SUPREME COURT OF QUEENSLAND

CITATION:	*R v Johnston* [2002] QCA 74
PARTIES:	**R** v **JOHNSTON, Douglas Lindsay** (appellant)
FILE NO/S:	CA No 269 of 2001 SC No 542 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2002
JUDGES:	Davies and Williams JJA and Douglas J Separate reasons for judgment of each member of the Court each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - ANCILLARY LIABILITY - COMPLICITY - STATUTORY PROVISIONS - AIDING, ABETTING, COUNSELLING OR PROCURING - where victim was driven to remote bushland - where grievous bodily harm was done to the victim - whether appellant lured the victim into the car for the purpose of enabling or aiding others to perform an act which caused grievous bodily harm CRIMINAL LAW - ANCILLARY LIABILITY - COMPLICITY - STATUTORY PROVISIONS - CODE PROVISIONS - whether the appellant was a party to the offence under s 7(1)(b) or s 8 of the *Criminal Code* (Qld) CRIMINAL LAW - ANCILLARY LIABILITY - COMPLICITY - COMMON PURPOSE - CODE PROVISIONS - whether appellant formed a common intention with others to do serious harm to the victim CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - PREJUDICIAL EVIDENCE - GENERALLY - evidence indicated appellant's involvement in plan to do serious harm to the victim -

whether this evidence had no or very limited probative value and substantial prejudicial effect

Criminal Code (Qld) s 7(1)(b), s 8

R v Barlow (1997) 188 CLR 1, followed

COUNSEL: S J Hamlyn-Harris for appellant
S G Bain for respondent

SOLICITORS: Legal Aid Queensland for appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **DAVIES JA:** On 14 August 2001 the appellant was convicted of grievous bodily harm on 18 June 1999. He was not present when, on that day, which was a Friday, grievous bodily harm was undoubtedly done to the victim David Mark Ware. He was convicted either on the basis of s 7(1)(b) of the *Criminal Code* that he did or omitted to do an act for the purpose of enabling or aiding other persons to commit that offence; or that, pursuant to s 8, he was one of a number of persons who formed a common intention to prosecute an unlawful purpose, that in the prosecution of that purpose grievous bodily harm was committed and that that offence was of such a nature that its commission was a probable consequence of the prosecution of that purpose.

[2] He appeals against his conviction on three grounds. The first is that the verdict was unsafe and unsatisfactory. The second is that a miscarriage of justice occurred in consequence of the erroneous admission into evidence of a statement by Ware that, when he was in a vehicle and was, in effect, being abducted by four men, Anderson, Worland, Speer and a fourth unidentified person and it was discovered that he was armed with a knife, Anderson said words to the effect that he would kill Johnston for not telling him about the knife. And the third is that the learned trial judge misdirected the jury as to the test to be applied in the application of s 8. In order to understand these grounds it is necessary to say something of the circumstances in which this offence was committed.

[3] In the first half of 1999, in order to repay a debt which he owed to a man called Terry Harvey, Ware agreed to produce some amphetamines for him. With money provided by Harvey they together purchased all of the equipment necessary for that purpose and all except one of the ingredients. Ware was then taken to a motel at the Gold Coast with the items purchased. As it turned out he had to leave there after one night because Harvey had not paid the rent thereafter. He took the items he had purchased and all or almost all of his own possessions to an undercover car-park and stashed them behind some boards. When he returned later to attempt to recover them he found that the area had been cordoned off by police.

[4] On Tuesday 15 June Sean Wallace, with whom Ware shared a house, brought two women, Linda Bayley and Nikki Vermeer, to the house. They stayed there that night. At some stage one of them asked Ware to accompany them to a unit at the Gold Coast to check it to see if it was bugged. He agreed and the next day he and Vermeer drove to the Gold Coast in Bayley's Honda Civic car. There they entered the Grand Mariner Resort by means of a security key attached to Bayley's car keys and together they checked the unit.

[5] They returned to the house but returned to the unit that night and stayed the night. On Wednesday 16 June they again returned to the house, returning to the unit later that day with Wallace and Bayley. All four stayed the night.

[6] On Thursday 17 June Vermeer, Wallace and Bayley returned to the house. Ware stayed at the unit. That afternoon he rang Harvey. He demanded that Harvey get his stuff back from the police and said that he, Ware, would go down to the police himself if they did not help. Ware said in evidence that he was concerned to recover his personal possessions.

[7] Ware expected the two women and Wallace to return that night. They did not do so but at 4.00 am the following morning, when he was in bed, they returned accompanied by the appellant Johnston, whom Ware knew, and a man who was introduced to him as Peter but who, it was not disputed at the trial, was Speer.

[8] Ware related in evidence a conversation which he then had with Johnston:

> "Doug came in and saw me in the bedroom and let me know basically that they were back … he said that they - they had a lot of weapons down in the boot of a vehicle that he had to go and get rid of, and he asked if I would go with them to help make up numbers … I gathered that he wanted people with him for security to make sure it doesn't … nothing goes wrong … I was offered my choice of weapons out of there and there was no special sum of cash offered, but there would be some cash … Well, when I was getting myself dressed, I picked up a cane knife which I had in my bag and put that down the left hand inside of my jeans, so that it was just held there and suspended by the belt."

Ware said that Johnston saw him put the cane knife inside his trousers. He then left the unit with Johnston, Wallace and Speer.

[9] They went down to the basement where two vehicles were parked. One was Bayley's Honda; the other was a car which Ware thought was a Statesman but which turned out to be a Fairlane. He said that Wallace and Speer "basically just sort of headed towards the Honda and Doug (Johnston) sought of shepherd me towards the Statesman". When the Fairlane drove off it had five occupants. The driver, a front seat passenger and, in the rear seat, a person referred to as "BJ", who was in fact Worland, Johnston and Ware. After the Fairlane and the Honda had travelled a short distance there was a rearrangement of passengers between the two vehicles. When they drove off again the occupants of the front seats of the Fairlane were the same but in the rear seat Worland was on one side, Ware had been told to sit in the middle and Speer was on the other side. Johnston, the appellant, had gone off in the Honda.

[10] After the two vehicles had travelled a further distance they appeared to separate. It was about this time that, according to Ware, the front seat passenger started to abuse him. He then recognized the front seat passenger as Tony Anderson, Harvey's nephew. Ware said in evidence:

> "He then started to abuse me and told me that I was to be killed basically for fucking over his aunt and uncle on the $5,000 deal that they had done with the bike club."

Before the purchase of the equipment and ingredients for the production of the amphetamine Harvey had taken Ware to the Vagabonds, an outlawed motorbike

club, and introduced him to the club president. The deal apparently included the production of the amphetamine which Ware had undertaken to produce.

[11] Anderson then said that they believed Ware was going to "turn dog" and that Terry (Harvey) and Jo (Harvey's de facto wife) told him that Ware was going to go to the police and inform on everybody so that he could get his property back from the police. Anderson continued to threaten Ware on several occasions waiving a knife in front of him.

[12] Ware said in evidence that, during the course of this journey, he attempted to telephone Terry Harvey and Johnston but that their numbers were turned off. However Speer, having borrowed the phone from Ware, spoke to someone, and so did Anderson, although Ware could not hear what they were saying.

[13] During the course of this journey Worland observed the knife hidden in Ware's trousers. There was a struggle for it and the knife was apparently removed. Anderson then asked Ware if Johnston knew that he had the knife in his possession. When Ware said yes, Anderson said "Well he'll be fucked when we get back to him". The back seat occupants then proceeded to tie and gaff tape Ware's hands behind his back with rope and tape which Speer produced.

[14] The car was then driven to a place in remote bushland. Anderson instructed Worland and Speer to get Ware out of the back seat and they did so, one by pushing, the other pulling. Anderson then instructed them to gaff tape Ware's mouth and eyes and Anderson then took him into the bush. Anderson then cut Ware's throat with a knife. Ware went limp and Anderson called to the others "I have killed him. He's dead". Anderson then gave instructions to remove the ropes and tape and Ware felt a number of pairs of hands removing the ropes and tapes. Anderson then said "Oh I need to take the fingers. I have got to take the fingers back for proof". Attempts were then made, apparently by Anderson and then Speer to cut off two fingers of his left hand. His small finger and ring finger were cut off and he suffered injuries to the middle and index finger of that hand. He pretended to be dead during this period and the others then left him.

[15] There does not appear to be much doubt that Anderson attempted to murder Ware and in the end he pleaded guilty to that offence. So did Speer. Worland went to trial. He was acquitted of attempted murder but convicted of grievous bodily harm. Another man, Armstrong, who was alleged to be the driver of the car, was also charged with attempted murder but was acquitted of that offence and of grievous bodily harm, apparently because he was not satisfactorily identified as the driver.

[16] The jury were invited to and apparently did infer that Johnston was aware, before the above journey commenced, of a plan to at least do Ware serious harm and either was a party to that plan or aided in its execution. The evidence from which they were asked to infer this was of four kinds. The first was the evidence of Ware about what Johnston told him the purpose of the fateful journey was to be. In the light of the other evidence the jury was asked to infer that this was a deliberately false story for the purpose of luring Ware into the car with four other men intent on seriously harming him. The second was the conversation in the car between Anderson and Ware about the knife which, it was said, supported Johnston's knowledge of and involvement in a plan to take Ware to a remote location and there do him serious

harm. Of course this conversation is the subject of the second ground of appeal, that it was wrongly admitted into evidence.

[17] The third category of evidence relied on to prove Johnston's guilt consisted of telephone records of conversations from which it might be inferred that he was a party to a plan to do serious harm to Ware or was at least aware of such a plan. The first and perhaps most significant of these was a record of a telephone call from Harvey's home to Christine Humphrey's home telephone, where Johnston lived, at 3.17 pm on 17 June, the day before the offence was committed. This was only two minutes after the phone call from Ware to Harvey in which he threatened to go to the police. Later that night there were also two telephone calls from Harvey's phone to Speer's phone. Then at 1.10 am on 18 June, several hours before Johnston arrived at the Grand Marnier unit, there was a phone call from Christine Humphries telephone to Terry Harvey's telephone. There were also records of telephone calls from Terry Harvey's phone to Christine Humphrey's phone on 18 June, after the offences had been committed, at 12.11 pm and 3.29 pm.

[18] And the fourth category of evidence was that of several security cameras from which it could be inferred that Johnston was in the company of the other offenders in the early hours of 18 June. And of course he entered the unit with them that morning.

[19] The prosecution case against Johnston was put to the jury on alternative bases: either Johnston was a party to the offence of grievous bodily harm pursuant to s 7(1)(b) in that he lured Ware into the car for the purpose of enabling the other offenders to commit the offence of grievous bodily harm; or he was a party pursuant to s 8 in that he, with others, formed a common intention to prosecute an unlawful purpose, namely to do serious harm to Ware, and the offence committed was of such a nature that its commission was a probable consequence of the prosecution of such purpose. It is plain that "offence" in both of these provisions means the element of conduct, in this case an act, which, if causing a prescribed result, namely grievous bodily harm, renders a person engaging in the conduct liable to punishment.[1] It is convenient to consider the first and third grounds of appeal in the context of those alternative bases of liability.

Johnston's liability pursuant to s 7(1)(b)

[20] In support of his submission that the verdict was unsafe, to the extent that it relied on s 7(1)(b), the appellant contended that, as Anderson and Speer intended to kill Ware, and consequently there was no evidence that they intended merely to do him grievous bodily harm, he, Johnston, could not be convicted of grievous bodily harm pursuant to that section; he did not do what he did for the purpose of enabling Anderson and Speer to attempt to murder Ware. This contention is, it seems to me, a variation of that which failed in *Barlow*.[2] All that was necessary for the purpose of convicting Johnston of grievous bodily harm pursuant to s 7(1)(b) was that he did an act, namely lure Ware into the car, for the purpose of enabling or aiding the others to perform an act which in fact caused grievous bodily harm. However, in the case of each of Anderson and Speer, because of each of their states of mind, the act also constituted attempted murder. It was plainly open to the jury, from the

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1 *R v Barlow* (1997) 188 CLR 1 at 9.

2 See fn 1.

evidence to which I referred, to infer that the appellant lured Ware to the car for the purpose of enabling others to do him injury which constituted grievous bodily harm.

[21] The direction which her Honour gave with respect to s 7(1)(b), in relation to the appellant and some other alleged offenders, was relevantly:

> "It is unnecessary to prove the exact manner of carrying out the grievous bodily harm. It is enough that they knew that serious harm of the kind that I have just given you a definition about, was to occur in some way and they assisted or encouraged that unlawful conduct."

[22] No criticism is made of that direction and in my opinion it is, in the above respect, in accordance with the law.

[23] However the appeal against conviction must succeed unless the jury were also entitled to convict the appellant under s 8. That is because, as already mentioned, the matter was left to the jury on alternative bases and it is impossible to say on which basis the jury convicted.

Johnston's liability pursuant to s 8

[24] Mr Hamlyn-Harris accepts for this purpose that:

> "… the operation of s 8 is limited to deeming the secondary party to have done the act or to have made the omission which renders the principal offender liable to punishment only insofar as the doing of an act of that nature or the making of an omission of that nature was a probable consequence of prosecuting their common unlawful purpose … "[3]

[25] Nevertheless he submits that:

> "…what in fact occurred when he was taken to the bush is in my submission unequivocally an attempt by Anderson and Speer to kill the complainant, and that is to say they - or at least one of them - cut his throat and then at attempt was made to cut off his fingers, and in fact two of his fingers were cut off, apparently to be used as proof that they had killed him."

And:

> "… the question really for the jury is whether cutting the complainant's throat and then cutting off his fingers in order to - to demonstrate that he'd been killed, whether those acts were acts of such a nature which were contemplated by the common plan."

[26] On one view it may be implicit in these submissions that what Mr Hamlyn-Harris submits is necessary in order to render Johnston criminally liable for grievous bodily harm under s 8 is that acts which included an intention to kill or do grievous bodily harm must have been contemplated by the common plan to which he was a party. That may be implicit from the phrase "apparently to be used" in the first of those passages and the phrase "to demonstrate" in the second.

[27] However, as *Barlow* demonstrates, pursuant to s 8 one offender may be guilty of murder whilst another co-offender may be guilty only of manslaughter. And similarly, as in this case, one may be guilty of attempted murder whilst another may

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[3] *The Queen v Barlow* (1997) 188 CLR 1 at 13.

be guilty only of grievous bodily harm. That is because the second offender in each case is "liable to punishment only insofar as the doing of an act of that nature … was a probable consequence of prosecuting their common unlawful purpose" and, in the case of the second offender, his knowledge of the intention of the principal offender is not proven. To the extent that Mr Hamlyn-Harris' submission went as far as implying that knowledge of such an intention was required for a conviction of grievous bodily harm, it is plainly inconsistent with *Barlow*.

[28] However I think that Mr Hamlyn Harris was saying no more than that "an act of that nature" means an act of cutting Ware's throat; that an act of doing serious harm by whatever means or even of doing serious harm with a knife was not sufficient. In my opinion that is too narrow a construction of the requirement that the offence must be of such a nature that its commission was a probable consequence of the purpose. In the first place, an offence of that nature cannot mean merely the precise act which was done; it must mean an act of serious wounding with a knife. Secondly to see whether an act of that nature was a probable consequence of the prosecution of the common purpose it is necessary to examine more closely what that common purpose was.

[29] It is relevant, in considering that question to advert to the reasons why the purpose of the plan was to inflict serious harm on Ware. The jury would have been entitled to infer that there were two such reasons. The first was to punish Ware for threatening to go to the police; and the second and more important reason was to ensure that he never did so. The jury were entitled to infer that Johnston was a party to a plan which had these as its ultimate purposes. It may be inferred accordingly that a probable consequence of the prosecution of this plan would be that serious injury would be inflicted on Ware by whatever means seemed appropriate to achieve those ends. In my opinion that included the use of some weapon such as a knife.

[30] For those reasons I would not accept Mr Hamlyn-Harris' submission that it was not open to the jury to conclude that Johnston was a party to the offence of grievous bodily harm pursuant to s 8.

The learned trial judge's direction with respect to s 8

[31] The complaint about her Honour's directions is that they did not make it clear to the jury that the act which in fact caused grievous bodily harm, or an act of that nature, must be a probable consequence of the plan. What her Honour said in this respect was:

> "… if grievous bodily harm was a consequence of a plan to do him harm, then he can be held criminally responsible. So you have to be satisfied that an injury which constitutes grievous bodily harm … whatever manifestation, so long as it falls within that definition of grievous bodily harm, was a probable consequence of entering into the preconcert to take him away and do him some serious harm."

[32] Specifically the criticism seems to be that her Honour should have told the jury that it was not sufficient that grievous bodily harm was a consequence of a plan to do him serious harm; it was necessary to say that, in order to convict Johnston, the jury must be satisfied that grievous bodily harm by cutting Ware's throat was a probable consequence of the prosecution of the plan. This submission must fail for the same reason as the previous submission failed; that it was sufficient for liability pursuant

to s 8 that Johnston was a party to a plan to take Ware to a remote location and there do him serious harm by means which might include the use of a knife.

[33] It may well be that, where 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. However here, as already mentioned, the jury were entitled to infer that the common intention to which the appellant was a party was to do serious harm to Ware by whatever means seemed appropriate to ensure his silence; and in such circumstances it was open to the jury to conclude that an act of the kind done here, namely wounding with a knife so seriously as to be likely to endanger life or cause permanent injury, was a probable consequence of the prosecution of that common purpose. That seems to have been what her Honour had in mind when she said that if grievous bodily harm was a consequence of a plan to do him harm Johnston can be held criminally responsible. And by speaking of grievous bodily harm as a consequence of the plan, her Honour was posing the question whether such harm, by whatever means, was a probable consequence of prosecuting the common unlawful purpose. I do not think that in saying this her Honour erred.[4]

[34] Her Honour might have put this question more specifically by:

(a) inviting the jury to consider whether Johnston was a party to a plan to do serious harm to Ware, by whatever means; and

(b) whether, in that event, the use of a knife for that purpose was a probable consequence of the prosecution of that plan.

However Johnston's counsel did not seek any redirection on this question and, in the factual context of this case, it is reasonable to conclude that these questions were implicit in the way in which her Honour directed. Accordingly I would reject the submission that any miscarriage arose from her Honour's direction on this section.

The second ground - wrongful admission of evidence

[35] Mr Hamlyn-Harris' submission that the statement made by Anderson in the car should not have been allowed into evidence was not that it did not satisfy the requirements for admissibility of evidence of this kind stated in *Tripodi v The Queen*.[5] On the contrary he was prepared to concede that, without the admission of this evidence there was reasonable evidence of preconcert between Johnston and the occupants of the car other than Ware that Johnston would lure Ware into the car for the purpose of enabling the others to do serious harm to him. This could be inferred from Johnston's plainly false story to Ware in the bedroom in the unit at Grand Mariner Resort, the telephone calls and the evidence from the security cameras to all of which I have referred. Rather he submitted that the statement had no or very limited probative value and substantial prejudicial effect and consequently should have been excluded, in the exercise of the trial judge's discretion.

[36] I do not agree that it had limited probative value. Here, as in conspiracy cases, evidence of Johnston's involvement in the plan to seriously harm Ware was not only a precondition of the admissibility of this evidence but, at least in respect of liability pursuant to s 8, was also proof of an element of the offence, namely Johnston's

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4 Compare, under the common law, *Varley v The Queen* (1977) 51 ALJR 243 at 246; here the use of a knife was "within the scope of the common design".

5 (1961) 104 CLR 1 at 7; see also *Ahern v The Queen* (1988) 165 CLR 87 at 99.

involvement in that plan. And the evidence of the statement by Anderson was proof of his involvement because it was implicit in it that Johnston, knowing that the others intended to do serious harm to Ware, should not have permitted him to enter the car whilst armed with a knife. Accordingly I do not think that the exercise of her Honour's discretion in this respect miscarried.

Order

Appeal dismissed.

[37] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by Davies JA and I agree with what he has said, and with his conclusion. However I wish to add some brief observations of my own.

[38] The indictment presented to the court charged Anderson, Armstrong, Speer, Worland and the appellant with attempted murder and other offences arising out of the events of 18 June 1999. On 20 April 2001, Anderson pleaded guilty to attempted murder (which was accepted in full discharge of the indictment with respect to him) and he was duly sentenced. The matter proceeded to trial against the other four. At the outset of the trial Speer pleaded guilty to attempted murder and grievous bodily harm; he was remanded for sentence until the conclusion of the trial against the others. The trial before the jury continued with respect to the charges of attempted murder and grievous bodily harm with respect to Armstrong, Johnston and Worland; each pleaded not-guilty to those charges. With respect to the appellant and Worland the jury returned verdicts of not-guilty of attempted murder but guilty of grievous bodily harm. Armstrong was found not-guilty of each charge.

[39] As noted by Davies JA the prosecution case against the appellant relied on both s 7(1)(b) and s 8 of the *Criminal Code*. The other persons the appellant allegedly aided to commit the offence (s 7(1)(b)) or the persons with whom he formed a common intention to prosecute an unlawful purpose (s 8) included Anderson, Worland and Speer. At the end of the day Anderson and Speer were convicted on their own pleas of attempting to murder Ware on 18 June 1999, and the appellant and Worland were found not-guilty by the jury of that charge but found guilty of grievous bodily harm.

[40] It is against that background that the issues raised by this appeal have to be determined.

[41] The prosecution case against the appellant was a circumstantial one. The jury was asked to infer beyond reasonable doubt that the appellant aided the others to commit the offence (doing serious harm to Ware) or formed a common intention with those others to prosecute an unlawful purpose (do serious harm to Ware) in the course of which grievous bodily harm was occasioned to the complainant Ware. Davies JA has outlined the essential ingredients of that circumstantial case. In the absence of any evidence from the appellant explaining or putting an innocent construction on the conduct relied on by the prosecution, I am satisfied that the jury was entitled to draw the conclusion it did. Having regard to the whole of the evidence I am not persuaded that the verdict was unsafe and unsatisfactory. The reasoning of Davies JA clearly demonstrates that there is nothing in *R v Barlow* (1997) 188 CLR 1 which would render the verdict here (be it based on s 7(1)(b) or s 8) unsafe or unsatisfactory.

[42] Further, for the reasons given by Davies JA, I agree that there was no misdirection with respect to s 8 of the *Code* and that there was no wrongful admission of evidence.

[43] The appeal should be dismissed.

[44] **DOUGLAS J:** I have read the reasons of Davies JA and agree that the appeal be dismissed.