SUPREME COURT OF QUEENSLAND

CITATION:	*R v Huston* [2017] QCA 121
PARTIES:	**R** **v** **HUSTON, Ashley James** (appellant)
FILE NO/S:	CA No 103 of 2015 SC No 329 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 19 May 2015
DELIVERED ON:	9 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23 February 2017
JUDGES:	Gotterson and McMurdo JJA and Boddice J Judgment of the Court
ORDER:	**1. Leave to amend the notice of appeal in accordance with paragraph [1] of the Supplementary Submissions filed on behalf of the Appellant on 25 May 2017 be granted.** **2. The appeal be allowed and the conviction be set aside.** **3. The appellant be retried.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – COMPLICITY – COMMON PURPOSE – PROBABLE CONSEQUENCE – where the appellant enlisted the help of a co-offender to rob the victim, a seller of the drug ice – where there was evidence that the appellant intended to assault the victim and rob him but did not intend to use a weapon – where there was evidence that the appellant told the co-offender not to bring a knife – where the co-offender nonetheless brought the knife and stabbed the victim, who ultimately died – where there was evidence that the appellant was upset and angry at his co-offender after the stabbing – where s 8 of the *Criminal Code* (Qld) extends criminal liability where two or more persons have a common intention to prosecute an unlawful purpose and the commission of an offence is a 'probable consequence' of that purpose – where the trial judge, in summing up, referred to the test under s 8 as requiring the offence to be a 'likely' consequence of the unlawful purpose, rather than a 'probable consequence' – where the trial judge

nevertheless, on 24 occasions, referred to the correct test of 'probable consequence' – whether a miscarriage of justice occurred

CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – COMPLICITY – COMMON PURPOSE – SCOPE OF AGREEMENT – where the trial judge correctly stated the requirements of s 8 *Criminal Code* (Qld) according to the Bench book direction and asked the jury to consider what the common intention to prosecute an unlawful purpose was, whether the offence of murder was committed in the prosecution of that purpose, and whether that offence was of such a nature that its commission was a probable consequence of the prosecution of that purpose – where there was a live issue between the prosecution and the defence about what the common unlawful purpose was – where the judge did not identify the evidence which had to be considered specifically on the question of what the common purpose was – where it was possible that the common intention had "prescribed a restriction" on the nature of the offence which the secondary offender was deemed to have committed because the jury may have concluded that the common purpose was to rob without the use of a weapon and that murder was not a probable consequence of that common purpose – whether a miscarriage of justice occurred

Criminal Code (Qld), s 8

Darkan v The Queen (2006) 227 CLR 373; [2006] HCA 34, considered
R v Barlow (1997) 188 CLR 1; [1997] HCA 19, applied
R v Keenan (2009) 236 CLR 397; [2009] HCA 1, distinguished
R v Ritchie [1998] QCA 188, cited

COUNSEL: M J Copley QC for the appellant (pro bono)
D R Kinsella, with S J Bain, for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** On 19 May 2015, a jury found the appellant and Brian Stewart Krezic each guilty of murdering Brodie Joseph Noel Smith on 13 June 2012.

[2] The appellant appeals that conviction upon grounds that, in two distinct ways, there was a miscarriage of justice by the directions given by the trial judge about the prosecution's reliance upon s 8 of the *Criminal Code* (Qld). For the reasons that follow, one of those grounds should be rejected but the other accepted, with the result that the appeal should be allowed and a retrial should be ordered.

[3] Before discussing those grounds, we should summarise the Crown case and the evidence.

Crown Case

[4] In the early hours of the morning of 13 June 2012, the deceased was observed to walk slowly towards a petrol station at Park Ridge in the State of Queensland. He collapsed near the driveway and was subsequently pronounced dead. An autopsy revealed the deceased had nine stab wounds. One stab wound was to the scalp, penetrating into the bone and brain. Another stab wound was to the chest. It travelled between the ribs penetrating the outer layer of the aorta. A further stab wound penetrated a kidney. The medical evidence was that the likely fatal wounds were those penetrating the aorta and the kidney.

[5] The Crown case was that the deceased was killed after having agreed to supply drugs to the appellant at the request of Angela Moutsatsos. Moutsatsos was charged on the same indictment with having murdered the deceased but the Crown accepted a plea of guilty to the deceased's manslaughter from Moutsatsos in satisfaction of the indictment.

[6] The case advanced at trial against the appellant was that he was guilty of the deceased's murder either as a principal offender or, alternatively, on the basis that he actively participated in a common unlawful purpose to rob the deceased and that it was a probable consequence of that common unlawful purpose that the deceased would die from injuries inflicted with an intention to cause death or grievous bodily harm. Ultimately, it was the s 8 argument which was the Crown's principal, if not only, argument.

Evidence

[7] The principal witness in the Crown case was Moutsatsos. Moutsatsos gave evidence that she met the deceased about three weeks prior to his death. The deceased was a seller of the drug ice. Moutsatsos knew an acquaintance, Rebecca Wilson, had recently obtained drugs from the deceased. In the days prior to the deceased's death Moutsatsos told the appellant that Wilson had obtained drugs from the deceased for $170, being money Wilson owed the appellant. Moutsatsos said the appellant was unhappy about this event.

[8] Moutsatsos said that on the evening of 12 June 2012, the appellant drove her to a house at Marsden. They watched a movie and smoked some of the drug ice together. Whilst there they had a conversation about acquiring more drugs. Moutsatsos said when she raised that the deceased might be able to assist, the appellant suggested she call the deceased. The appellant said he "would like to do him over for his gear". The appellant explained that he would pretend to buy drugs from the deceased but take them from him without paying and if necessary "flog him". The appellant asked Moutsatsos how big the deceased was before they left the house.

[9] Moutsatsos said they travelled to an ATM so that Moutsatsos could withdraw some money from her bank account. Whilst there, Moutsatsos telephoned the deceased on two occasions. An arrangement was made for the deceased to supply her with drugs in exchange for $400. The appellant told her to suggest to the deceased that her friend "Chris" would meet the deceased at a particular petrol station in about 20 minutes. The deceased agreed to meet "Chris" without Moutsatsos being present. Moutsatsos said the appellant and she settled upon the name "Chris" because the deceased knew money was owed to "an Ashley" and they did not want the deceased "to cotton on" that he was meeting the appellant.

[10] Moutsatsos said she later received a telephone call from the deceased who said it would be necessary for him to meet his dealer down the road from the petrol station. The deceased was enquiring whether "Chris" would be willing to pick the deceased up from the petrol station to drive him to the meeting with his dealer. Moutsatsos told the deceased that would be okay.

[11] Moutsatsos said she asked the appellant what he intended to do. The appellant told her he intended to ask the deceased if he could look at his "gear". The appellant would then take it from the deceased, get into his car and drive away. Moutsatsos said the appellant, when asked what he would do if the deceased put up a fight, said "I'll flog him if I have to at the worst case".

[12] Moutsatsos said that during the trip to the agreed meeting place, the appellant enquired about what the deceased had said and expressed concern that he might be outnumbered when he met the deceased. The appellant made two telephone calls on his mobile. Moutsatsos said the appellant asked whoever he was telephoning whether he wanted to do a "job". The appellant said he would pick that person up. Moutsatsos said the appellant told her he had called "Brian". That man was Krezic.

[13] The appellant and Moutsatsos travelled to a house where they picked up Krezic, who then sat in the front seat with Moutsatsos moving to the back seat. Krezic was told of the purpose of the meeting, being that the deceased owed the appellant money.

[14] Moutsatsos said the appellant and Krezic discussed how they would proceed. Krezic suggested he leave the vehicle behind the petrol station and get back in after the appellant had collected the deceased. The appellant said Krezic should hide in the boot of the vehicle. The appellant would collect the deceased. After he had met with the deceased's dealer, the appellant would feign to look for his wallet and release the boot lock so that Krezic could get out.

[15] Moutsatsos said when they arrived at the petrol station there were a lot of people in the area. The appellant told her it was too risky as they did not know how many people at the petrol station were with the deceased. The vehicle left and drove past the petrol station again. Krezic expressed confidence the group was not associated with the deceased. At that point, the deceased telephoned Moutsatsos and asked for the whereabouts of Chris. Moutsatsos said she would find out.

[16] Moutsatsos said the appellant stopped the vehicle and opened the boot. She observed Krezic sitting in the boot. The appellant told Krezic to "bally up" so that no-one saw his face. Moutsatsos observed Krezic put an orange shirt around his face. The appellant warned Krezic not to lock himself in the boot of the vehicle. At that point Moutsatsos started to walk away. The deceased again called her to ask the whereabouts of Chris. She replied he was really close. Moutsatsos said she observed the appellant drive away.

[17] Moutsatsos said a short time later she heard a long, loud scream. Two or three minutes later, the vehicle returned and she sat in the back seat. The appellant was driving and Krezic was in the front passenger seat. Krezic put the orange shirt, which had an object wrapped in it, in the boot. Moutsatsos asked the appellant how it had gone. The appellant said "he fucking stabbed him". Moutsatsos asked why and the appellant said he did not know, "he just fucking got out and stabbed him".

[18] Moutsatsos said when Krezic returned to the vehicle Krezic said to her "if you open your mouth you're next". Moutsatsos said as they drove back towards Krezic's house the appellant kept asking Krezic why he had done it. The appellant called Krezic an idiot. The appellant repeatedly hit the dashboard. Krezic played the radio and laughed. Moutsatsos said he was almost "buzzing". Krezic recalled stabbing the deceased "here", pointing to an area between his own shoulder blade and ribs. Krezic said he had stabbed the deceased a few times.

[19] Moutsatsos said when they arrived back at Krezic's house, Krezic removed something from the boot. Around this time, Moutsatsos received a telephone call from someone who told her the deceased was dead. Moutsatsos told the appellant about this telephone call. The appellant then left to go to his father.

[20] Moutsatsos also gave evidence of conversations between the appellant and Krezic on the way to the meeting with the deceased, about the level of violence to be used against him, if that was required in order to steal his drugs. We will return to that evidence below. As we will discuss, that evidence was critical to the jury's consideration of the first of the factual questions under the prosecutor's argument based upon s 8.

[21] The appellant's father gave evidence that he was awoken by the appellant some time after 2.00 am on the morning of 13 June. The appellant told him there had been an incident in which a person had been stabbed. The appellant's father asked if the appellant had done it. The appellant told him "Brian" had done it. The appellant said he was underneath the deceased when Brian stabbed the deceased. The appellant said he had told Brian to leave the knife in the car. The appellant's father told the appellant to give himself up.

[22] Moutsatsos said that after the appellant returned from speaking to his father, the appellant told her he and she would tell the police a story that involved the deceased pulling a knife on the appellant and the appellant getting the knife off the deceased and stabbing him in self-defence. The appellant subsequently telephone triple zero. The appellant told the operator a man had pulled a knife on him. The appellant said a fight had occurred and that he got the knife off the fellow and stabbed him.

[23] Police officers gave evidence that they located the appellant and Moutsatsos outside the Browns Plains police station at 4.14 am in the morning. In their conversation with the appellant, which was recorded, the appellant told police a similar story to that told to the triple zero operator. He added that he had disposed of the knife and had acted in self-defence.

[24] At 6.22 am that morning, the appellant had a further conversation with police. The appellant indicated he wanted to change his account. The appellant said he had previously been covering up for a mate. In a subsequently recorded conversation, the appellant said he had intended to steal or rob the deceased of his drugs. The appellant said that as he had observed others with the deceased when he first drove past the petrol station, he had called Krezic for help. The appellant arranged for Krezic to hide in the boot of the vehicle.

[25] The appellant said he picked the deceased up from the petrol station. He subsequently pulled over, claiming he had forgotten his wallet. The appellant said when the car stopped Krezic left the boot, dragged the deceased out of the car and attacked him. The appellant said he tackled the deceased and Krezic stabbed him. The appellant said he first saw the knife "when I got back in the car". The appellant said he abused Krezic for using the knife. Krezic subsequently disposed of the knife.

[26] The appellant gave a later interview in which he admitted to police that he had known that Krezic was carrying a knife with him in the car on the way to the meeting with the deceased. In that interview, the appellant related the conversation between the two men about the level of violence which would be used, and that which would not be used. We will return what was said in that interview.

Section 8

[27] Section 8 provides as follows:

> "When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such a purpose, each of them is deemed to have committed the offence."

As the trial judge correctly instructed the jury, the application of s 8 required the jury to consider three factual issues:

(a) what the common intention to prosecute an unlawful purpose was;

(b) whether the offence of murder (or manslaughter) was committed in the prosecution of that purpose;

(c) whether that offence was of such a nature that its commission was a probable consequence of the prosecution of that purpose.

First ground of appeal

[28] The first ground relates to the third of three questions under s 8. The appellant's argument is that jury was misdirected because, on occasions, the trial judge used the word "likely" instead of the word "probable". That issue under s 8 required the prosecution to prove a "probability of outcome", as a necessary protection to prevent an excessively wide liability for an alleged party to an offence.[1] It is submitted that whilst the trial judge did direct the jury that the commission of the offence had to be not merely possible, but probable, in the sense that it could well have happened in the prosecution of the unlawful purpose, the jury was directed that a criminal liability could arise upon satisfaction that the offence charged was "likely" to be committed as a result of carrying out the commonly intended purpose. Consequently, it is argued, the appellant was deprived of the possibility of an acquittal of murder.

[29] The respondent submits that whilst "likely" was used on a number of occasions by the trial Judge, in the context of the summing up as a whole there was no reasonable prospect the appellant was wrongly deprived of the possibility of an acquittal of murder and a conviction for manslaughter.

[30] The respondent submits that the use of the word "likely" came directly from the model Bench book direction on s 8. It was the form of direction sought by defence counsel. Whilst the trial Judge interchanged the words "probable" and "likely" the circumstances of the directions as a whole ensured that the degree of likelihood was discernible from the directions given by the trial Judge. The respondent submits whilst it is not necessary in every case to explain the meaning of the expression "a probable consequence" to the jury, the trial Judge did give such a direction, furnishing information which helped

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1 *Darkan v The Queen* (2006) 227 CLR 373 at [76] ("*Darkan*").

the jury to carry out its task in the concrete circumstances of the appellant's case.[2] The trial Judge referred, on no less than 24 occasions, to the test of "probable consequence" and gave a specific direction in terms of its meaning. In the circumstances, it is argued, the jury could not properly have concluded the trial Judge was referring to a different test to "probable consequence" when using the term "likely". The jury could only have understood that the relevant consequence under s 8 of the *Code* was that death had to be probable.[3]

[31] It is necessary to set out in full the passages from the summing up which are relevant to this first ground.

[32] Relevantly, the trial Judge directed the jury that criminal responsibility was extended:

> "If two or more people plan to do something unlawful together, and in carrying out the plan an offence is committed, the law, by s 8 of the Queensland *Criminal Code*, provides that each of those people is taken to have committed that offence if, but only if, it is the kind of offence **likely** to be committed as the result of carrying out that plan."
>
> (emphasis added)

[33] The trial Judge directed:

> "For the prosecution to prove a defendant guilty, relying on this section of the *Code*, therefore, it is necessary for you, the jury, to be satisfied beyond reasonable doubt that, first, there was an unlawful intention to prosecute an unlawful purpose. You must consider fully and in detail what was the alleged unlawful purpose and what its prosecution was intended to involve. Secondly, that murder was committed in the prosecution or carrying out of that purpose. You must consider carefully what was the nature of that actual crime committed. And, thirdly, that the offence was of such a nature that its commission was a **probable** consequence of the prosecution of that purpose.
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> Here, the unlawful purpose alleged by the prosecution is robbery. The definition of robbery in our *Criminal Code* is:
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> > 'Any person who steals anything and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen, is said to be guilty of robbery.'
>
> The prosecution case, in this context, is that each defendant actively participated in a common unlawful purpose to rob Mr Smith and it was a **probable** consequence of that common unlawful purpose that Mr Smith would die from injuries inflicted with an intention to cause death or some grievous bodily harm to him. In this case, it will also be relevant for you to take into account that the burden lies on the prosecution to establish that the defence of self-defence does not apply to these defendants."
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> (emphasis added)

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2 Ibid at [67].

3 *R v Brown* [2007] QCA 161.

[34] After detailing the elements of the offence of murder and the extended criminal responsibility pursuant to s 7 of the *Code*, the trial Judge returned to liability under s 8 of the *Code*. After quoting s 8 of the *Code*, the trial Judge directed:

> "So, if two or more people plan to do something unlawful together and in carrying out the plan an offence is committed, the law is that each of those people is taken to have committed that offence if, but only if, it is the kind of offence **likely** to be committed as the result of carrying out that plan. For the prosecution to prove a defendant guilty relying on this section, it is necessary for you, the jury, to be satisfied beyond reasonable doubt of three things and, again, these are up on the slide for you. First, that there was a common intention to prosecute an unlawful purpose. You must consider fully and in detail what was the alleged unlawful purpose and what its prosecution was intended to involve. Secondly, that murder was committed in the prosecution or carrying out of that purpose. You must consider carefully what was the nature of that actual crime committed. And, thirdly, that the offence was of such a nature that its commission was a **probable** consequence of the prosecution of that purpose.
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> …
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> When considering what any common intention was, and what was any common unlawful purpose, you should consider whether you are satisfied beyond reasonable doubt that the defendant agreed to a common purpose, for example, that involved the possible use of violence or force or to carry out a specific act or that involved inflicting some serious physical harm on the deceased. If you are satisfied beyond reasonable doubt that there was a common intention to prosecute an unlawful purpose, and what that was, you must ask if you are satisfied beyond reasonable that an offence of murder was committed in the prosecution or furtherance or carrying out of that purpose. If you are so satisfied, then in considering whether you are satisfied beyond reasonable doubt that the nature of the offence committed was such that its commission was a **probable** consequence of the prosecution or furtherance or carrying out of the common unlawful purpose, the **probable** consequence is a consequence which would be apparent to an ordinary reasonable person with the defendant's state of knowledge at the time when the common purpose was formed.
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> That test is an objective one and is not whether the defendant himself recognised the **probable** consequence or himself realised or foresaw it at the time the common purpose was formed. A **probable** consequence is more than a mere possibility. For a consequence to be a **probable** one, it must be one that you would regard **probable**, in the sense that it could well have happened. So for the offence actually committed to be a **probable** consequence, the commission of the offence must not be merely possible but **probable**, in the sense that it could well have happened in the prosecution of the unlawful purpose.
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> If you're satisfied that acts constituting an offence were committed and that the commission of those acts was the **probable** consequence of the prosecution of the unlawful common purpose, it does not matter

> that the actual perpetrator who committed those acts did so with a specific intent, where the fact the perpetrator had that intent was not itself either subject of the agreed or an objectively **probable** consequence of the prosecution of that unlawful common purpose. The defendant can still be convicted of the offence constituted by those acts but not the offence of committing those acts with that extra specific intent, where that specific intent was not an agreed or **probable** consequence of carrying out that purpose.
>
> For example, if you are satisfied beyond reasonable doubt that, in fact, a murder occurred, which is an unlawful killing of another person, committed by a perpetrator and intended to cause the deceased death or grievous bodily harm, you must obviously ask yourselves whether you are satisfied beyond reasonable doubt that that offence of unlawful killing, with that specific intent, was objectively a **probable** consequence of the prosecution of the subjectively agreed unlawful purpose held in common, if any, which you have found to exist. If you were so satisfied, and satisfied of other relevant matters, you could find the defendant guilty of murder. However, if you are not so satisfied, you would then consider whether the commission of an offence of manslaughter was a **probable** consequence of carrying out the agreed unlawful purpose."
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> (emphasis added)

[35] The trial Judge, after directing the jury on the offence of murder, continued:

> "In other words, for the Crown to prove beyond reasonable doubt that the defendant is guilty of murder on the basis of section 8, it must prove to your satisfaction beyond reasonable doubt that a **probable** consequence of the prosecution of the common purpose of assaulting the deceased must have been that one or more of the people attacking the deceased would have the intention of doing the deceased at least grievous bodily harm. The relevant common intention, which must be proven beyond reasonable doubt contemplated by section 8 and necessary to support a verdict of guilty of murder, is one to commit an assault of sufficient seriousness that an intention to cause death or grievous bodily harm on the part of at least one or more of those attacking the deceased was a **probable** consequence of a prosecution of that purpose.
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> If that **probable** consequence is absent, but the assault the subject of the common intention was nevertheless of sufficient seriousness that a death was a **probable** consequence and it occurred, the proper verdict is manslaughter. It is not necessary, in either case, that those consequences were intended, or even foreseen by the defendant. Let me try to express that with particular reference to the fact of this case. Here the evidence is that the defendants planned to rob Mr Smith of his illegal drugs and possibly his money together, and in carrying out that plan together, one of them stabbed Mr Smith and killed him. In those circumstances, if you decide that Mr Krezic did the stabbing, Mr Huston is in law taken to have murdered Mr Smith if, but only if, murdering someone was the kind of offence that was a **probable** consequence of carrying out the plan to rob Mr Smith.

> If you are satisfied of those matters then the offence committed by each of the defendants is murder. I have already told you that murder is killing someone with the intention of causing death or doing grievous bodily harm. If you are not satisfied that murder, in the sense of killing with such an intention, was the kind of offence that was a **probable** consequence of carrying out such a plan, then you may find the defendant guilty, if at all, only of the lesser offence of manslaughter. For that, you would have to be satisfied that death was something that was **likely** to result from carrying out the plan.
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> Here the defendant may be found guilty of murdering Mr Smith if, but only if, you are satisfied beyond reasonable doubt that killing him with that intention was something that was a **probable** consequence of carrying out the plan to rob him. If you are not satisfied of that, then you may find the defendant guilty, at most, only of manslaughter. If you are left in doubt whether the murder was the kind of offence **likely** to result from carrying out their plan, then you may find the defendant guilty of the lesser offence of manslaughter. For that, you need to be satisfied beyond reasonable doubt that killing Mr Smith, without any intention to cause death or grievous bodily harm, was something that was a **probable** consequence of carrying out the plan to rob. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter."
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> (emphasis added)

Consideration of the first ground

[36] The expression "a probable consequence" in s 8 of the *Code* does not mean "on the balance of probabilities". In *Darkan v The Queen*[4] the majority held:

> "It is not necessary in every case to explain the meaning of the expression 'a probable consequence' to the jury. But where it is necessary or desirable to do so, a correct jury direction under s 8 would stress that for the offence committed to be 'a probable consequence' of the prosecution of the unlawful purpose, the commission of the offence had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose."[5]

[37] In *Darkan*,[6] the majority of the High Court cautioned against the use of "likely" as an explanation for the expression "probable consequence" in s 8 of the *Code*, noting that "just as the range of possible meanings for 'probable' may justify some explanation of the expression, to offer as an explanation that the word means 'likely' is only to point to a further word which carries diverse meanings".

[38] Whilst the interchange of the words "probable" and "likely" may, in certain circumstances, be unhelpful, there is no reasonable prospect the jury would have understood, by the use of such words in this summing up, that the consequence under s 8 of the *Criminal Code* merely had to be "likely" rather than "probable". The trial Judge directed the jury on multiple occasions that the question was that of a "probable

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4 *Darkan* (2006) 227 CLR 373 at [71].
5 Ibid at 398 [81].
6 (2006) 227 CLR 373 at [71].

consequence" and correctly directed the jury as to the meaning of that expression. The trial Judge did so by furnishing information relevant to the concrete circumstances to be considered by the jury.

[39] The references to "likely" by the trial Judge, in such circumstances, could only reasonably be understood as a short form reference to the need for the person attacking the deceased having the intention of doing the deceased at least grievous bodily harm to be a "probable" consequence of the commission of the unlawful purpose. There is no reasonable prospect that the occasional use of the word "likely" caused the jury to apply a "less demanding test", rather than follow the specific direction of the need to be satisfied that a "probable consequence" of the unlawful purpose was that the person attacking the deceased would have the intention of doing the deceased at least grievous bodily harm.[7]

[40] For these reasons the first ground of appeal cannot be accepted.

Second ground of appeal

[41] We have set out the three factual issues under s 8 at paragraph [27] above. It is the first of those questions, which we will call the common purpose question, and the judge's directions to the jury about it which must now be considered.

[42] By a supplementary written submission, the appellant seeks leave to add a ground of appeal that a miscarriage of justice was occasioned, in that the directions did not make clear to the jury what evidence was relevant to the common purpose question. The respondent does not oppose the addition of this ground of appeal and leave to amend will be given.

[43] It was necessary for the jury to answer that first question before considering the others. Kiefel J said in *R v Keenan*:[8]

> "The inferences available as to what the common purpose may have been in a given case will depend upon the evidence, viewed as a whole. Section 8 does not require the connection, between the offence actually committed and the common purpose to be prosecuted, to be established at the point *when* the common purpose is determined as a fact. It provides for the requisite connection to be determined by the application of the test, whether the offence was the probable consequence of the common purpose, *after* that purpose has been ascertained."
>
> (emphasis added)

[44] The common purpose question requires a jury to consider the states of mind of each of the participants. It requires a determination of what the common intention was, as distinct from what was intended by only one of them. As Brennan CJ, Dawson and Toohey JJ said of this question in *R v Barlow*,[9] the intention of a party may be determinative of the extent of that party's criminal liability because that intention defines what their Honours called "the content" of the common purpose. As they observed, "[t]hat common intention prescribes any restriction on the nature of the act done or omission made which the secondary offender is deemed to have done or made."[10]

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7 cf. *R v Crossman* [2011] 2 Qd R 435 at [57].
8 (2009) 236 CLR 397 at 431 [117].
9 (1997) 188 CLR 1 at 13.
10 Ibid.

[45] Where the purpose is one which will or may involve the use of actual violence, there will often be an issue, as there was in the present case, as to what was the level of violence which was commonly intended. In another such case, *R v Ritchie*,[11] McPherson JA (with the agreement of Helman and Chesterman JJ) said:[12]

> "Before some other individual can … be held criminally responsible under s 8 for an event (such as the death of the deceased) that ensues from such acts of excessive violence that are not his or her own, it is essential that the jury be satisfied *either* that the event was a probable consequence of the level of violence originally intended by all; *or* that that other individual shared in the expanded intention to inflict more serious violence than had first been planned. Otherwise the intention will not be 'common' to him or her. The expression 'escalating' violence is sometimes used to describe actions which take place after a relatively modest beginning; but it is necessary, if s 8 is not to produce serious injustice, to establish that an accused person alleged to be responsible under its terms be proved to have formed and to have shared the intention to inflict more serious violence than was originally in the common contemplation of all concerned."

[46] In *Keenan*, Kiefel J described the relevance, in cases of this kind, of the level of violence which was commonly intended. Her Honour set out what was said in this Court by Davies JA in *R v Johnston*[13] as follows:

> "[W]here there is a plan to do an act of a specific kind to a person, for example to assault him by punching him, an act of an entirely different kind, for example by shooting him, would not be an act of such a nature that its commission was a probable consequence of the prosecution of that plan."

Kiefel J then observed:[14]

> "It is not to be expected that every plan involving the infliction of physical harm will be detailed and include the means by which it is to be inflicted. However it may be possible to infer what level of harm is intended and from that point to determine whether the actual offence committed was a probable consequence of a purpose *so described*."
>
> (emphasis added).

[47] In *Keenan*, the relevant defendant was found guilty, through the operation of s 8, of doing grievous bodily harm by shooting the deceased. There was no evidence that the use of a gun had been discussed by the participants in the offence and the gun was used by another accused. This Court set aside the conviction upon the basis that a jury could not have excluded an inference that the person who fired the shot was acting independently of the common intention about an attack upon the deceased. That decision was reversed by the High Court, which held that the unlawful purpose which was commonly intended was to "inflict serious physical harm by whatever means"[15] and that it was irrelevant that the means of the use of a firearm was not anticipated by

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11 [1998] QCA 188.
12 Ibid at p 6.
13 [2002] QCA 74 at [33] cited in *R v Kennan* (2009) 236 CLR 397 at 432 [118].
14 (2009) 236 CLR 397 at 432 [119].
15 Ibid at 424 [88].

that defendant. In cases such as the present one, *Keenan* demonstrates the need for care and precision in a jury's finding of the content of the common intention to prosecute an unlawful purpose. It illustrates, in a case where violence was commonly intended, the relevance of the nature or degree of violence which was commonly intended.

[48] As we have said, the principal argument for the prosecution in the present case, was that the appellant was guilty by the operation of s 8. The defence case was that the stabbing of the deceased was not a probable consequence of what the appellant and Krezic had intended because the appellant had expressly rejected the use of Krezic's knife in their plan to rob the deceased. As we will now discuss, that argument had some support in the evidence.

Evidence of the common purpose

[49] Moutsatsos gave relevant evidence of the appellant's intention, as revealed by what he said both before and after the attack upon the deceased. Before Krezic was enlisted, she and the appellant discussed where they could obtain the drug ice. She identified the deceased as a source and the appellant suggested to her that she call the deceased to see if he had any of the drug and that if he did, the appellant said, he "would just do him over because [the deceased] owed [the appellant] money …". The appellant told her that he would pretend to buy drugs from the deceased and after asking to look at them, he would "just leave … without paying". The appellant also said that "if he had to … he would flog him".

[50] A little later, the appellant asked her to ring the deceased, which she did. After she spoke to him and ascertained that he had the drug for supply, she was telephoned by the deceased who asked to be picked up and driven to where the deceased was to meet his dealer. When she reported this to the appellant, she said that the appellant "was a bit concerned about being outnumbered" and the appellant then rang Krezic. Before meeting with Krezic, the appellant told her that "he was going to ask to look at the gear and just take it off him to look at it and basically put it in his pocket and get in the car and drive away". She said: "that's when I asked what if he puts up a fight, and he said, well, I'll flog him if I have to at the worst case".

[51] When Krezic joined the appellant and Moutsatsos in the car, Krezic said "look what I've got" and produced a knife. She described the appellant's reaction to the knife by this evidence:

> "Was there any response to that? --- Yeah. Ashley said to Brian words to the effect of – he swore. He said what the fuck do you need that for – or them for. Don't be stupid. Just leave them here.
>
> And do you recall him saying anything else? --- Brian laughed and said nah, fuck 'em. So Ashley told him again – well, he paused for a bit and told him again don't be stupid. Just leave them here. Just use your hands like I'm going to. And then tried to persuade Brian to leave the – to leave them there and said that he didn't want to go to jail for killing someone and – and referred later to not going to – not wanting to go to jail for stabbing someone, and Brian didn't have a bar of it. So he had – just laughed it all off and didn't take any of it to heart.
>
> All right. I'll just step you back through that, and can I ask as you're recounting this conversation if you can just do your best to remember

> the words that were actually said by each person and their response as if you were in the conversation. Can I ask that you tell us your best memory of that conversation again? --- Yes. So when – so when Brian first got in and he leant over to – to Ashley and said look what I've got, Ashley said what the fuck do you need them for? Don't be stupid, and Brian chuckled and said nah, fuck 'em. Ashley paused for a bit and said just leave them here. Don't be fucking stupid. You don't want to go to jail for killing – for killing some cunt, he said, and I'm pretty sure Brian just – just laughed again and didn't really say anything back, and Ashley said again don't be stupid. Just use your hands like I'm going to. You don't want to go to jail for stabbing some cunt.
>
> And did Brian respond to that at all? --- I think he just said nah, fuck 'em again.
>
> And was anything else said at that time? --- Not that I can remember.
>
> Okay. Had you moved at all in the car while this was being said? --- No.
>
> Okay. Did you then start to drive somewhere? --- Yes, and we reversed out and headed towards the United service station.
>
> And as you were driving was there any further conversation in the car? --- Yes. Ashley – Ashley brought back up again with Brian about not bringing the knife – or the knives. He just – Ashley out of the blue just turned around to Brian and said don't take them with you. Don't be fucking stupid. You don't need them, to which Brian said again fuck 'em."

[52] Moutsatsos also described a relevant conversation with the appellant after the stabbing. She gave this evidence:

> "And during that time that you – that they had arrived and Ashley said "Get in the car," was anything else said at all when you first got there? --- Yeah, when I got in the car, as Brian got out of it, I asked Ashley "How'd it go?" or something like that and Ashley said "He fucking stabbed him." And I said "Why?" and he said "I don't fucking know, he just fucking got out and stabbed him.
>
> …
>
> And was anything said in the car on the way to Brian's house? --- Yes. Ashley kept saying to – Ashley kept saying to Brian "What the fuck did you do that for? You're a fucking idiot." Ashley kept hitting the dashboard of the car and the steering wheel out of frustration and – well, agitation. Kept hitting it and just swearing to himself, saying "Fuck, fuck," and hitting everything and said to Brian numerous times "What the fuck did you do that for?""

[53] A little later, as Krezic was leaving the car, Moutsatsos asked the appellant "why did he do that?" and she said that the appellant replied "I don't fucking know." She asked the appellant whether "they ended up getting anything" (meaning drugs) from the deceased. She said that the appellant replied that "they never made it to the dealer", and when she asked him again why "Brian did that", the appellant just said: "I don't know. I don't fucking know."

[54] In cross-examination by the appellant's counsel, Moutsatsos said that the appellant had repeatedly told Krezic not to use the knife and had said "just use your hands like me if you have to". She agreed that "the discussion was … that Krezic would only get involved if [the appellant] got into trouble with [the deceased]". She agreed that when interviewed by police, she had said that it was her understanding, as the appellant and Krezic left to meet the deceased, that Krezic was not going to use the knife "because [the appellant] had been so insistent that he not do it".

[55] The appellant did not give evidence, but the jury had recordings of the several occasions on which he was interviewed by police. His version of events changed markedly over the course of those interviews, and at the trial, both the prosecution and the defence seemed to accept that it was the last of the interviews upon which the jury could rely. The appellant was asked in this interview whether he and Krezic had discussed how they were "going to do it" and the appellant answered:

> "We was just going to pull him out, give him a couple, give him a little floggin', not, nothing to what … happened, just punch him up a bit, take his stuff, and then piss off, then go pick [Moutsatsos] up and go".

The appellant was asked "was [there] any conversation about how you're going to … assault him?" to which the appellant answered:

> "Well, yeah, just pull him out, punch him a bit, and take whatever he's, we knew that he had a bum bag on him, take that. And then once we got there he'd taken him out, I, once everything escalated, it got too far and I didn't really worry, I didn't worry about the gear, the bum bag, or anything. I just wanted to go."

[56] The appellant was asked by police whether, during the trip to the service station to meet the deceased, there was a discussion about the use of a weapon. He said that during the trip, the two had discussed the use of a pole which the appellant had in his car. The appellant said that he had told Krezic that he had the pole "in case we need it". But the appellant said that this changed when the two arrived at the service station and saw that the deceased was alone. The appellant said:

> "There was, there was a pole in the back of my car that we, I discussed about taking, and decided not to once we'd got there 'cause it wasn't, the group of people that we thought were going to be there, it was just him on his own."

[57] In the same interview, the appellant said that during the trip to the service station, Krezic had said that he had a knife which he showed to the appellant. The appellant said in that interview that he told Krezic: "don't use it … we don't need to, there's two of us, it should be fine."

[58] The appellant told police that when they met the deceased, a fist fight ensued between the appellant and the deceased whereby the appellant ended up on the ground with the deceased on top of him. He said that he then heard the deceased scream and rolled him away. He said that he had heard a "pop" from the back of the deceased. He said that he knew Krezic probably had the knife with him, but did not believe that he was actually going to use it. He said that the plan was not to "hospitalise" the deceased, but to do just enough to "retard him a bit, grab his stuff, get in the car and leave; not to beat him to death". He was asked by the police whether he thought that it was a possibility that someone was going to get stabbed when he knew that Krezic had

a knife and the appellant said "I thought it was, he brought it as a precaution. But I didn't think that when we got there, that we didn't need it, that he actually would use it." He said that there was no need for the knife and added "maybe just scare him". He said that the effect of what he had told Krezic was "don't pull that knife out, leave that knife here, do not … touch it, it's not needed …".

[59] The jury thereby had a considerable amount of evidence which was to the effect that the appellant had insisted, several times, that Krezic not use his knife. This was not a case, such as in *Keenan*, where the participants had not discussed whether to use the weapon which one of them then did use. In *Keenan*, the unlawful purpose was to be defined as the infliction of serious physical harm, so that the determination of the common purpose was not to be made by reference to the means by which it would be achieved.[16] In the present case, the purpose did involve the use of actual violence, but according to the evidence discussed, a level of violence in which a weapon would not be used. Any violence was to be only to the extent necessary to overpower the deceased and steal his bag, in the circumstance that there would be two of them against the deceased alone.

[60] For the common purpose question, the jury had to assess what was intended by both the appellant and Krezic. A *common* purpose of the infliction of violence at a level whereby a knife would be used was not proved by the fact of the appellant's knowledge that Krezic had a knife.

[61] In *Keenan*,[17] Kiefel J, in discussing some potentially relevant factors in a jury's assessment of the content of the common purpose, said:

> "An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors."

[62] In this case there was direct evidence as to what was commonly intended (and what was not commonly intended) as to the level of any harm which was to be inflicted. Depending upon what of the above evidence was not rejected by the jury, and what weight they attributed to it, the jury could have concluded that it was outside the common intention that a level of violence whereby a weapon, in particular Krezic's knife, would be used. The jury could have found, as was described in *R v Barlow*,[18] that the common intention had thereby "prescribed a restriction" on the nature of the offence which the secondary offender was to be deemed to have done or made.

[63] It was, of course, for the prosecution to prove the fact and content of a common intention to prosecute an unlawful purpose. The common purpose which had to be proved was one from which the stabbing of the deceased (and for the offence of murder, the stabbing with an intention to kill or do grievous bodily harm) was a probable consequence.

The summing up on the common purpose question

[64] The trial judge identified the three questions which had to be considered in any case involving the operation of s 8. As to the common purpose question, his Honour said

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16 See *R v Keenan* (2009) 236 CLR 397 at 434 [124].
17 Ibid at 432 [120].
18 (1997) 188 CLR 1 at 13.

that the jury had to be satisfied that there was a common intention to prosecute an unlawful purpose and added that "you must consider fully and in detail what was the alleged unlawful purpose and what its prosecution was intended to involve." His Honour continued:

> "Here, the unlawful purpose alleged by the prosecution is robbery. The definition of robbery in our *Criminal Code* is 'any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen, is said to be guilty of robbery'."

His Honour then said:

> "The prosecution case in this context is that each defendant actively participated in a common unlawful purpose to rob Mr Smith, and it was a probable consequence of that common unlawful purpose that Mr Smith would die from injuries inflicted with an intention to cause death or some grievous bodily harm to him."

[65] After discussing the possible operation of s 7 of the *Code*, his Honour returned to s 8 which he then read to the jury. As these directions were given, the jury was shown slides which corresponded with what his Honour was saying. His Honour again described the three issues under s 8, and again, his Honour told the jury that they were to "consider fully and in detail what the alleged unlawful purpose was and what its prosecution was intended to involve." His Honour then said:

> "Let me say something then about common unlawful purpose. Obviously a great deal depends on the precise nature of any common unlawful purpose proved by the evidence in the light of the circumstances of the case, particularly the state of knowledge of the defendant. It is the defendant's own subjective state of mind, as established by the evidence, which decides what was the content of the common intention to prosecute an unlawful purpose. That common intention is critical because it defines the restrictions on the nature of the acts done or omissions made which the defendant is deemed by the section to have done or made.
>
> When considering what any common intention was, and what was any common unlawful purpose, you should consider whether you are satisfied beyond reasonable doubt that the defendant agreed to a common purpose, for example, that involved the possible use of violence or force or to carry out a specific act or that involved inflicting some serious physical harm on the deceased."

[66] After discussing the other questions under s 8, his Honour returned to the common purpose question, in the context of the differences between murder and manslaughter. His Honour said:

> "[F]or the Crown to prove beyond reasonable doubt that the defendant is guilty of murder on the basis of s 8, it must prove to your satisfaction beyond reasonable doubt that a probable consequence of the prosecution of the common purpose of assaulting the deceased must have been that one or more people attacking the deceased would have the intention of doing the deceased at least grievous bodily harm. The relevant

> common intention … contemplated by s 8 and necessary to support a verdict of guilty of murder is one to commit an assault of *sufficient seriousness* that an intention to cause death or grievous bodily harm on the part of at least one or more of those attacking the deceased was a probable consequence of a prosecution of that purpose.
>
> If that probable consequence is absent, but the assault the subject of the common intention was nevertheless *of sufficient seriousness* that a death was a probable consequence and it occurred, the proper verdict is manslaughter."
>
> (emphasis added)

[67] Those directions were correct, but it was then necessary for those statements of principle to be related to the evidence and the respective arguments. His Honour continued:

> "Let me try to express that with particular reference to the facts of this case. Here the evidence is that the defendants planned to rob Mr Smith of his illegal drugs and possibly his money together, and in carrying out that plan together, one of them stabbed Mr Smith and killed him. In those circumstances, if you decide that Mr Krezic did the stabbing, Mr Huston is in law taken to have murdered Mr Smith if, but only if, murdering someone was the kind of offence that was a probable consequence of carrying out the plan to rob Mr Smith.
>
> If you are satisfied of those matters then the offence committed by each of the defendants is murder."

[68] His Honour added:

> "Here the defendant may be found guilty of murdering Mr Smith if, but only if, you are satisfied beyond reasonable doubt that killing him with [an intention to kill or do grievous bodily harm] was something that was a probable consequence of carrying out the plan to rob him."

[69] In our respectful opinion, the new ground is established. Although his Honour discussed the evidence in detail, there was not an identification of the evidence which had to be considered specifically on the common purpose question and before considering the other issues under s 8.

[70] That was part of a wider difficulty, in that from the directions which were given, the jury may have understood that it was sufficient for them to be satisfied that there was a commonly held purpose to rob the deceased, without considering what level of violence was to be used, and not used, against him.

[71] From this point in the summing up, his Honour summarised the arguments of counsel. The argument of the prosecutor, in relevant respects, was summarised as follows:

> "In respect of Mr Huston, he argued that it was his plan to rob Mr Smith. He contemplated the use of a pole to get drugs and money from him and went ahead with the plan to rob him violently, even when he knew that Mr Krezic had a knife and was concerned that he might use it. He argued, principally in reliance on s 8 of the *Criminal Code*, that the death of Mr Smith was a probable consequence of the plan Mr Huston had formed to rob him in the circumstances. … [The appellant] also admitted to the police officer that he knew Mr Krezic

> had a knife, which [the prosecutor] argued portrayed the fact that Mr Huston was aware of the risk that it would be used when he said it should be fine. That evidence, he submitted, was confirmed by Ms Moutsatsos's evidence that that was the plan and that an ordinary reasonable person who knew about that plan, knowing the things that Mr Huston knew, would regard killing with intent as a probable consequence of it. He argued that Mr Huston's apparent remorse afterwards was irrelevant and that he knew of the significant possibility that a knife would be produced, from which you would conclude that, pursuant to s 8 of the *Criminal Code*, Mr Huston should be found guilty of murder on the basis that murder was a probable consequence of the plan."
>
> In a slide shown to the jury, his Honour summarised the defence argument as being that neither murder nor manslaughter was a probable consequence "of the original plan to steal drugs and to punch Mr Smith".

[72] The summary of the argument by the appellant's counsel was relevantly as follows:

> "Mr Chowdhury reminded you that after Mr Smith had been stabbed the evidence was that Mr Huston became hysterically upset … [and that this was] powerful evidence corroborating what had been said by Ms Moutsatsos to indicate that Mr Krezic had gone beyond the bounds of the criminal plan devised with Mr Huston. …
>
> He asked you [to] reject the evidence about the metal bar in the car as a red herring because Mr Huston's plan was to use hands, not a knife, and the intention was only to tackle Mr Smith, not to kill him or do him grievous bodily harm. He said it was Mr Krezic who departed from the plan and that the death of Mr Smith was not a probable consequence of the plan. … [H]e submitted that what was said by Mr Huston supported the view that the plan was simply to involve punching rather than the use of a weapon, … that he did not use the pole in the car and told Mr Krezic not to use the knife …
>
> He also discounted the use of s 8 as a means by which you would conclude that his client was guilty on the basis that murder was one probable consequence of the original plan to steal drugs and punch Mr Smith, pointing out the use of the word 'probable' and arguing that intentional killing was not a probable consequence of such a plan. He therefore urged you to find his client not guilty of murder and also submitted that manslaughter was not a probable consequence of such a plan because it did not involve weapons. He conceded that it is possible that somebody might die through an assault with fists, but argued it was not a probable consequence; that Mr Krezic was on a frolic of his own and that the death of Mr Smith was not Mr Huston's fault so that you should acquit him of manslaughter as well as of murder."

[73] From those passages, the divergence appears between the arguments on the common purpose question. The appellant's argument was that the content of the purpose had to be assessed by the level of violence which was, and that which was not, commonly intended. The prosecution argument was that it was sufficient for the jury to find that there was common purpose of robbing the deceased, and that assessment of a level of

violence was to be made in considering the third issue under s 8. That was an assessment of what, on an objective view, was a probable outcome of a robbery by two men one of whom had a knife. But it was not such a probable consequence of a planned assault in which the knife was not to be used. The prosecution argument was conducive to improper reasoning by the jury, as the jury should have been told.

[74] After summarising the submissions of counsel, the trial judge suggested a sequence in which the jury might consider the issues. His Honour did so by reference to slides which were shown to the jury, one of which was headed "Possible Course of Deliberations Parties to Offences: s 8", which suggested that the jury consider whether the prosecution had satisfied them beyond reasonable doubt as to four things, namely:

> "1. that each defendant had a common intention to prosecute an unlawful purpose of robbery;
>
> 2. that the offence of murder was committed in the prosecution or carrying out or furtherance of that purpose;
>
> 3. that the offence of murder was of such a nature that its commission was a probable consequence of the prosecution or furtherance of that purpose;
>
> 4. alternatively, that the unlawful killing of Mr Smith, without any intention to cause him death or grievous bodily harm, was a probable consequence of carrying out the plan to rob …"

By the next slide shown to the jury, they were instructed that if they answered "yes" to the first, second and third of those four questions, they should find the relevant defendant guilty of murder. If they answered "yes" to the first, second and fourth, their verdict should be manslaughter.[19] And if they answered "no" to "each of questions 1, 2 and either of questions 3 or 4" then their verdict would be not guilty.

[75] His Honour, in effect, read those slides to the jury, before describing "another possible and shorter approach" which, for the case against the appellant, his Honour described as this course of reasoning:

> "In respect of Mr Huston, has the prosecution proved beyond reasonable doubt that the defendants had a common intention to prosecute an unlawful purpose? If yes, was the offence of murder of such a nature that its commission was a probable consequence of the prosecution for furtherance of that purpose? If yes, then Mr Huston is guilty of murder. If no, was the unlawful killing of Mr Smith without any intention to cause him death or grievous bodily harm a probable consequence of carrying out the plan? If yes, then Mr Huston is guilty of manslaughter. If no, Mr Huston is not guilty."

[76] This was a complex trial requiring the jury to consider the alleged guilt of two defendants, and there were substantial differences between the two prosecution cases. And against each defendant, there were alternative verdicts and alternative bases of legal responsibility.

[77] In these circumstances, the particular relevance of the arguments to the common purpose question may not have been understood by the jury. This was a case, like

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19 For each alternative they were reminded that the prosecution had to exclude a defence of self-defence.

Keenan and others, where the common purpose question required the jury to determine the level of violence which was commonly intended. It required the jury to do more than determine whether there had been a common intention to rob the deceased. As the jury was told, a robbery could involve any level of violence and, indeed, only a threat of violence. The jury had to make a more detailed finding because the defence case, with evidentiary support, was that the only intention which was common to the participants was that the violence, if necessary, would be minimal and would not involve a use of the knife. In accordance with the standard Bench book direction, the jury was told that they were to "consider fully and in detail what was the alleged unlawful purpose and what its prosecution was intended to involve." But in the way in which the jury may have reasoned, that involved only a matter about which there was no substantial issue on the evidence. The jury may have understood that the critical argument of the appellant's counsel was relevant only to the third question under s 8.

[78] The appellant's trial counsel did not seek any further direction, although his Honour had given counsel ample opportunity to consider a draft of his summing up. Therefore the only ground of appeal which is relevant here is that the failure to direct the jury properly on the common purpose question resulted in a miscarriage of justice.[20]

[79] A miscarriage of justice has occurred here because it is reasonably possible that the failure to direct properly on this question may have affected the verdict.[21] There is a risk that the appellant was thereby found guilty of an offence which was beyond the scope of his criminal responsibility from the prosecution of a common purpose.

[80] For the respondent, it is argued that any directions or redirections which focused the minds of the jury on the intended level of violence would have been to the appellant's disadvantage. That cannot be accepted. We have set out the relevant evidence which, taken as a whole, supported a finding that the common purpose was to use a level of violence which was lower than what would occur with the use of weapons and was restricted to such force as was necessary to overpower the deceased and steal the drugs. Had that been the jury's finding, it is reasonably possible that the outcome may have been different.

Conclusion and orders

[81] The appeal should be allowed upon the ground of a miscarriage of justice. We would order as follows:

(1) Leave to amend the notice of appeal in accordance with paragraph [1] of the Supplementary Submissions filed on behalf of the Appellant on 25 May 2017 be granted.

(2) The appeal be allowed and the conviction be set aside.

(3) The appellant be retried.

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20 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 15 [49].

21 Ibid.