at 886.

215 [1990] 1 SCR 852 at 871-872.

for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect a woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with [BWS]. We need help to understand it, and help is available from trained professionals."

168 Before this Court, the Crown argued that the Supreme Court of Canada had taken a wrong turning in the relevance which it ascribed to evidence about BWS. In particular, the Crown drew attention to the following passage in that Court's opinion in *Malott*²¹⁶:

"The admissibility of expert evidence respecting battered woman syndrome was not at issue in the present case. The admissibility of the expert evidence ... was not challenged. However, once that *defence* is raised, the jury ought to be made aware of the principles of that *defence* as dictated by *Lavallee*."

169 Taken in context, I do not agree that these words are to be read as endorsing an entirely new and discrete defence to a charge of culpable homicide arising from proof of the presence of BWS or an analogous abusive relationship. A few paragraphs earlier in its opinion in *Malott*, the Court had made it plain that "the charge as a whole should be examined to ascertain whether the jury were given an adequate charge on battered woman syndrome as it relates to self-defence"²¹⁷. In her reasons in that case, L'Heureux-Dubé J expressly stated, correctly in my view, that BWS was not "a legal defence in itself"²¹⁸. It seems unthinkable that the Supreme Court of Canada, if it had been minded to create an entirely new "defence" or ground of exculpation (assuming that to be possible), would not have done so in language more explicit and with more elaborate reasoning. What that Court, and courts in other jurisdictions²¹⁹, have been at pains to emphasise is that any expert evidence of BWS, or an analogous condition, must be related to the facts of the particular case. Specifically, whilst such expert evidence could not be tendered to usurp the decisions reserved by law to the jury, it might be offered as relevant to questions such as (1) why a person subjected to prolonged and repeated abuse would remain in such a relationship; (2) the nature and extent of the violence that may exist in such a relationship before producing a response; (3) the accused's ability, in such a relationship, to perceive danger from the abuser; and (4) whether,

216 (1998) 155 DLR (4th) 513 at 521. Emphasis added.

217 (1998) 155 DLR (4th) 513 at 520.

218 (1998) 155 DLR (4th) 513 at 527.

219 For example, *Ruka* [1997] 1 NZLR 154 at 173.

in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or grievous bodily harm than by resorting to the conduct giving rise to the charge. These considerations, accepted in *Malott*, are equally applicable in Australia where expert evidence is received to describe common features of the conduct of people in abusive relationships and where provocation or self-defence are put in issue.

Provocation

170 There is no substance in the complaints made for the appellant concerning the trial judge's charge to the jury on the issue of provocation:

1. In regard to the complaint about the use of the word "would" instead of "could" or "might" in the judge's directions, it is appropriate to remember that the judge gave the jury the following instruction:

"You must decide whether the provocation was of such ... gravity, that it *might* - not would - *might* cause an ordinary person in the circumstances of these accused to react in the way in which they reacted. ... So you are talking about your judgment of what an ordinary person, a person with ordinary powers of self-control, *might* have done in that situation. *Might* an ordinary person in that situation have killed the deceased - and, remember, I am using the word '*might*' which indicates you are dealing with possibilities."²²⁰

Taken as a whole and with the passage I have quoted, there was no risk whatever that the jury were ultimately misinformed about the law which they were to apply²²¹.

2. As to the complaint concerning the judge's reference to a "specific triggering incident", this was the subject of no request for redirection at the trial. Doubtless this is because the language now complained of appeared in a charge which explained, in words which I would accept as accurate, the kind of "triggering" incident or circumstance to which reference was being made:

"It will be open to you ... in the provocation context, to consider whether or not there might be some relatively minor act of abuse – I do not mean trivial, but relatively minor act of abuse – which was, as it were, the last straw that breaks the camel's back and which produced a sudden loss of control for a woman in her circumstances that might possibly have caused

²²⁰ Emphasis added.

²²¹ This was the view of the Court of Appeal. See *R v Osland* [1998] 2 VR 636 at 650-651.

her to react as she did and which might cause an ordinary person in the circumstances in which she was, to do so."

This direction was correct. Evidence of a long-term abusive relationship, even if accepted, did not afford a person in the position of the appellant a blank cheque to plan and execute the homicide of her abuser, protected by the law of provocation, with only a passing nod at the immediate circumstances said to have driven her to the grave step of participating in the termination of a human life.

3. That leaves the suggested failure of the trial judge to relate the evidence of BWS (received without objection in the appellant's case) to the issue of provocation which the appellant invoked. Again, no relevant objection was taken at the trial to this part of the judge's charge. Obviously, the instruction given by the judge must depend upon the evidence called and the issues in the particular case. Having accurately outlined the evidence on BWS, the judge told the jury that the issue of provocation:

"[W]ill involve considering whether or not [Mr Albion and the appellant] killed [the deceased] when experiencing a loss of self-control, what might possibly be regarded such loss of control that an ordinary person in those circumstances, that is their circumstances, might experience. ... [Y]ou might ... use the battered woman syndrome to reach a conclusion that the Crown had not satisfied you, when [the appellant] participated in his killing, that she had not finally snapped or reached a point where control was lost in response to a final provocation; and that as a woman who had been, as they would contend, degraded and beaten down over a period of years, that her reaction was that of an ordinary person in that situation. In the light of that provocation you may ... not have much difficulty in concluding, if you accept [the appellant's] and all the others' evidence, that she was at least at some stages a battered woman within the syndrome."

I read this and other portions of the instruction on this issue (some of them set out in the reasons of Callinan J) as highly favourable to the appellant. However, the failure of the jury to resolve the issue of provocation against the Crown is scarcely surprising given the evidence. Although, as described by the appellant and her son, the past conduct of the deceased towards them was deplorable, there was clear evidence (most especially in the intercepted telephone conversations) that such conduct had abated in the years immediately preceding the killing. There was no suggestion in the appellant's evidence of any particular conduct on the part of the deceased in the day or days preceding his death which could be described as "the last straw". Even if the jury were satisfied that the appellant could be classified as a "battered woman", and a true victim of BWS as described in the evidence, there would have been abundant justification for a conclusion that her conduct, in furtherance of her plan to kill her husband, was coolly premeditated. In her

case, there was little or no evidence to demonstrate that she had lost that level of self-control which the common law and statute law in Australia ascribes to the "ordinary person" in the position of the accused²²².

In *Green v The Queen*²²³, a case where an unwanted and unexpected homosexual advance was alleged to constitute provocation, I expressed the view that this Court should be extremely careful to avoid any signal condoning serious violence by people who take the law into their own hands. This case is quite different in that the appellant was not as free in her circumstances to walk away from the unwanted conduct as Mr Green was in his. But I remain of the view which I expressed in *Green*. In a case bearing some similarities to the present one, Gleeson CJ, in the New South Wales Court of Criminal Appeal, remarked to similar effect²²⁴:

"[W]ith all its theoretical imperfections, and practical roughness, the law of provocation is still only a limited concession to a certain type of human frailty, and is not intended to allow a jury to reduce what would otherwise be murder to manslaughter upon a view that a deceased person received his or her just deserts. The law is not intended to encourage resort to self-help through violence."

- 171 As Gaudron and Gummow JJ have observed, any imperfections in the charge of the trial judge in this case in relating the evidence of BWS to the issues of provocation and self-defence can properly be ascribed to the general terms in which Dr Byrne gave his evidence about the typical features of BWS and the absence of clear evidence linking such testimony to the appellant's own conduct. In the circumstances, the judge's directions were adequate. Having regard to the undisputed evidence about the prior digging of the deceased's grave ("hole") and the appellant's evidence about the deceased's last hours, it is not at all surprising that the jury concluded against the appellant and in favour of the Crown on the issue of provocation.

Self-defence

- 172 Nor is there any substance in the appellant's belated complaints²²⁵ about the way that self-defence was treated at the trial:

²²² *Stingel v The Queen* (1990) 171 CLR 312 at 336; *Green v The Queen* (1997) 191 CLR 334 at 409-412.

²²³ (1997) 191 CLR 334 at 415-416.

²²⁴ *Chhay* (1994) 72 A Crim R 1 at 13.

²²⁵ No such complaint was made to the Court of Appeal: [1998] 2 VR 636 at 638-639.

1. The appellant argued before this Court that the trial judge had erred in refusing to admit hearsay evidence of what the appellant had told others about the violence inflicted on her by the deceased and the threats which he allegedly made to her. Such evidence was rightly rejected. The cases relied upon by the appellant to justify the admission of the hearsay evidence are distinguishable. Such cases apply where the evidence falls into the *res gestae* exception²²⁶, relates to the state of mind of the deceased²²⁷ or where there is direct evidence as to the deceased's violent character²²⁸. Nor is there any substance in the complaint, also made belatedly, about the directions given to the jury concerning the relevance of the fact that the appellant and Mr Albion had dug a hole, shortly before the deceased's death, capable of receiving his body.
2. The appellant submitted that the trial judge had failed to make clear the connection between the evidence of BWS and the law of self-defence. In my view, the judge made such a connection. His instruction included a statement as to the question which the jury had to ask themselves. This was:

"[W]hether [the appellant] and [Mr Albion] believed that [the deceased] was a then threat to their lives and safety and, if they did, whether they believed that on reasonable grounds".

After discussing provocation, the judge directed the attention of the jury to an obviously relevant question:

"The real problem may not be the issue of the syndrome, but in deciding whether or not the facts, the evidence, admit of self-defence through fear of an impending attack".

This direction was correct and sufficient.

In *Zecevic v Director of Public Prosecutions (Vict.)*²²⁹, this Court explained that issues of self-defence were to be approached "in a practical manner and without undue nicety, giving proper weight to the predicament of the accused". The reason assigned for this approach was that, in most cases where the issue of self-defence is presented to a jury, the accused may have been afforded "little, if any, opportunity for calm deliberation or detached

²²⁶ *R v Benz* (1989) 168 CLR 110.

²²⁷ *Walton v The Queen* (1989) 166 CLR 283.

²²⁸ *Re Knowles* [1984] VR 751 at 768.

²²⁹ (1987) 162 CLR 645 at 662-663.

reflection."²³⁰ Self-defence may indeed be relevant to a case where an abusive relationship is established by the evidence. Such evidence may assist a jury to understand, as self-defensive, conduct which on one view occurred where there was no actual attack on the accused underway but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike. Clearly, it is still necessary to discriminate between a self-defensive response to a grave danger which can only be understood in the light of a history of abusive conduct and a response "that simply involves a deliberate desire to exact revenge for past and potential – but unthreatened – future conduct."²³¹ The former will attract considerations of self-defence. The latter will not. That is doubtless why cases involving evidence of prolonged abuse have been held to attract the law of self-defence but generally where, immediately before the fatal attack, the alleged abuser had threatened further serious violence against the accused²³² or, in one case, her son²³³. The significance of the perception of danger is not its imminence. It is that it renders the defensive force used really necessary and justifies the defender's belief that "he or she had no alternative but to take the attacker's life."²³⁴

- 173 Read as a whole, there is no error in the trial judge's directions to the appellant's jury on self-defence. The jury's verdict in her case is fully explained by a conclusion, plainly open to the jury, that the appellant's conduct was premeditated and effected with "calm deliberation" and "detached reflection"²³⁵ rather than reasonably necessary to remove further violence threatening her with death or really serious injury. The complaint about the directions on self-defence are rejected.

Directions on causation

- 174 These conclusions bring me to the point of difference which has emerged in this Court. The question is whether, following the ultimate acquittal of Mr Albion,

230 (1987) 162 CLR 645 at 663.

231 *Secretary* (1996) 86 A Crim R 119 at 122.

232 *Lavallee* [1990] 1 SCR 852; *Secretary* (1996) 86 A Crim R 119.

233 *R v Whynot* (1983) 9 CCC (3d) 449. See also *R v Hickey* unreported, Supreme Court of New South Wales, 14 April 1992.

234 *Lavallee* [1990] 1 SCR 852 at 876 per Wilson J; cf Willoughby, "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?", (1989) 38 *Kansas Law Review* 169 at 184.

235 *Zecevic v Director of Public Prosecutions (Vict.)* (1987) 162 CLR 645 at 663.

and in the light of the directions given to the jury concerning the acts of the appellant which caused or contributed to the death of the deceased, her conviction must be set aside and a new trial had in which the jury would be instructed with greater particularity on the issue of the appellant's actions as they may have contributed to the cause of the death. Gaudron and Gummow JJ, having concluded that the appellant's conviction cannot be upheld on the basis that she substantially contributed to the death of the deceased, proceed to consider the other grounds of conviction left to the jury. I agree with the analysis of McHugh J concerning the liability of persons for the acts constituting the crime where those persons are acting in concert and present at the scene with the perpetrator. However, for the purposes of this appeal, I need only address the argument on causation.

175 With every respect, there is an air of unreality about the appellant's argument. At no stage before the matter reached this Court did the appellant make the slightest suggestion disputing her active contribution to the acts causing the deceased's death:

1. *Police interview:* In the video tape recorded interview between police officers and the appellant, conducted in January 1995, the appellant acknowledged that it was she who raised with Mr Albion the plan to kill the deceased. It was she, with her son, who picked the particular place and over a couple of hours helped him dig the "hole" ready for the deceased's body. It was she who gave the deceased some of her tranquillisers, crushing 6 or 7 tablets and putting them in his meal. It was she who said to her son "I'll do it" evoking his offer because, he said, she was not strong enough. It was she who suggested a baseball bat but her son, considering that a bat would break, went to the shed to get a piece of pipe. The interview proceeded:

"Q 168 And what happened then?

A We hit him.

Q 169 When you say 'we', can you explain exactly what happened?

A David hit him and - and I held him down, 'cause his nerves were startin' to jump, so we just held him down.

Q 170 How many times did David hit him?

A I think twice.

Q 171 Whereabouts?

A On his head. I just wished I had've done it, that's all.

73.

Q 172 And how hard was the blow?

A Well, I suppose it was hard.

...

Q 181 Right. And after he'd been struck twice, what happened?

A We just held him down till his nerves stopped jumpin around.

Q 182 And was there any injuries to his head?

A Yeah, there was a hole."

Thereafter, it was the appellant who tied a bag over the deceased's head. By that stage she thought he was dead because he had stopped twitching. The interview went on:

"Q 209 Right. When David struck Frank, he intended to kill him?

A I suppose *we* did, yes.

Q 210 Mm.

A It was just to get rid of the shit."²³⁶

It was the appellant who helped her son carry the deceased to the "hole" they had dug. After depositing him there, in the bush, she returned to clean up the bedroom in an endeavour to remove the evidence of the killing. There was no suggestion in this interview that the appellant's actions were other than those of a most substantial contributor to the deceased's death²³⁷. On the contrary, the appellant made it plain that she was the moving force: contributing the idea, the methodology and to the disposal of the body. She seemed to express regret for involving her son at all, a view which might well have been shared by the jury. When Mr Albion struck the blows that killed the deceased, she accepted that he was doing so for her. She made the death possible by administering the sedative and holding the deceased

²³⁶ Emphasis added.

²³⁷ *R v Hallett* [1969] SASR 141 at 149; *Royall v The Queen* (1991) 172 CLR 378 at 398, 441.

whilst he twitched his last mortal movements. Far from objecting to the tender of the evidence of this interview at the trial, the appellant's counsel took the appellant through it.

2. *Pre-trial proceedings:* When the issues for trial were being defined in discussion between the trial judge and counsel in advance of the hearing counsel made clear, as had been stated in a written outline, that the appellant's defence was "based on self-defence and provocation". Counsel said specifically: "There is not going to be denial of involvement in the killing."
3. *Opening statement:* After the jury were empanelled, the Crown Prosecutor, in his opening, referred to this identification of the issues. He told the jury specifically:

"For Mrs Osland you heard it stated that it is not disputed that Mrs Osland was involved in the killing of Frank Osland, nor as I apprehend is it disputed that he died as a consequence of being struck on the head with a steel pipe whilst asleep or under narcosis."

There was no objection to this statement. From the outset, then, this was the way the issues were presented for the appellant at her trial. No change occurred during the course of the trial.

4. *Closing address:* At the conclusion of the evidence, in the address to the jury on behalf of the appellant, her counsel stated what she submitted the fundamental issues to be. As defined by her, they were the issues of self-defence and provocation. In expressing the issue of self-defence she acknowledged the appellant's involvement in the killing of the deceased²³⁸. Far from contesting that the appellant had played a causative role in killing her husband, that role was, in terms, acknowledged. Virtually the whole of the address was directed to the issues relevant to the abusive relationship and why the appellant had not just left the deceased. The appeal to the jury was that they should evaluate the appellant's conduct not solely by reference to what had happened on the night of the killing or the few days before it. They were to look at the "years of that relationship" in order to decide whether "it was necessary for her *to act as she did*"²³⁹. Far from attempting to suggest some differentiation between the appellant's involvement in the acts causing the deceased's death, and that of Mr Albion, their actions were undifferentiated. Understandably enough, the appellant's counsel declared:

238 "[H]as the Crown been able to satisfy you beyond reasonable doubt that Heather Osland did not believe on reasonable grounds that it was necessary for her to do *as she did in killing* Frank Osland?". Emphasis added.

239 Emphasis added.

"*They did it.*"²⁴⁰ As far as her case was concerned, the appellant never denied that she had killed the deceased. She admitted that she had killed him; but sought to explain or justify it in the circumstances. So far as counsel for Mr Albion was concerned, he also made it plain before the first jury, as the conduct of his case had done, that he had struck the deceased "to save himself and his mother". The only real issue tendered in his case was that of self-defence.

5. *Judge's charge:* It is with this understanding of the evidence and the conduct of the trial that the complaints now so belatedly made about the judge's directions to the jury must be understood. His Honour made it clear that it was for the Crown to establish that the death of the deceased had been caused by the acts of the accused. Such acts did not have to be the sole cause but had to be "a substantial cause of death". He pointed out that the evidence in this respect was not extensive because the matter had not been argued by the defence. Nevertheless he made it clear that it was still a matter upon which the jury had to be satisfied. He identified the blows with the steel bar as "an operative and substantial cause of death". He suggested that it was the conduct and acts of the accused that had caused the death. He added, as an aside, "in this case, it can only be a blow with the instrument". In its context, this remark could only be taken as meaning that the immediate cause was the blow with the instrument. This is made plain by the context of these words in a long trial of two accused in which it was common ground that those blows had been wielded only by Mr Albion. It is reinforced by the passage which preceded and followed the reference to the "blow with the instrument". The succeeding passage states:

"Now it does not seem to be denied that it was the acts of the accused jointly that caused the death. It is not likely, having heard counsel's submissions, that you will be troubled by that. Nevertheless it has to be proved and you will have to be satisfied on the evidence the accused's act did cause the death. You may, of course, additional to what I have said, rely upon the statements of Heather Osland to the police and to you and the evidence given by David Albion before you."

There was no relevant request for redirection.

6. *Court of Appeal:* Nor was any ground of appeal filed in the Court of Appeal complaining about the directions given by the trial judge concerning the appellant's involvement in the acts causing the death of the deceased. No such point was argued or considered by that Court, although everyone was then aware of the acquittal of Mr Albion at his second trial. It was only in this Court that the point was advanced for the first time. Even then, it was

²⁴⁰ Emphasis added.

not put forward as a specific ground of objection to the directions on law given by the trial judge to the jury. Although there were many other objections, this was not one of them. Instead, the point was only mentioned as ancillary to the argument concerning the suggested incompatibility between the jury's verdict in the case of the appellant and the successive jury decisions concerning Mr Albion.

176 Against this explanation of the issues upon which the trial of the appellant was fought and the repeated and express denial that any contest was presented to the effect that the appellant's actions were not causative of the death of the deceased, it will be understood that the point upon which it is now suggested that the appellant's trial miscarried carries little forensic merit. But as the trial judge recognised, whatever the issues that counsel on behalf of the Crown and the accused defined as those upon which the jury's verdicts were invited, it remained the judge's duty accurately and adequately to explain the ingredients of the offence of murder of which the appellant was charged. Did his instruction fall short of that requirement?

177 In my opinion, it did not. The judge listed the elements in the crime. He explained the necessity for the Crown to prove that the appellant and her co-accused were the cause or a cause of the death of the deceased. Correctly, he told the jury that her actions did not have to be the sole cause and that it was sufficient that her conduct should be a "substantial cause of death". His reference to the blows to the head of the deceased as "a cause" clearly meant, in the context, an immediate cause of death. But it would be to ignore the way the entire trial had been conducted, and the issues presented, to suggest that these remarks exculpated the appellant from causing the deceased's death. It had never been submitted that she had actually wielded the blows. This is made clear by the trial judge's statement that the "blow with the instrument" was "*an* operative and substantial cause"²⁴¹. He was not purporting to elaborate all the causes. Still less was he directing the jury to exclude from their deliberations the causative conduct alleged against the appellant which she herself had never disputed. To suggest the contrary is, in my respectful view, to lift the passage now complained of out of context and to submit it to a microscopic examination, in isolation, in a way that is both unrealistic and uncalled for. The applicable test of causation was one of significant or substantial contribution to the deceased's death. This was adequately explained to the jury. Their satisfaction that it had been made out in the case of the appellant is hardly remarkable given that she had never denied it.

178 Taking into account the evidence that left it open to the jury in the appellant's trial to conclude that she was the leading participant who conceived, planned and actively participated in the killing of the deceased, there are many explanations for the jury's verdict in her case and their failure to agree on the verdict in the case of

241 Emphasis added.

77.

Mr Albion. A possible reason was a disagreement as to whether Mr Albion should be found guilty of murder or of manslaughter. This Court has no way of judging why the jury in Mr Albion's second trial acquitted him. It does not have the transcript of that trial. It cannot even begin to speculate on the reasons. At the first trial, there were significant differences in the evidence given by the appellant and her son as to the violent and intimidating conduct of the deceased towards them immediately before the killing. For all this Court knows, the second jury might have treated such evidence, if repeated, as justifying Mr Albion's conduct as self-defence in his case. We simply do not know. This Court should not cast doubt on the second jury's acquittal of Mr Albion. Apart from anything else, it is always possible that a jury may return a merciful verdict where a son acts to defend his mother against a perceived threat of violence. But the fact that a different jury acquitted Mr Albion cannot impugn the verdict of the jury that convicted the appellant. Neither in the directions given nor in the resulting verdicts is there justification for disturbing that conviction. In my view it should stand.

Order

179 The appeal should be dismissed.

CALLINAN J.

Facts and the proceedings in the courts below

180 On the morning of 30 July 1991 Mrs Marjorie Heather Osland (the appellant) and her son David Albion (Mr Albion) dug a grave in bushland near Bendigo where they were living with the appellant's husband, Frank Osland (Mr Osland). That evening the appellant fed the husband curry laced with a sleep-inducing drug containing diazepam. After he became unconscious Mr Osland was bludgeoned to death by the appellant's son using an iron bar. The appellant and Mr Albion then hooded the deceased's head in a plastic bag and transported his body in his motor vehicle to the grave which they had prepared where they buried him. They then drove his vehicle to Melbourne where they abandoned it.

181 It was not until 12 January 1995 that the appellant and her son were charged with murder. In the meantime they had repeatedly represented to all (except Mr Albion's brother, Paul) including the police to whom the appellant reported the deceased as a missing person, that he was alive.

182 The trial of the appellant and the first trial of Mr Albion took place in October 1996 in the Supreme Court of Victoria. It lasted 22 days and resulted in the conviction of the appellant for murder and a disagreement by the jury with respect to Mr Albion. On a retrial on 12 December 1996 Mr Albion was acquitted of both murder and manslaughter.

183 The appellant was sentenced to a term of imprisonment of 14 years and 6 months. She was ordered to serve a minimum period of 9 years and 6 months before becoming eligible for parole.

184 The appellant sought leave to appeal to the Court of Appeal of Victoria against both her conviction and sentence. The grounds of appeal were extensive. They included complaints about the trial judge's directions to the jury with respect to numerous matters including provocation, the use to which lies told by the appellant could be put and the directions on motive of the appellant. Other grounds relied on were that some evidence favourable to the appellant had been wrongly rejected and that other evidence adverse to her had been wrongly admitted.

185 The appellant chose to give evidence at her trial. She deposed that she had met the deceased in 1970 and began to cohabit with him in 1977. She had four children all below 13 years of age from a marriage that had been unhappy and had by then failed. After only two weeks of cohabitation the deceased became violent and abusive, "very abusive, very emotional, very traumatic". Mr Osland, she said, was dictatorial in all domestic, social, familial and sexual matters. The appellant's evidence in chief is a catalogue of alleged indignities. She gave many examples of painful and systematic violence which she said was inflicted on her by him from time to time. As often as once weekly, the appellant, or one of the children was

struck by Mr Osland. He was a very jealous man. He made a practice of accusing the appellant of "slutting around" and dominated almost all of her and the family's activities. According to the appellant, Mr Osland frequently imposed anal intercourse upon her against her wishes. He threatened that he would kill her and the children if she ever tried to leave him. There were other manifestations of Mr Osland's violent disposition. He was cruel to animals: he spoke to the children of killing and chopping them up. She told the jury that in the early days of their cohabitation the deceased was a big man, of 16 stone, and that she was a small woman only 5 feet 3 inches in height. Another practice he adopted was to lock the appellant and the children out of the house when they returned from church on Sundays. On two occasions he pointed a firearm at the children.

186 In due course the appellant was able to obtain a tenancy of a Housing Commission house and to move herself and her children from the house they had been occupying with Mr Osland. During a brief absence by the appellant, Mr Osland broke in to the Housing Commission house. He took up residence there after he had lost an entitlement to live in a house owned by his former employer.

187 In 1980 the appellant, her children and Mr Osland left Karratha in Western Australia where they had spent the preceding 3 years and moved to Bendigo in Victoria. There another separation occurred. In 1981 the parties bought a house in Bendigo as tenants in common with a deposit provided by the appellant and a loan from a bank. The bank would not lend the money for the purchase unless a male was also liable to repay the loan. Mr Osland agreed to this and moved into the house with the appellant and her children. Separations intermittently occurred. Again Mr Osland inflicted physical abuse upon the appellant and threatened to kill her and the children. The appellant was suffering cystitis possibly related to the deceased's insistence upon anal intercourse, against her will. There were further outbreaks of violence against the children, and threats of death made to the appellant's mother.

188 On one occasion, at Christmas 1982, when the parties were separated the appellant sent the male children to stay with their natural father. She said that when they were away she would have an opportunity to leave Mr Osland and to hide from him. However no permanent break occurred then. The appellant throughout this period was working and earning despite Mr Osland's intense jealousy and repeated, embarrassing appearances at her various workplaces. She was accordingly able to purchase a unit for herself in Bendigo where she set out to live with her two daughters.

189 In 1984 the appellant decided to visit a friend in the United States. Mr Osland demanded that the appellant stay in Australia. She refused and travelled to the United States making a point of telephoning him eighteen times during her holiday of nine weeks. Whilst she was away he sent her some flowers on her birthday. On her return he met her at the airport and drove her back to Bendigo. She gave evidence that at this time "[She] cared about him and wished he would change."

A reasonably happy interlude of about two months of cohabitation ensued. A reversion to Mr Osland's old ways occurred as soon as the parties married, an event which took place soon after the appellant's return from the United States. She explained this development on the ground that she hoped marriage might "make things work between us." According to the appellant's evidence, even on the wedding day, at the church, and during the reception Mr Osland made offensive comments to her.

190 Matters continued to deteriorate. Mr Osland said that he had married the appellant in order to gain possession of the unit she had bought. Another separation occurred in about April 1985 when the appellant obtained the assistance of the police to eject Mr Osland from the unit in which the family was then living. He persisted in following and threatening the appellant and her children, at her work place, in the street, and outside her residence.

191 I have really summarised enough of the appellant's evidence to give the substance of her description of life with the deceased until about early 1991, a pattern of threats, physical violence, short-lived reconciliations, illness (cystitis and hypertension) repression and fear. The appellant denied in her evidence in chief that she had asked her other son, Paul who gave evidence to that effect, to kill Mr Osland. She denied a similar claim made in evidence by another witness Mr Dalziel.

192 The appellant's evidence of more recent times before Mr Osland's death, was that his violence towards her was "building up". She described his threats to Mr Albion made during the week before the deceased was killed. She said that Mr Osland literally kicked her out of bed during this period. He punched the appellant in the chest numerous times. She feared that he might attempt to smother her when she was sleeping. She had reached a point at which she thought an attempt by him to kill her was certainly imminent. She thought in particular that her failure to obtain some fittings for a bed which he had demanded would be a precipitating factor. I quote from her account of events leading up to the death of her husband:

"When you couldn't get the knuckles for the bed, what effect did that have on you? - - I knew I'd be in deep shit, because I didn't have the knuckles and then he'd accuse me that I hadn't been out there, that I'd been lying. It was just a deep fear that built up in me.

So did you do anything or say anything to David [Albion] as a result of this feeling because you hadn't been able to get the knuckles? - - I just knew we'd be in trouble.

Did you say anything to David about that? - - Yes we did, we talked about it.

What did you say? - - - I would've said David, oh my God. We didn't have to talk much because we just knew by actions, that I'd be in trouble.

After you'd been to Henry Ott's where did you go? - - - We just parked in that little – little, what do you call it? Oh, where the bush had made that opening in the bush, up the track, we went up through the track and driving up through there, looking. David thought the plants [marijuana] would be up there, and there were - - -

HIS HONOUR: A sort of an opening you mean? - - - Yes, like an opening, it was onto a dirt road, we went up through the bush and we turned off and sat in that opening and think my God, what are we going to do.

When you say 'thinking', were you saying anything or just thinking? - - - Just thinking.

Did you speak to David at all when you stopped there in that clearing? - - - I just said, 'What are we going to do?' I just knew that he was – I just knew that he was going to kill me, the fear in me was just so bad.

What did you do? - - - We thought, 'What are we going to do? We will just dig a hole like he was always going to dig a hole for us.'

But did you say anything? - - - No, there wouldn't have been much said between us because it was just the fear that David and I both had inside.

You said, 'We said we'd dig a hole', who actually said that? - - - I'd say me.

Did you say anything about what you'd do with the hole? - - - We'd just see what mood he was in when he came home that night.

Did you say anything about what you'd do depending on his mood? - - - No, not really.

...

Did you say anything to David about what the purpose was for digging a hole? - - - If he was violent and verbal like he was the night before, well we'd just shove him in the hole.

HIS HONOUR: You said that to David? - - - Yes, virtually.

It was just - - -

I'm not sure what 'virtually' means? - - - It's a fear that you have - - -

I think what Mrs Hampel is asking you to direct you to is not so much what you were personally thinking, but what was said between you and David, if anything? - - - There was virtually nothing, because there's just that much fear was in us.

COUNSEL: What was in your mind? - - - I knew I'd be dead, I knew he'd kill me.

What was in you mind as the purpose for the hole? - - - That we would just shove him in the hole if he come home the same as he did the night before.

What did you do after that? - - - We went home and got the shovel and the crowbar.

What did you do after that? - - - Then we just went back and dug a hole.

You were asked by the police in your interviews about digging the hole; weren't you? - - - Yes.

I want to read you a couple of questions and answers that you were asked by the police in the first interview. That was the one that was recorded on the audio tape.

...

You were asked this, 'And can you go through with me exactly what happened on the night he was killed?'

Answer: That day he was just so bad it was either – he would just – the tension in the house was just so bad it really was, you've got no idea, and I'd made – said that we'd – said to David about it – he said, 'We have to get rid of him, mum'. I said, 'I know, even if I left him he'd never leave me alone' which he never did.

Question: 'And what happened then?' Answer: 'We dug the hole that day.' You gave those answers to the police in the audio interview about the hole? - - - Yes, that's correct.

What did you say about the accuracy or truthfulness of those answers? - - - That is true.

You then in the first video interview, the one out at the scene – I am going to all three interview[s], if that's of assistance Your Honour. (To Witness) I want to ask you a couple of questions about what you said in the first videoed

interview, the one out at the scene. At question 8 were you asked this, 'And can you tell me what happened on that occasion?'

...

Answer: 'I just came here to – we sat there in the car and decided that we'd dig a hole. If he was shitty when we went home well we'd do something about it.' You gave that answer? - - - Yes, I did.

What do you say about the truthfulness and accuracy of that? - - - That's true, that's correct.

And in the long interview back at the CIB office, question 49 and following, Your Honour, did you give these answers? Question: 'If we can get back to the day of the murder, what was actually discussed between David and yourself; can you remember the conversation?' Answer: 'Not – not murder him, just get rid of him, just getting rid of all the shit out of our life. All the time it was, it was just shit all the time. We couldn't breathe, we didn't talk when he was there. Couldn't have anyone at the house. He wouldn't allow anyone at the house.'

Question: 'So what plan of action did you?' Answer: 'We just thought we'd go and dig a hole and just kill him, that was all, just getting rid of him, because I knew if I left him – because I wanted to leave – and I knew he wouldn't let me go anyway. There was no really – I don't reckon there was a real plan planned. We'd thought about things, and we'd talked about things in getting rid of him.'

Question: 'Had you any specific plan how you were going to do it?' Answer: 'No, it just all come about that day virtually. I'd think about – it was virtually – either just virtually the day before or that day, that was all.' Question: 'Who brought up the conversation with regard to killing him?' Answer: 'It would be me, I suppose.'

Question: 'Can you remember what you said to David?' Answer: 'No I can't'. Question: 'Was David aware at that stage that's what you were thinking about?' Answer: 'Yes, we were both thinking it was just to get rid of the shit'. Question: 'Had Frank ever assaulted David?' Answer: 'As far as hitting him, you mean?'. Question: 'Yes?' Answer: 'Probably when he was little, but he done more mental things to David, like not letting him get his bike and locking the bikes up and not letting him feed the birds and the birds starved to death when we had birds, and it was all just mental.'

...

Question: 'If you can slowly go through what happened that day, including any conversation you can remember between yourself and David?' Answer: 'We didn't really talk that much. We just went out, got in the car and we went for a drive, decided we'd dig a hole, which we went there because David had been out there trying to find some marijuana plants once before, went up and around and we found the spot, and we sat in the car probably for half an hour or more and Bonnie, my dog, and the two little pups were only little at the time'. You were asked some questions then about what time it was, then you were asked at question 62: 'And what did you have with you at the time?' Answer: 'Shovel and crowbar'. Question: 'Right, and it was David's idea to pick that location?' Answer: 'No we just wandered around and we just picked it together.' Question: 'And what happened when you got there?' Answer: 'We just started digging a hole, because if we did do anything, at least we had a hole.' What do you say as to the truthfulness and accuracy of those answers? - - - That's correct, what I can remember.

What did you do when you dug the hole? - - - We had no plan to do him any harm. We just waited for him to come home.

Before he came home did you do anything else? - - - We waited at the front windows to see him get out of the car, like we normally did, to see what mood he was going to be in.

...

You said that you were watching out the window for Frank to come home?

- - - Yes.

Why were you doing that? - - - We always stood there watching. We did that for – for months; used to watch him when he got out of the car just to see what mood he was in. If he was laughing more jovially with his mates, then we knew we were in trouble when we got inside. If he was more solemn when he got out of the car, he wouldn't be so bad when he got inside.

On the Tuesday night, what was he like when he got out of the car? - - - He was laughing. He was as happy as anything.

How did that make you feel? - - - We knew. We listened for him to walk down the driveway and we knew we were in trouble.

What happened when he came inside? - - - He verbally abused me over having me hair cut. And I blocked all the rest of it out of my head. I just can't get it out of my head.

85.

Was anything said about the knuckles for the bed? - - It would've been, yes. I know he was so angry. I can see him standing over me. I can see it, but I can't hear his words.

How long was he verbally abusive after he got home? - - I reckon a good hour, hour and a half.

What were you doing during that time? - - Just listening.

How did you feel during that time? - - I knew I was in trouble. I was full of fear.

What were you fearful of? - - My life, I was fearful that if David went that day I knew I was - .

Were you fearful that David would leave that day? - - Yes, I thought he'd chuck him out the door like he did Erica.

Why did you think he'd do that? - - Cause he's done it so many times before.

When he was verbally violent for an hour and a half did you decide to do anything? - - I just thought I'd put the sleeping - those tablets in his dinner to quiet him down. I just wanted one night of peace.

You told the police in your interview that you crushed the tablets up? - - Yes.

Is that correct? - - Yes.

What did you do with them? - - I put them in his dinner.

You told Mr Thatcher in the interview that you'd cooked spaghetti for dinner? - - Yes.

What did you cook for dinner? - - I actually cooked curry. I told Mr Thatcher that on the Saturday in the cells that I'd actually remembered cooking curry.

Regardless of what it was, what did you do with the crushed up tablets? - - I mixed it in his food.

Did anything happen when you served the dinner that night? - - Yes, he got very angry because he reckoned that I made it only for David, he didn't want it and pushed it away.

Had you made curry before? - - Yes, loads of times.

Was it any different from the curry you'd made on other occasions? - - - No, not at all.

Had you made it for David? - - - No, I just made it in general, it was just a general meal.

How much of it did Frank eat? - - - He didn't eat all of it anyway, it might have been half, over half.

What was his manner like when he pushed it away? - - - He was so angry 'cause I'd only made it for David and just got up from the table.

When you say he was so angry 'cause you'd only made it for David, what did you actually say? - - - I can see him but I can't hear his words.

What was his manner like? - - - He was just so aggressive.

How did you feel? - - - I was just so frightened.

What happened after that? - - - He went down into the shed.

How long was he gone there? - - - I reckon 10 minutes, quarter of an hour.

What did you do while he was gone? - - - I just cleared the table.

What were you thinking about while he was gone? - - - Oh God, if he found out that I put the stuff in his meal I'd be in deep shit.

What happened after that? - - - I saw him come back from the shed and he stumbled up the stairs, virtually fell up the stairs.

What was in your mind when you saw that happened? - - - I thought, 'Oh my God, he'll know that I've put the stuff in his meal to quieten him down'.

Did you think about what would happen to you if he did realise you'd put the stuff in his meal? - - - Yes, I did.

What did you think about what would happen to you? - - - That if he put the pillow over me head this time I was virtually gone, he came in –.

Then what did he do? - - - He sat at the kitchen table.

What did he do when he sat at the table? - - - He was sort of falling back like he was – like he was drugged.

87.

Was he awake or asleep? - - - He was half – he was sort of nodding on and off.

Was he [w]aking on and off? - - - No, but his head would fall back occasionally when he was nearly nodding off to sleep.

How did that make you feel? - - - I though[t], 'My God, if he wakes up and finds out what I've done I'll be in trouble.'

What did you do? - - - We just watched him.

Who's the we? - - - David and I.

How long did he stay at the table? - - - I'd reckon, 20 minutes.

...

Did he change from the way you described he was? - - - Yes, he got up and pushed the chair back and then stomped into the bedroom, kicking the door open and then went into the bedroom.

Did he say anything when he did that? - - - No, he was just really angry – he was just really angry.

What was it about what he did that made you believe that? - - - It was just the way he done it.

What did you do when he got up and went into the bedroom? - - - David and I stood in the big room and we thought, 'Oh, my God'.

When you say 'we thought' are you now talking about what you saw or what you thought? - - - What we were thinking between us.

Okay, let's talk about what you were thinking. What were you thinking? - - - I thought. 'My God, he'll know I put the stuff in his meal'. I just was – would probably never have – I was just paranoid what would happen if he woke up and knew what I'd done.

Did you say anything to David at that stage? - - - No, we just knew the fear that had built up in us so badly.

What did you do? - - - We just – sort of that I couldn't live like this any more.

...

Did you speak? - - - No, not really, it was just eye contact between David and I and we just knew.

HIS HONOUR: What did you know? - - - Beg your pardon?

What did you know. You said, 'eye contact' between David and you. You are saying, 'we knew' but I think David will have to speak for himself about that, but what was the next thing that you decided to do? - - - Well, there was just no way out – there was no way out for David and there was no way out for me 'cause I just knew he'd never let me go.

COUNSEL: You told the police in your interview that David went to the shed and got a piece of iron pipe? - - - That's correct.

What happened between the time you knew there would be no way out for you, and the time David got the pipe? - - - I was just standing in the big room, I didn't move, I was just - I was paralysed - I was just paralysed in fear, I think, thinking of what would happen if he woke up.

You told the police in your interview what happened after David got the pipe? - - - Yes.

And how Frank was killed? - - - Yes.

Is that the truth? - - - Yes, it is.

You've told the police what happened after Frank was killed in terms of taking his body out to the hole and burying him? - - - That's true, yes.

Is what you told the police in the interview about that the truth? - - - Yes, it is.

You told the police, in your interview, that after you went home and cleaned the lace from your bed? - - - That's correct, yes.

Is what you told the police about that the truth? - - - Yes, it was, and then while we were cleaning that I thought, 'Oh my God, what about his car?'

And you told the police that's what you thought and that you then took the car to Melbourne and dumped it? - - - That's correct.

Is what you told the police about that the truth? - - - That's true, yes."

193 Self evidently, a jury would be entitled if they were so minded, to infer from that account, a high degree of premeditation. They would also be entitled to take the view that the appellant did not drug her husband to quieten him down as she

later said in evidence, but instead to render him powerless to resist the fatal assault upon him which was planned as evidenced by the preparation of the "hole".

194 A number of telephonic intercepts were subsequently made by police and tendered in evidence at the appellant's trial. They revealed telephone conversations between the appellant and others during which the appellant spoke of allegations of which she had heard that she and Mr Albion had killed the deceased, and how false such allegations were. She also counselled those to whom she spoke as to the way they should conduct themselves, and how others had conducted themselves in interviews with police officers. Conversations with her co-accused were also taped during which the appellant discussed with him what he should say to the police when they called upon him.

195 Some of those conversations are capable of being construed as revealing a somewhat different picture, particularly of recent times, from that painted in the evidence in chief of the appellant to which I have referred. The following are examples of conversations between the appellant and her friend, Gwen, and between the appellant and her daughter, Erica:

"Osland: Yeah because of his violence and everything towards me in me marriage you know going back earlier.

Gwen: mmm

Osland: I had a motive to do it now.

Gwen: mmm

Osland: If I was going to do anything I would've done it years ago.

Gwen: That's right." (conversation between appellant and Gwen Rotherington on 21 December 1994).

"Osland: But the thing is though Erica I just said to Stan before you know like if he's saying that you and David sort've sit there and plan it you know like you'd be six or seven years of age or eight, he never used to hit much once he got older it was only when you were little and those days is Karratha days, right and I know when he was sleeping in the corner but you were all too young for all that shit to even remember what how he used to sleep in the trailer you wouldn't know all that shit." (conversation between appellant and her daughter, Erica on 18 December 1994).

196 In most respects the appellant's version of events given in examination in chief corresponded with her account in various interviews conducted by police officers. During one of these the appellant said this:

"Right. Can you tell me exactly what happened?

We just hit him with a bar.

What sort of bar was it, Heather?

Just a round bar. Just a piece of pole.

And where did you get that from?

Down the shed.

Who actually hit him?

Well, we - it's together. I'm not saying David did.

He - I wanted to do it but I wasn't strong enough, David said. Poor David.

How many times did you hit him?

Just once, I think. Just once, might be twice.

So, in fact, David hit him with the steel pole?

We hit him together, it's joint responsibility. I know it is, it's not fair that David's got to take that blame.

What happened after he was hit?

(No audible reply)

Was he dead?

Yeah. He was dead.

How did you know?

Well, he wasn't movin'."

197 The evidence of Mr Albion, the co-accused, at the trial was that, when the deceased came home on the night of the killing, he was working on his car when he heard the appellant scream. He went into the house and saw her up against the wall with the deceased standing over her. He was yelling at her and abusing her and she was pleading with him. He ran in and told the deceased to "get the fuck off her". The deceased then turned on him and told him to "get the fuck out of the

house". When he said that he would not leave without his mother, the deceased had screamed "I'll kill you", after which he felled David with a punch to the head.

198 As the Court of Appeal said, it was a fundamental part of the appellant's case that she had become, by the time of the killing, a clear example of the condition known as the "battered woman's syndrome"²⁴². In support of this contention at the trial the appellant called evidence from Dr Kenneth Byrne, a consultant psychologist. It was his opinion, based on the history which he obtained from the appellant, that she was indeed a typical example of the battered woman's syndrome. Dr Byrne said that the syndrome comprised a "collection of responses, thoughts, feelings and attitudes" which compelled the woman who was the subject of the syndrome meekly to comply with the batterer's wishes without giving any logical thought to her own rights. It entailed a belief on the part of the woman that she could never free herself from the enforced domination of the man, and an induced fear that, if she did not comply with the wishes of the man, it would only serve to worsen her plight. She thus becomes the subject of a "learnt helplessness" which drives her into submission, accompanied by a "learnt hopefulness" that, if she submits, matters will improve.

199 The defence of provocation based on the evidence to which I have referred was also advanced by the appellant in the alternative to self-defence.

200 In answer to the appellant's claims at the trial and in the Court of Appeal the Crown made these submissions:

- (a) That this was a pre-planned killing in which the participants had, pursuant to that plan, dug a grave, rendered the deceased comatose by drugging his food, discussed the method of executing the "kill" and then ruthlessly carried it out. Such pre-planning, it was said, was the antithesis of self-defence or a killing through loss of self-control.
- (b) That the killing was cold-blooded and premeditated appeared clearly from the evidence of the son Paul, and one Robert Dalziel, each of whom said that, well before the killing, the appellant had sought to solicit his services to kill the deceased. (There was indeed evidence to this effect).
- (c) That the appellant's claim of fear of the deceased up until the night of the killing was an extravagant over-statement which did not match some of the statements which she was recorded as making on the intercepted telephone conversations which were before the jury. In those recorded conversations the appellant could be heard telling her friends that she and the deceased had been living independent lives for

242 *R v Osland* [1998] 2 VR 636.

some years before the night of the killing. Nowhere was she heard to say that she had been subjected to repeated abuse in the years before the killing. Thus, in one conversation, taped shortly before her arrest, she was heard to say: "ten or fifteen years ago, I could have throttled the shit out of him, but not in the last couple of years. We just did not talk." (Again this is a correct summary of, and a quotation from part of the evidence).

- (d) That on at least two nights per week, the appellant had established a habit of socialising separately with her friends. (There was evidence to this effect) Whatever may have been the situation in earlier years, it no longer prevailed at the time of the killing.
- (e) That the appellant, in her evidence, did not suggest any particular words or deeds which triggered the killing. Her evidence was simply that it was "more of the same". Although Mr Albion had given evidence of specific abuse of the appellant and himself on the night of the killing, the appellant had not given any such evidence, nor had she been cross-examined by Mr Albion's counsel to suggest that such events had occurred.

The appeal to this Court

201 The first argument advanced by the appellant was that the acquittal of her son required that the appeal be upheld on the ground that the two verdicts were so inconsistent that they could not stand together. It is convenient to deal with this submission later.

202 The Court was referred to *Ryan v The Queen*²⁴³ to support the next submission. This was that if regard be had to the course of events leading up the death of Mr Osland, it could readily be seen that there was no act of the appellant which could have been selected by the jury as the, or *an*, act causing death: that the trial judge had failed to draw attention to this matter and that it was his Honour's duty to do so even though the defence case may not have been presented on this basis at the trial. The appellant's counsel concedes that this point was also not taken in the Court of Appeal.

203 A related submission was that the appellant's liability (if any) was derivative only: that unless the appellant's son, Mr Albion, who struck the fatal blow or blows was convicted of murder, the appellant, whose role was subsidiary because she did not strike the blow, could not be convicted of murder.

243 (1967) 121 CLR 205 at 218-219.

204 In my opinion, in a case of this kind, a case of actual participation in all phases of the crime it was not necessary nor is it necessary to resort to the shifting and often inconsistent decisions of other courts over the years in which the distinction between principals and accessories in various degrees has been drawn. The history of the distinctions is fully discussed in Smith's *Modern Treatise on the Law of Criminal Complicity* (1991). The distinctions generally owe their existence to technical and substantive differences with respect to modes of trial, jurisdiction, punishment and benefit of clergy, all matters of diminished or no importance in modern times. For more than a century, legislative attempts have been made to simplify the law in these areas. This Court should not reverse that process.

205 The common law originally divided all crimes into three categories: treasons, felonies and misdemeanours. It was only in relation to felonies that there were different levels of participation recognised by law. Originally, the categories of participation were principals, accessories *before* the fact, accessories *at* the fact and accessories *after* the fact. The reason for the lack of differentiation between the parties in misdemeanours and treasons was said to be that treasons were regarded as too serious, and misdemeanours as not serious enough, to justify such fine distinctions.

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

207 These classifications also had important procedural implications. Accessory liability was in essence derivative. This necessitated conviction of the principal to ground a case against other participants. Further, there were important implications for jurisdiction.

208 Later, accessories *at* the fact became described, for purposes of classification, as principals in the second degree. Smith describes this as a judicial manoeuvre designed to do away with the situation that the accessory might escape liability simply because the principal had not been convicted²⁴⁴. Bromley CJ in *R v Griffith* is probably the author of one of the first statements (or possibly *the* statement) reflecting a changed approach²⁴⁵:

"... [N]otwithstanding there is but one wound given by one only, yet it shall be adjudged in law the ... wound of every one, that is, it shall be looked upon as given by him who gave it, by himself, and given by the rest by him as their

244 Smith, *A Modern Treatise on the Law of Criminal Complicity*, (1991) at 24-25.

245 (1553) 1 Plowd 97 at 98 [75 ER 152 at 155].

minister and instrument. And it is as much the deed of the others, as if they had jointly holden with their hands the club or other instrument with which the wound was given, and as if they had all together struck the person that was killed. So that it cannot be well termed that they, who gave the wound, are principals in deed, and the other principals in law, but they are all principals in deed, and in one same degree."

209 Along similar lines, Bracton had earlier written²⁴⁶:

"the wound, the assistance and the instigation together form a single deed: there would be no wound had there been no assistance, and neither wound nor assistance without the instigation."

210 In consequence:

- (i) participants in various degrees would be eligible for trial, although the "doer" may not have been convicted; and,
- (ii) there were various implications to the defence of benefit of clergy. None of them is relevant to contemporary Australia.

211 By the *Criminal Law Act* 1826 (UK), an accessory before the fact was rendered liable for conviction for a substantive felony even if the principal had not been convicted.

212 The *Accessories and Abettors Act* 1861 (UK) superseded the 1826 Act by dealing comprehensively with accessories before the fact. The *Criminal Law Act* 1967 (UK) eventually abolished the distinction between felony and misdemeanour in England. The course of legislation in England influenced that which followed in Australia.

213 In Victoria, legislation was enacted in 1981 which abolished the distinction between felonies and misdemeanours. In 1958, the *Crimes Act* empowered the Court to impose the same punishment on both categories of principal. Accessories could be proceeded against as if each were the principal felon.

214 There is no question that there may be more than one principal in the first degree to murder²⁴⁷. An early example of the application of the principle is

246 Bracton, *Trans Thorne*, ii, 392.

247 See Smith & Hogan, *Criminal Law*, 8th ed (1996) at 128-129; Brett, Waller and Williams, *Criminal Law: Text and Cases*, 8th ed (1997) at 464-465; La Fave and Scott, *Criminal Law*, 2nd ed (1986) at 570 (referring to *State v Adams* 105 La 737, 30 So 101 (1901); *Roney v State* 76 Ga 731 (1886)).

provided by *R v Jackson*²⁴⁸. In that case one accused struck the deceased with a large hedge stake, while the other robbed the victim. Both were held to be principals in the first degree.

215 The doctrine of concert has been invoked in some of the cases. For example, in *R v Lowery and King [No 2]*, Smith J said²⁴⁹:

"The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or the other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are *equally guilty* of that crime regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime." (emphasis added)

However, in *R v Demirian*, McGarvie and O'Bryan JJ said²⁵⁰:

"In none of the other cases did the court decide that all persons present at the crime and acting in concert were to be treated as principals in the first degree. What was decided was that all were liable to be convicted of the crime."

²⁴⁸ (1857) 7 Cox CC 357. See also *Macklin, Murphy & Others* (1838) 2 Lewin 225 [168 ER 1136]; *R v Kelly* (1847) 2 Car & K 379 [175 ER 157]; *R v Haines* (1847) 2 Car & K 368 [175 ER 152]; *R v Bingley, Dutton and Batkin* (1821) Russ & Ry 446 [168 ER 890]; cf Smith, *A Modern Treatise on the Law of Criminal Complicity*, (1991) at 28, fn 44; *Mohan v The Queen* [1967] 2 AC 187 at 195.

²⁴⁹ [1972] VR 560 at 560.

²⁵⁰ [1989] VR 97 at 124.

216 In taking this view, the Full Court of the Victorian Supreme Court was adopting some of the comments of James LJ in *R v Richards*²⁵¹.

217 With respect, the passage in *Demirian* overlooks that it is an important aspect of concert that it does not depend upon derivative liability. This is because those who act in concert are to be treated as being causatively jointly responsible for the commission of the crime.

218 Section 323 of the *Crimes Act* 1958 (Vic) made its first appearance in that State in a form slightly different than now appears²⁵². Its apparent source was the *Accessories and Abettors Act* 1861 (UK). The object of the enactments seems to have been to do away with derivative liability.

219 The current provisions of s 323 of the *Crimes Act* 1958 (Vic) (as amended in 1981) read:

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

220 If it were necessary to decide the point I would be inclined to hold that the practical effect of the section is to make it irrelevant to decide whether the accused

251 [1974] QB 776. See *R v Demirian* [1989] VR 97 at 121. *R v Richards* was overruled by the House of Lords in *R v Howe* [1987] AC 417.

252 The relevant sections in the Act as passed were as follows:

"323. Every principal in the second degree in any felony whether the same be a felony at common law or under any Act shall be liable to the same punishment as the principal in the first degree.

324. Every accessory before the fact to any felony whether the same is a felony at common law or under any Act may be presented indicted informed against tried convicted and punished in all respects as if he were a principal felon.

325. Every accessory after the fact to any felony whether the same is a felony at common law or under any Act may be presented indicted informed against and convicted either as an accessory after the fact to the principal felony together with the principal felon or after the conviction of the principal felon, or may be presented indicted informed against and convicted of a substantive felony whether the principal felon has or has not been previously convicted or is or is not amendable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony if convicted as an accessory may be punished."

actually struck the blow or did a final act to complete a crime. The section appears to eliminate the need for a trial of a person formerly thought to be an accessory only, to await and depend upon the attainment or conviction of the principal. The one exception would be punishment which will always look to the particular role of an offender in carrying out a crime.

221 No matter whether the section is to be taken as procedural or substantive, (a matter which it is not necessary to decide), there is no modern need for any difference in the test to determine the liability of a participant (as a principal in the first degree if that nomenclature still be appropriate) from that provided by Brennan J and McHugh J in *Royall v The Queen*²⁵³. Their Honours adopted a test of sufficient significant contribution. In the present case the contribution of the appellant consisted of the preparation of the grave, the planning of the killing with the son, the choice of a curry which would disguise the drug, the drugging of the husband's food, the encouragement of him to eat it, the discussion with her son concerning the choice of weapon, her presence at the precise time and place of his slaying, the holding of the deceased, and the planning of each of, his burial, the concealment of his grave and the disposal of his car.

222 Having regard to these features of the evidence, most of them ultimately uncontested, the appellant was plainly and directly, and in material ways, closely implicated in the killing of her husband. She made a significant contribution to that killing. In her evidence in chief she expressly adopted the contents of her third interview with police officers. It may therefore perhaps be taken as the best version for the appellant of these events. It was certainly evidence on which the jury could act. Yet even on this version the appellant admitted that, whether a preconceived plan [to kill Mr Osland] would be carried out on the evening of his death depended on her husband's mood when he came home: that they [she and Mr Albion] agreed to get a bar (a bat being rejected as being not substantial enough for their purposes); that she ground up the sleep inducing tablets and mixed them in the curry she had prepared; and that when Mr Osland fell asleep she held him down, either while her son struck and killed the victim or immediately after he had struck the deceased. All of these facts involved the appellant sufficiently directly and significantly in the cause of Mr Osland's death.

223 *Royall v The Queen*²⁵⁴ is a case in which this Court considered the issue of causation in a murder charge arising under the New South Wales *Crimes Act* 1900, s 18. There Brennan J said:

"The basic proposition relating to causation in homicide is that an accused's conduct, whether by act or omission, must contribute significantly

253 (1991) 172 CLR 378 at 398, 441.

254 (1991) 172 CLR 378 at 398.

to the death of the victim²⁵⁵. It need not be the sole, direct or immediate cause of the death. However, when death is not caused directly by the conduct of the accused but by something done by the victim or by a third person in response to the conduct of the accused, there is a question whether the chain of causation has been broken."

224 And as McHugh J in the same case pointed out²⁵⁶, causation is a question of fact. His Honour added:

"In most criminal cases, the issue of causation is not controversial. If an accused's act or omission is causally linked with the event or occurrence, it is always only one of the conditions which were jointly necessary to produce the event or occurrence. Ordinarily, however, the application of the commonsense test of causation is enough to determine whether the accused's act or omission was sufficiently significant to make him or her 'causally responsible' for the event or occurrence in question."

225 By the application of such a practical test, the appellant's conduct undoubtedly contributed significantly to the victim's death. She was, with her son, causally responsible for the death. The assessment of the significance of her participation in the acts leading to the victim's death was entirely a matter for the jury. But there was abundant evidence, some of which I have summarised or quoted, which entitled the jury to convict the appellant as a principal, or as one of two persons who together directly caused or at least, significantly contributed to the deceased's death.

226 It was next submitted that the trial judge erroneously made no attempt to distinguish between the respective states of mind of Mr Albion and the appellant at the time of the administration of the death blow or blows. The submission was that in the circumstance that it was accepted on all sides that Mr Albion was the person who actually inflicted the blow, the distinction was important and should have been drawn in the trial judge's charge.

227 The direction of the trial judge was, in my opinion, an appropriate response to the way in which the case had been conducted. No application for any such direction or for a redirection along these lines was made. Furthermore, there were sufficient references in the summing-up to the need to consider the guilt of the appellant and her son, and the respective states of mind of each separately to enable the jury to draw any distinctions that they thought they should. No objection was taken to these. It did not follow that the jury were bound to reach the same conclusion with respect to each of the accused. Moreover, as to the appellant's

²⁵⁵ *Pagett* (1983) 76 Cr App R 279 at 288.

²⁵⁶ (1991) 172 CLR 378 at 441.

intention there could have been little doubt. Practically everything the appellant did shortly before, but especially after her husband arrived home was deliberately and carefully directed to that end. At least, it was clearly open to the jury on the evidence to so conclude.

228 I return now to the first submission that the acquittal of Mr Albion on a second trial was so inconsistent with the conviction of the appellant at the first trial that the latter cannot be allowed to stand. The argument was put that the case had been presented as one of two parties acting in concert and that the appellant's counsel at the trial had accepted, indeed effectively adopted that approach.

229 The first authority to which the appellant referred was *R v Darby*²⁵⁷. Counsel read to the Court a passage from the joint judgment of Gibbs CJ, Aickin, Wilson and Brennan JJ²⁵⁸ which states:

"In the light of the wealth of both academic and judicial consideration that has been devoted to this topic in recent years, we have no doubt that this Court should now redirect the common law of Australia on to its true course. It should determine that the conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person. In our opinion such a determination will focus upon the justice of the case rather than upon the technical obscurities that now confound the subject."

230 However that statement certainly does not mean that identical verdicts must, as a matter of law, be reached in a joint trial on the same counts whatever the differences charged. Nor does it mean that separate trials of co-defendants have to be viewed in the same way as joint trials. Or that the same verdicts must always be reached in respect of people apparently similarly complicit in a particular crime whether tried separately or jointly.

²⁵⁷ (1982) 148 CLR 668.

²⁵⁸ (1982) 148 CLR 668 at 678.

231 The appellant then relied on some statements in *King v The Queen*²⁵⁹. The ratio in that case is stated in the following passage:

"[W]here two persons are tried jointly upon the one charge as participants in the same degree, it does not inevitably follow that both must be convicted or both must be acquitted ...²⁶⁰. The evidence may be sufficient to prove the case against the one accused beyond reasonable doubt, but be insufficient to prove the case against the other. In that event, the conviction of one and the acquittal of the other involves no inconsistency ... [W]here there is no material distinction in the evidence admissible against each accused to establish an element to be proved against both, different verdicts may be inconsistent. Inconsistency appears only if the acquittal of one and the conviction of the other is to be accounted for by the making of different findings as to the common element."

232 That case is also distinguishable on the facts. There one of the accused was convicted and the other acquitted at a joint trial. There is an important distinction between an acquittal and a disagreement by a jury. As was pointed out during argument in this Court the jury may have simply been immovably divided on a question whether Mr Albion should be convicted of manslaughter or murder having regard to his lesser involvement in conceiving, planning and executing the death of Mr Osland²⁶¹. I do not accept that the jury's failure to agree upon a verdict in relation to Mr Albion at the joint trial can be regarded as repugnant to the verdict of guilt in respect of the appellant. I cannot accept therefore the appellant's submission that such a disagreement may, for the purposes of determining an issue of inconsistency, be equated with a verdict of acquittal.

233 *Surujpaul v Reginam*²⁶², upon which the appellant relied in this connexion, is clearly distinguishable. That was a case of one trial of five people. At the end of it, although all of the accused (including the appellant) were acquitted of murder as principals, and the other four of being accessories before the fact, the appellant was found guilty as an accessory before the fact to murder. It was the acquittal, and, I would emphasise, acquittal of everyone, of murder that made a guilty verdict of accessory to murder offensive to the law as to logic. In those circumstances there was, for juristic purposes no murder in respect of which any one of the accused could have been an accessory.

²⁵⁹ (1986) 161 CLR 423 at 433-434 per Dawson J.

²⁶⁰ *R v Darby* (1982) 148 CLR 668.

²⁶¹ cf *R v Howe* [1987] AC 417 at 458 per Lord Mackay of Clashfern. See also *Pagett* (1983) 76 Cr App R 279.

²⁶² [1958] 1 WLR 1050; [1958] 3 All ER 300.

234 Nor does *R v Storey*²⁶³ assist the appellant. That case turned on entirely different considerations including the admissibility of evidence given at a previous trial and the directions that the trial judge should have given in relation to it.

235 It was put for the appellant that she and her son were referred to in identical terms in the learned trial judge's summing up and that it therefore followed that any result of the trial that was not common to both was legally unacceptable. As a corollary, it was said that the trial judge should have given explicit instructions which required the jury to distinguish between the two of them. The judge's directions reflected the way in which the case had generally been conducted. No point was taken at the trial on these matters. As I have already pointed out, the trial judge more than once gave directions which required the jury to consider separately the guilt or innocence of each of the accused. He was correct to do so. No objection to that course was taken by trial counsel.

236 Nothing turns on the acquittal of Mr Albion in the second trial when he was tried alone. The record of that case is not, and cannot be before us. However, it would not be at all surprising if there were quite different evidence called and submissions made in that second trial where Mr Albion faced the jury alone, without the difficulties for his case presented by the evidence of motivation and planning by his mother.

237 The next submission for the appellant was that, although on the issues of provocation and self-defence the trial judge admitted the evidence by the clinical psychologist concerning the typical features (for example, emotional and physical submission, reticence in revealing acts of cruelty and threats by a domineering male to a woman, and an ultimate inability to bear any more of these) of a woman in the position of the appellant, his Honour's directions to the jury in regard to those matters had been defective.

238 At the forefront of the appellant's case on appeal with respect to the directions of the trial judge on this question was a contention that directions should have been given in accordance with, or analogous to, the directions discussed and prescribed by the Supreme Court of Canada in *Malott v The Queen*²⁶⁴. The reasons of Major J in that case, which followed earlier consideration of the "battered woman syndrome" in the Supreme Court of Canada in *Lavallee v The Queen*²⁶⁵, show that his Lordship and the courts in Canada may regard "battered woman syndrome" as a separate defence. The passage to which reference was made shows that the

²⁶³ (1978) 140 CLR 364.

²⁶⁴ (1998) 155 DLR (4th) 513.

²⁶⁵ [1990] 1 SCR 852.

Supreme Court of Canada was there dealing with a case, like this one, in which expert evidence had been called²⁶⁶.

"The admissibility of expert evidence respecting battered woman syndrome was not at issue in the present case. The admissibility of the expert evidence of Dr Jaffe on battered woman syndrome was not challenged. However, once that defence is raised, the jury ought to be made aware of the principles of that defence as dictated by *Lavallee*²⁶⁷. In particular, the jury should be informed of how that evidence may be of use in understanding the following:

1. *Why an abused woman might remain in an abusive relationship.* As discussed in *Lavallee*, expert evidence may help to explain some of the reasons and dispel some of the misconceptions about why women stay in abusive relationships.
2. *The nature and extent of the violence that may exist in a battering relationship.* In considering the defence of self-defence as it applies to an accused who had killed her violent partner, the jury should be instructed on the violence that existed in the relationship and its impact on the accused. The latter will usually but not necessarily be provided by an expert.
3. *The accused's ability to perceive danger from her abuser.* Section 34(2)(a) [of the *Criminal Code*] provides that an accused who intentionally causes death or grievous bodily harm in repelling an assault is justified if he or she does so 'under reasonable apprehension of death or grievous bodily harm'. In addressing this issue, Wilson J for the majority in *Lavallee* rejected the requirement that the accused apprehend imminent danger. She also stated²⁶⁸

'Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical "reasonable man" observing

266 (1998) 155 DLR (4th) 513 at 521-522 per Major J.

267 [1990] 1 SCR 852.

268 [1990] 1 SCR 852 at 882-83.

only the final incident may have been unlikely to recognize the batterer's threat as potentially lethal.'

...

4. Whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm. This principle was summarized in *Lavallee* as follows²⁶⁹:

'By providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.'

These principles must be communicated by the trial judge when instructing the jury in cases involving battered woman syndrome and the issue of self-defence."

239 The submission for the appellant that this Court should adopt a new and separate defence of battered woman syndrome goes too far for the laws of this country. There is no such separate defence in Australia. A trial judge will be constrained by any expert evidence given in a particular case with respect to these matters. Alternatively, if these are not matters for expert evidence, but matters in relation to which there is a growing community awareness, (as incidentally, I think there may be) then they are matters for a jury to decide with proper assistance from the trial judge. In some cases they may be matters both of expertise and common sense as they undoubtedly were here. The appellant gave evidence of as many instances of cruelty and imposition as she could remember, and she explained why she was reticent about them, and also why, despite them, she became reconciled from time to time with Mr Osland. The jury would have been conscious of the fact that, as in all cases of homicide, the deceased was not able to give his version of events which might have been markedly different from the two accused.

240 The psychological evidence given by Dr Byrne was not given in a vacuum. It was called and given by him in the context of, and by reference to, the appellant's own evidence. It could have had no other cogency. The trial judge's summing up on these matters was given in the same context. In those circumstances the summing up was both appropriate and adequate. Indeed, it was not an unsympathetic direction to the appellant on these matters.

241 It is appropriate to quote at some length from the directions which the trial judge gave:

269 [1990] 1 SCR 852 at 890.

"You may use the battered woman syndrome if you accept that Heather Osland was within it, to reach conclusions about her behaviour, that is her failure to leave at an earlier time, her acceptance of the promises by [Mr] Osland of reform of his conduct, the learned helplessness and hopelessness, the effect on her memory, and the abuse and the other matters instanced.

You have to weigh those matters up against the facts as you find them to be, because the facts as you find them will either give the necessary support to Dr Byrne's conclusions, or, if you do not accept all of those facts or the substantial ones, the relevant ones, to destroy or diminish the opinion.

Issues of her memory and other matters will be considered by you in the light of the whole of the evidence. Mrs Osland herself in effect, in respect particularly of the final day, said that she had blocked these matters out of her memory. On the other hand the reality is that evidence was given in great detail of abuse, physical and psychological, on a month by month basis over a period of years. These issues are facts all for you.

But it may not matter to you whether she fits within the syndrome at all. It is after all only words to describe behaviour and consequences which occur in a relationship, extrapolated to erect some propositions for scientific purposes. It is the behaviour that you should focus on, as disclosed by the evidence, and whether or not in the light of my instructions to you, concerning self-defence and provocation, you are satisfied that the Crown has negated those defences.

This primarily means considering, first, whether Mrs Osland and David Albion believed that Frank Osland was a then threat to their lives and safety, and if they did, whether they believed that on reasonable grounds, that is self-defence. It will involve considering whether or not they killed him when experiencing a loss of self-control, what might possibly be regarded such loss of control that an ordinary person in those circumstances, that is their circumstances, might experience. But you might, for example, use the battered woman syndrome to reach a conclusion that the Crown had not satisfied you, when Mrs Osland participated in his killing, that she had not finally snapped or reached a point where control was lost in response to a final provocation; and that as a woman who had been, as they would contend, degraded and beaten down over a period of years, that her reaction was that of an ordinary person in that situation. In the light of that provocation you may – and it is entirely a matter for you – not have much difficulty in concluding, if you accept Mrs Osland's and all the others' evidence, that she was at least at some stages a battered woman within the syndrome. Or even if no one had ever thought of the syndrome or sought to establish it. The real problem may not be the issue of the syndrome, but in deciding whether or not the facts, the evidence, admit of self-defence through fear of an

impending attack or admit a finding of loss of control that is the failure of the Crown to exclude them.

You might think that a sufficient number of the characteristics of the battered wife or the typical characteristics of the relationship or of the battering male had been established by the evidence. You may also be of the view that many perhaps of the consequences for the woman, described by Dr Byrne, have occurred in this case: changes in thinking ability, avoidance symptoms, increased alertness or arousal, learned helplessness. But what you may find more difficult – or, if not more difficult, the critical thing to decide and reach a view about – is to connect those matters to the killing in this case, because of the way in which it occurred: that is, planned, if you think it was; use of drugs to induce helplessness, if you think it was, as against to calm him down; no significant abuse in the days preceding or the relevant day, if you view that evidence in that way; or the other side of it, ample abuse and threats; or no behaviour out of the norm, even if you regard it as unacceptable behaviour.

There was no evidence that in the case of a battered woman it may be some relatively minor incident that might cause her to react in a way that ordinary people would not, in the murder context, but which, because she is a battered woman, does produce a response that would not otherwise be thought to be based on reasonable grounds. It would be open to you, however, in the provocation context to consider whether or not there might be some relatively minor act of abuse – I do not mean trivial, but relatively minor act of abuse – which was, as it were, the last straw that breaks the camel's back and which produced a sudden loss of control for a woman in her circumstances that might possibly have caused her to react as she did, and which might cause an ordinary person in the circumstances in which she was to do so. You will find the answers to these conundrums in the evidence which you decide to accept and in the light of the instructions as to self-defence and provocation which I will now give to you."

242 As appears from the extracts from the trial judge's charge which I have quoted, his Honour moulded his directions to accord with the facts of the case before the Court. He was plainly correct to do so. In the end, it was for the jury to decide whether the deplorable conduct of her husband as recounted by her had actually occurred and whether, in the circumstances, it justified the response of the appellant. It was open to the jury to accept or reject the contentions of the appellant and of the psychologist on these matters. Their verdict of guilty in her case strongly suggests that this is what the jury did.

243 The appellant complained that the summing up on self-defence was defective. However, when the submissions are analysed they really come down to these matters: that although the directions with respect to self-defence were in terms accepted as being entirely unexceptionable, (and there were no very specific

complaints about the trial judge's explanation of provocation), his Honour should have given those directions at a different point in his summing up. It was put, in effect, that his Honour's comments and directions with respect to the psychologist's evidence and other evidence concerning the appellant's relationship with her husband should have been given after he had directed the jury on the legal principles governing the defences rather than before them.

244 I cannot accept this submission. The trial judge's summing up properly and fairly dealt with these matters in an order which seemed to him to be appropriate, and in a way which an appeal court is not entitled to criticize.

245 Some other complaints were made in written submissions to the Court relating to the language used by the trial judge in discussing, both during the evidence and the summing up, the "battered woman syndrome", a term I use by way of shorthand only. These complaints involved no more than a choice of language. These are matters of semantics and are not open to legitimate criticism in the context of the case as a whole.

246 There were some complaints about the summing up which I regard as being more specific: that the trial judge should not have referred to the appellant's doctor (to whom complaints of violence had not been made) as "trusted" and, that his Honour should have dealt differently with the likelihood or possibility of a connexion between Mr Osland's repeated anal rape of the appellant and her recurrent condition of cystitis or urinary tract infection and her failure to complain of that imposition to the doctor. The summing up was a long, fair and detailed one. Even if it were not possible to regard the doctor as not being the appellant's trusted medical practitioner, in the sense of his having given long-standing care and treatment to the appellant, a reference to him in those terms, and the way in which the trial judge referred to the absence of complaints to him could not possibly invalidate the trial. Those matters are far too minor to attract such a consequence.

247 It was said that the trial judge's directions with respect to the way in which the respondent dealt with lies told by the appellant were defective. Once again no exception was taken at the trial to these directions.

248 Right from the outset, his Honour indicated that he regarded the lies told by the appellant as going to her credibility, and not as evidence of consciousness of guilt. Senior counsel for the appellant at the trial foreshadowed that it would be part of her case that her client had "lived the lie" of the deceased's disappearance. She addressed the jury on that basis. In the absence of the jury, his Honour observed to the prosecution:

"You did not make any submission to the jury or make any reference to the consciousness of guilt."

The question was answered in the negative by the prosecutor.

His Honour proceeded:

"The lies you have referred to are just credibility lies."

The prosecutor affirmed that to be so.

249 His Honour then said that he did not propose to give any directions as to consciousness of guilt as the Crown was not relying upon lies told by the appellant in that way and the case was conducted on that basis.

250 Accordingly, when his Honour directed the jury about the "cover-up" he did so by referring to the "essential mendacity of Heather Osland".

251 I do not read his Honour's charge on this subject, taken as a whole as affording any basis for a submission that the jury were left to utilise the appellant's lies as possible admissions of guilt.

252 In such circumstances the trial judge was not bound to give any further directions regarding the appellant's lies. None were sought.

253 There is no substance in the appellant's written submissions that the tapes and transcripts of the intercepted telephone calls should not have been admitted because of their disproportionate, prejudicial effect. As the Court of Appeal said, the evidence was highly relevant and probative.

254 Other complaints of minor misdirections were made. They too related for the most part to matters of expression. Read in the context of the summing up as a whole they were unexceptionable as indeed they must have appeared to counsel for the appellant at trial who there sought no redirection with respect to them.

255 A submission was finally made that some evidence objected to as hearsay was wrongly rejected. That evidence (mainly of prior consistent complaints) apparently intended by the appellant's counsel as a pre-emptive strike against a possible line of questioning by the Crown was rightly rejected although much of it, in any event, later found its way into evidence.

256 It follows from what I have said that there was no aggregation of errors to require that this appeal be upheld. Furthermore, the Court of Appeal carefully reviewed the evidence as a whole to conclude that the verdict was not unsafe and unsatisfactory. They have not been shown to be in error in so concluding. My own review of the evidence brings me to the same conclusion.

257 Furthermore, having now read the judgment of McHugh J, I agree with his Honour's reasoning and conclusion that those acting in concert and present at the scene are liable for the acts of each other.

Order

258 I would dismiss the appeal.