SUPREME COURT OF QUEENSLAND

CITATION:	*R v Georgiou & Ors; R v Georgiou & Anor; ex parte A-G (Qld)* [2002] QCA 206
PARTIES:	**R** **v** **GEORGIOU, Loizos** **EDWARDS, Leslie Arthur** **HEFEREN, Stephen Patrick** (appellants) **R** **v** **GEORGIOU, Loizos** **HEFEREN, Stephen Patrick** (respondents) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA 234 of 2001 CA 244 of 2001 CA 271 of 2001 CA 265 of 2001 CA 266 of 2001 SC 276 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction Sentence Appeals by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	14 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2002
JUDGES:	McPherson and Williams JJA and Atkinson J Judgment of the Court
ORDER:	**1. In CA No 234 of 2001, dismiss the appeal against conviction.** **2 In CA No 244 of 2001, dismiss the appeal against conviction.** **3. In CA No 271 of 2001, dismiss the appeal against conviction.** **4. In CA No 265 of 2001, dismiss the appeal against sentence.** **5. In CA No 266 of 2001, dismiss the appeal against sentence**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – PROSECUTION – VENUE – CHANGE OF – GENERALLY - whether pre-trial publicity has deprived the accused of fair trial – whether trial judge erred in failing to grant a change of venue

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES - whether evidence of prior convictions wrongly admitted necessarily leads to a miscarriage of justice – whether the same evidence admitted rightly and wrongly leads to prejudice

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL - INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – PARTICULAR MATTERS – SEPARATE TRIALS AND ELECTION – whether alleged offenders should be tried together unless jury directions inadequate to secure a fair trial - whether prejudicial statements admissible against maker, but not against subject of statement render joint trial unfair

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MURDER – CODE PROVISIONS - whether "prosecute an unlawful purpose" in s 302(1)(b) includes events subsequent to the acts which comprise the unlawful purpose

CRIMINAL LAW - ANCILLARY LIABILITY - COMPLICITY - STATUTORY PROVISIONS - CODE PROVISIONS - application of s 8 of the *Criminal Code* to a s 302(1)(b) murder - whether necessary to show accused realised co-accused meant to kill or do grievous bodily harm

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - CONSIDERATION OF SUMMING UP AS A WHOLE - whether possible misdirection corrected by re-direction

CRIMINAL LAW - ANCILLARY LIABILITY - COMPLICITY - STATUTORY PROVISIONS – AIDING, ABETTING, COUNSELLING OR PROCURING
CRIMINAL LAW - ANCILLARY LIABILITY - COMPLICITY - COMMON PURPOSE – CODE PROVISIONS – whether words "counselled" and "procured" requires further direction to the jury

Criminal Code 1999 (Qld) s 7(1)(d), s 8, s 23(1)(b), s 302(1)(a), s 302(1)(b)
Brennan v The King (1936) 55 CLR 253, applied
Hinch v Attorney-General (Vic) [1987] 164 CLR 15, applied
Montgomery v HM Advocate [2001] 2 WLR 779, discussed
Murphy v The Queen [1989] 167 CLR 94, applied
R v Georgiou, Edwards, & Heferen [2002] 1 Qd R 203
R v Raw (1984) 12 A Crim R 299, applied
R v Seiffert and Stupar (1999) 104 A Crim R 238, applied
Stuart v The Queen (1974) 134 CLR 426, referred to
The Queen v Barlow (1996) 188 CLR 1, applied
The Queen v Glennon [1992] 173 CLR 593, applied
R v Johnston [2002] QCA 74, applied

COUNSEL: P Callaghan for the appellant, Georgiou
TD Martin SC, with C Chowdhury, for the appellant, Edwards
GP Long for the appellant, Heferen
SG Bain for the respondent/appellant

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

[1] **McPHERSON, WILLIAMS JJA, ATKINSON J:**

EDWARDS (CA 244 OF 2001)

After a trial in the Supreme Court at Townsville, Edwards was convicted of the murder of a man named Bast, and Georgiou and Heferen were convicted of his manslaughter. Heferen was also convicted of breaking and entering a chemist shop and stealing therefrom, an offence associated with the killing. Each has appealed against conviction on a number of grounds.

[2] Prior to the trial in question, Georgiou and Edwards had pleaded guilty to the offence of breaking and entering and stealing from the premises of Northside Day Night Pharmacy in Bundock Street, Belgian Gardens, a Townsville suburb; formal admissions to that effect were made before the jury. That offence occurred about 1.30 am on 1 May 1999. Entry was gained by breaking glass at the front of the shop. Apparently the deceased, Bast, heard that breaking glass and left his nearby home obviously with a view to apprehending the offenders. There seems no doubt that the deceased, Georgiou and Edwards were on the street or footpath in the vicinity of the chemist shop when the deceased was fatally shot. A number of shots were fired, one of which struck the deceased causing his death. One can infer from the verdicts of the jury that Edwards was found to have fired the fatal shot, and Georgiou was guilty of manslaughter by operation of s 8 of the Criminal Code.

[3] The case against Heferen was purely a circumstantial one; there was no evidence actually placing him at the scene of the crimes at the material time. The prosecution case against him relied on s 7(1)(d) of the Code – counsel and procure – and section 8.

Change of venue

[4] Each of the three appellants applied at a pre-trial hearing for a change of venue from Townsville; the circumstances in which those applications were made are hereinafter set out. The applications were refused and the trial proceeded before a jury in Townsville commencing on 2 August 2001. Each appellant has now raised as a ground of appeal against conviction the trial judge's refusal to order a change of venue.

[5] As already noted the killing occurred on 1 May 1999. It is not surprising that, given the circumstances, it received extensive coverage in the media. The main headline in the Townsville daily newspaper on 3 May 1999 was "Death of a Hero". In the days which followed the media reported on the police investigation and the arrest of a number of persons over a period of days. The deceased came to be referred in many of the media reports as the "Good Samaritan". It is perhaps fair to say that the reporting made the crime more memorable than even most murders. At least one television bulletin asserted Edwards pulled the trigger.

[6] By about a week after the killing the media coverage slackened off. It commenced again with the committal hearing which extended (with adjournments) from October 1999 until about January 2000. Much of the evidence at the committal hearing was reported in the media, and again the description "Good Samaritan" was used in that reporting.

[7] The first trial of the appellants (together with a woman named Rice) commenced on 5 May 2000 in Townsville. There was almost daily reporting in the media of evidence at that trial; from time to time the deceased was referred to as the "Good Samaritan". The jury was out considering its verdict for some days before on 27 May 2000 finding Edwards, Georgiou and Heferen guilty of murder, and recording a disagreement with respect to Rice. There was fairly extensive, but brief, media coverage, particularly in Townsville, of the fact that the three had been found guilty of murder and sentenced to life imprisonment; they were described as murderers.

[8] In July 2000 there were television and print media reports of the fact that Edwards was dealt with by a court for shooting at a man at Charters Towers. Consequent upon a plea of guilty to an offence of threatening violence he was sentenced to two year's imprisonment. The publicity with respect to that incident and conviction appeared to be restricted to Townsville.

[9] As a result of one of the jurors at the first trial absenting himself from the place where the jury was being kept whilst deliberating, the Court of Appeal on 14 December 2000 quashed the murder convictions with respect to the three appellants and ordered a retrial; the reasons are reported at [2002] 1 Qd R 203. That decision received publicity over a short period of time in the media, both in Townsville and statewide.

[10] There was then the application for change of venue for the retrial which came before a judge sitting in Townsville on 18 April 2001. A report of that, including a report of submissions, appeared in the Townsville print media the following day. The expression "Good Samaritan" again appeared in that report. There was mention therein that the three had earlier been found guilty of murder but that conviction had been quashed on appeal.

[11] The second trial commenced on 2 August 2001 and the verdicts reached on 23 August 2001. During the second trial there was, as one would expect, media coverage of it.

[12] In support of the applications for a change of venue four affidavits from residents of Townsville were placed before the Court. Two of the deponents lived at the same address. In general terms each deposed to the fact that the community had been appalled by the "murder" and that it had been the subject of much discussion in the Townsville district.

[13] There was also evidence before the judge on the hearing of that application that the population of Townsville as at 30 June 2000 was approximately 144,000.

[14] The comment should be made that whilst most of the media reporting was centred on the Townsville area, some of the reports appeared in newspapers such as The Courier Mail which have a state-wide circulation. Further, one cannot say that because an article appeared in a Townsville paper it only came to the knowledge of people in that city. It is common in modern society for people to visit other cities and towns in the State, to carry newspapers with them as they do so, to communicate over some distance by telephone and in other ways, and generally to be more aware of what is newsworthy outside the immediate area of residence.

[15] In his reasons refusing a change of venue the judge concluded that "interest in the matter is largely confined to the Townsville area. Apart from some minor reporting of the death and the trial interest outside Townsville seemed confined to the unusual circumstances in which the appeals against conviction were allowed." He also referred to the fact that television coverage had been extensive with most reports containing a still photo of the deceased and a photo of Edwards. His Honour noted that in the period following the first convictions there was only little publicity.

[16] His Honour recognized the "general expectation that a trial will ordinarily be held in the place where the crime was committed" and said that was not displaced by the material then before him. He concluded that he was "not persuaded that there is a serious risk that the accused will not get a fair trial in Townsville". He noted the population of Townsville in that regard. After referring briefly to some authorities he ordered that the applications be dismissed.

[17] On the first day of trial, immediately after a jury had been empanelled, and before the balance of the panel were excused, the learned trial judge had the prosecutor read out the names of the witnesses he proposed to call. That procedure included identifying the deceased and the pharmacy which had been burgled. The members of the jury were then asked whether in the light of that information any of them had "any difficulty in deciding the case impartially?" By that stage any juror who recalled media publicity would have realised the case was about the killing of the "Good Samaritan". Two jurors responded that they felt they could not act impartially because of knowledge of or an association with a potential witness. Each of them was excused and replaced by two others from the panel. There was then an indication to the learned trial judge that no-one then empanelled had any difficulty in dealing with the case impartially.

[18] The learned trial judge gave some preliminary instructions to the jury with respect to the trial. In the course of that he said the following:

> "Now, the evidence is principally what is said by the witnesses in the witness box, and it includes any exhibits that are tendered in the course of the trial, and it's possible it may also include some evidence you will hear by telephone from one witness. Anything you've heard or read about the case, or anyone involved in the case outside the Court, isn't evidence. You shouldn't conduct any inquiries of your own outside the Court to verify evidence or fill in what you think are gaps in the evidence."

[19] Then immediately before the prosecution opened its case the learned trial judge said:

> "The other thing I omitted to tell you yesterday, which I'll do now, is that some of you may know, some of you may not, but it'll become apparent during the course of this trial, particularly when exhibits are tendered, that this is not the first trial in relation to these particular offences. That's why there are other markings on various exhibits that ultimately you will be seeing. The reasons why the first trial didn't conclude the matter will be of no interest to me and no interest to you, but I just thought I'd let you know in case you were curious about any markings on documents that that's the reason."

[20] Because three accused persons were on trial the learned trial judge in his summing-up dealt at some length with what constituted evidence and what use could be made of it. He emphasised more than once that each accused was entitled to have the case against him considered separately and only on evidence which was admissible against him. Then, in a passage which is of importance for present purposes, he instructed the jury as follows:

> "Now, you must not speculate. You must decide the case solely on the evidence. You must not have regard to anything you may have read or heard about the case outside the court room. For example, you have to disregard anything printed in the newspaper or shown on television, or any opinions expressed by friends or family members. Now, just remember, you have been in the court room for all of the evidence. No-one else, apart from myself, counsel and the accused, have been here for all the evidence. No-one else is therefore able to make a decision based on the evidence which has been presented in this case. In other words, no-one is better placed than you people to decide the guilt or innocence of these accused."

[21] Right at the end of the summing-up he also said:

> "Remember, members of the jury, this is not a matter of vigilante-ism or applying emotion or anything else to the exercise which you have to perform. You are to consider your verdict on the basis of the evidence against each accused separately and return it as dispassionately and cold-bloodedly in the sense of leaving outside influences out of it altogether as you are physically able."

[22] That provides the background in which this court must determine whether or not the appellants received a fair trial given that the change of venue application was dismissed.

[23] It is universally recognised that the test to be applied at the time of a pre-trial application for a change of venue is whether the risk of prejudice to a fair trial is so grave that no direction by the trial judge, however careful, could reasonably be expected to remove it. That is effectively the test derived from cases such as *The Queen v Glennon* [1992] 173 CLR 593, *R v Yanner* [1998] 2 Qd R 208, *Montgomery v HM Advocate* [2001] 2 WLR 779, and *Morris v The Queen*, unreported, Supreme Court of Victoria, JD Phillips J, 16 September 1991. Though that remains the core of the test, the position is somewhat different when the issue is raised on appeal after conviction. Mason CJ and Toohey J in *Glennon* at 606 stated that when the issue arises on appeal after conviction the issue "requires [the court] to be satisfied that there is a serious risk that the pre-trial publicity has deprived the accused of a fair trial. It will determine that question in the light of the evidence as it stands at the time of the trial and at the light of the way in which the trial was conducted, including the steps taken by the trial judge with a view to ensuring a fair trial."

[24] Here the jury heard evidence and addresses over some 13 days, and then took some two days deliberating on their verdict. There were some 45 witnesses called, whose evidence took up approximately 700 pages of transcript. That volume of evidence one would think would force into the background any recollection a juror may have of media reports of the crime published two years prior. It is difficult to imagine that a short report published approximately three and a half months before the commencement of the trial (the report of the change of venue application) would carry any weight in comparison with the volume of evidence put before the jury. As Lord Hope of Craighead said in *Montgomery* at 810:

> "The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witness may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media."

To similar effect is the observation of Toohey J in *Hinch v Attorney-General (Vic)* [1987] 164 CLR 15 at 74 that too little weight is often given to "the capacity of jurors to assess critically what they see and hear and their ability to reach decisions by reference to the evidence before them." (see also Brennan J in *Glennon* at 615).

[25] It is also significant to note that in the present case, so far as Edwards and Georgiou were concerned, there was no issue that they were involved in the burglary and were at the scene of the killing. Right from the time the prosecutor opened the case it would have been abundantly clear to the jury that Edwards and Georgiou were at the very least the burglars the deceased was trying to intercept at the time he was shot. Media publicity broadly associating them with the killing would therefore not have prejudiced their position.

[26] The media publicity, particularly in Townsville, did concentrate on Edwards, but it also included Heferen as one of the persons associated with the killing. Again given the evidence of association between Heferen and the other two, and the way in which the circumstantial case against him was put in the course of the summing-up, the earlier media reports would have had little or no impact on the jury's thinking.

[27] The major publicity occurred in the days immediately following the killing on 3 May 1999. There was then some publicity during the initial committal hearing (October 1999 to January 2000) and then more extensive coverage during the first trial (5 May 2000 to 27 May 2000). It was not submitted that the media coverage of the committal hearing and first trial was other than accurate reporting of evidence given.

[28] There was reporting of the fact that the Court of Appeal quashed the initial convictions and ordered a retrial, but that was extremely brief. The only other media reporting was of the application for change of venue, and again that was of brief duration. It is of some interest to note that the jury verdicts on the second trial were not the same as the first; the argument is not open that the second jury merely followed the first.

[29] Given that the second trial did not commence until 2 August 2001 none of that media coverage was likely to have had a prejudicial effect on the trial. Much was made in the course of argument about the use of the description "Good Samaritan" to refer to the deceased. That was no more than a description which the very circumstances of the killing evoked. A person on the jury hearing for the first time an outline of what happened in the course of the prosecutor's opening would be likely to think of that as being a fair description of the deceased. Being aware from earlier media reports that the deceased had been so described would not be likely to alter the attitude of a juror on hearing the evidence.

[30] Counsel for Edwards in the course of argument submitted that there would have been no administrative problems in transferring the trial from Townsville to Cairns. That may well be so, but it is doubtful that that would have significantly removed any risk of the appellants not having a fair trial because of prior media coverage. If the media publicity had the effect contended for by counsel for the appellants then the probability is that potential jurors in Cairns would have been just as affected as potential jurors in Townsville. At the initial hearing Rockhampton and Brisbane were also mentioned as possibly suitable venues.

[31] As already noted the population of Townsville relevantly was in excess of 140,000. That in itself distinguishes this case from that considered by JD Phillips J in *Morris*. There the population of Shepparton was such that there were some 32,000 people on the electoral roll. Perhaps of more significance in that case the deceased and the alleged killers, and their families, had a long and continuing association with the town. As the judge noted, the deceased and his family all grew up in Shepparton, married there, and were brought into contact with the public in their daily work. The real problem in that case was not so much the media publicity as the fact that such a large percentage of the population, and therefore of potential jurors, had direct contact with either the deceased or those involved with the killing. That is not the case here. It is not surprising that four deponents could be found to say the killing was for a period of time a topic of much discussion in Townsville, but that does not materially advance the argument of the appellants.

[32] Given the role played by the media in our modern society, media publicity, even sensational media publicity, about crime in general, and often about a particular crime, is only to be expected. The trial judge, who is in the best position to make the relevant risk assessment (cf *Boodram v Attorney-General of Trinidad and Tobago* [1996] AC 842 at 855 per Lord Mustill), must apply a "balancing

exercise … between the risk of oppression and the public interest that justice should be done and should be seen to be done." (per Lord Hope of Craighead in *Montgomery* at 808). The authorities indicate that in many, if not most, instances the risk can be met by the giving of directions (*Glennon* at 598 per Mason CJ and Toohey J and at 614 and 616 per Brennan J, and *Montgomery* at 801-2 per Lord Hope of Craighead). In many instances the assumption must be made that some jurors probably have some knowledge of the case from prior media reports and the risk to a fair trial thereby created is met by giving appropriate directions in the course of the trial. In that regard the reasoning of Mason CJ and Toohey J in *Murphy v The Queen* [1989] 167 CLR 94 at 99 is instructive:

> "But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury. The matter was put this way by the Ontario Court of Appeal in *R v Hubbert* (1975) 29 CCC (2 d) 279 at 291:
>
> > 'In this era of rapid dissemination of news by the various media, it would be naive to think that in a case of a crime involving considerable notoriety, it would be possible to select twelve jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence'."

[33] Applying all those considerations to the circumstances surrounding the second trial in question of the appellants it has not been demonstrated that the pre-trial media publicity deprived them of a fair trial. Given the nature of the evidence admissible against each, the delay between the most sensational reporting and the trial, and the directions given by the learned trial judge in the course of the trial, it has not been established that there is a serious risk that the pre-trial publicity deprived the appellants of a fair trial.

[34] There is one further argument raised on behalf of Edwards which should be noted. After his conviction at the first trial there was a media report in Townsville, as noted above, of his pleading guilty to an offence of threatening violence to a man at Charters Towers. It was submitted that in consequence there was publicity, likely to have come to the attention of potential jurors, that he had a prior conviction for violence. Mason CJ and Toohey J in *Glennon* at 604 noted that knowledge by the jury of a prior conviction for a similar offence stands in a different position from other prejudicial information. Wrongful reception of such evidence in the course of a trial frequently leads to a miscarriage and the discharge of the jury. But their Honours went on to say:

> "But it is important to distinguish between cases in which the jury are made aware of a prior conviction during the course of a trial and cases in which such awareness is not established. As McGarvie J acknowledged 'there is not an absolute insistence by the law that a jury have no knowledge of a prior conviction of an accused on trial'."

If the law were otherwise then a notorious criminal or, for example, a criminal who murdered a fellow jail inmate, could never be put on trial. As Brennan J observed in *Glennon* at 613:

> "If it were otherwise, the perpetrators of crimes which shock the public conscience . . . would often times go untried and unpunished, for pre-trial publicity prejudicial to an accused is stimulated by the notoriety of the accused and the heinousness of the crime."

[35] Here there was no reference to the Charters Towers offence in the course of the trial and there is nothing to suggest that any particular juror either had knowledge of it or gave weight to it. In the circumstances the submission is without substance.

[36] It follows that none of the appellants has established that he was deprived of a fair trial by the refusal to change the place of trial from Townsville. This ground of appeal is not established.

Separate trials

[37] Each of the three appellants at the pre-trial hearing applied for separate trials. That was refused. Each then relied on that refusal as a ground of appeal against conviction, but only counsel for Edwards made it the subject of submissions on the hearing of the appeal.

[38] On the hearing of the pre-trial application Georgiou only sought a separate trial from Edwards. Each of Edwards and Heferen sought a separate trial at which each alone would be an accused. Each of Edwards and Heferen relied on the fact that the prosecution proposed to lead in evidence statements from each of them, admissible against the maker, but inadmissible and highly prejudicial with respect to the other. The learned judge at first instance referred to *Webb v The Queen; Hay v The Queen* [1994] 181 CLR 41 and *R v Davidson* [2000] QCA 300. He concluded that prima facie each of the alleged offenders should be tried together unless it was demonstrated that appropriate directions as to the use which could be made of evidence by the jury would be inadequate to secure a fair trial. In his view appropriate directions were sufficient in the circumstances to ensure a fair trial.

[39] Though none of the three appellants gave evidence at trial counsel for each in the course of the trial, and in final addresses, put as a proposition to witnesses or raised as a suggestion for consideration by the jury that the actual killer was someone other than his client. There was even a suggestion raised during the trial that a third person, unidentified, was present and fired the fatal shot. In those circumstances it was clearly appropriate that the charges against each of the three be heard together.

[40] On the hearing of the appeal it was submitted on behalf of Edwards that he was denied a fair trial because of the seriously prejudicial statements by Heferen in his interview with the police. That statement was of course admissible against Heferen, but it was conceded at the trial that it was inadmissible against Edwards.

[41] The prejudicial material included statements that:

> Edwards had made a number of attempts in Mackay to break into chemists and steal drugs;
>
> Edwards always had a gun with him;
>
> Edwards had the idea in his head that the gun was the only thing protecting him from going to jail;

> He had seen Edwards in possession of a firearm on all the occasions he had ever seen him.

[42] The most critical issue on the trial of Edwards was whether or not he had possession of a gun at the time of the shooting. In those circumstances the possible prejudicial effect of Heferen's statements is obvious, particularly as they were not limited to the occasion in question.

[43] There was, however, other evidence on which a jury, properly instructed, could find that at the material time Edwards had a gun and was the person who in fact shot the deceased.

[44] Throughout the trial the judge was at pains to draw to the attention of the jury the limited use they could make of evidence they were about to hear. On almost all, if not all, occasions evidence was led which was limited to the trial of one of the three accused, the learned trial judge indicated to the jury the limited use they could make of the evidence. That was a theme that recurred on numerous occasions throughout the summing up.

[45] On the appeal there was no attack by any appellant on the summing up or the actual directions given from time to time by the learned trial judge with respect to the use the jury may make of evidence. The proposition advanced was simply that, so far as Edwards was concerned, the jury had knowledge of a highly prejudicial matter which was inadmissible against him and that in those circumstances this court should conclude that he did not get a fair trial.

[46] It has not been demonstrated that the learned judge at first instance erred in not ordering separate trials, and a review of what occurred at the trial does not establish that Edwards did not have a fair trial. The jury was directed repeatedly as to the limited relevance of the evidence in question and there is no reason to believe that the jury did not follow those directions in the course of their deliberations. This ground of appeal is not established.

Inadmissible evidence

[47] The Crown sought to tender a statement made by Heferen to police as evidence against him. Counsel for Edwards objected to certain paragraphs in that statement on the ground that they were so prejudicial to Edwards that they should be excluded. The learned trial judge acceded to that submission and ordered that certain paragraphs, including paragraph 31, be excluded from the statement. The edited statement became exhibit 143 and it was read to the jury by the trial judge's associate. At the conclusion of the reading of the statement it was realised that paragraph 31 had not in fact been edited out, and it had been read to the jury.

[48] Paragraph 31 was in the following terms:

> "The reason why I grabbed the gun and cut it into pieces was because I was scared for the safety of my family and Louis Georgiou. I thought if I cut Les's rifle up he could not use it and hurt anyone else. Les did not ask me to cut the rifle up for him."

[49] In the course of Heferen's lengthy recorded interview with police officers, which was admitted into evidence against him, the following passage appeared without objection:

> "He [Edwards] went to the toilet and I grabbed the rifle straight away, took it over to the saw and chopped it in half straight away. I think I got to chop it again, most of the way through it and the saw jammed … We unstuck the saw, Les had then gone and got what was left of the gun, the firing mechanism and put it in a vice, screwed it up tight and started smashing it with a hammer … He got all the pieces that were there and put them inside a plastic bag and I didn't take any notice then of what he did with them, I was just glad that I felt myself and my brother, my mother and anyone around us was not in any direct danger of being hurt by that gun … I was a bit worried for Louie myself cause Les was pretty genuinely up - you know – not too sure about what Lou would say or do."

[50] Once that passage was before the jury there was really no point in raising any objection to paragraph 31. The passage in the recorded record of interview went at least as far as what was stated in paragraph 31. Both passages, of course, were admissible only against Heferen and it is difficult to see how any prejudice could have accrued against Edwards merely because paragraph 31 unintentionally went before the jury.

[51] There is no substance in that ground of appeal.

Application of s 302(1)(b) of the Criminal Code

[52] Before the jury the prosecution relied upon s 302(1)(a) or s 302(1)(b) of the Criminal Code in support of its case against Edwards. Pursuant to s 302(1)(a) the prosecution had to prove beyond reasonable doubt that Edwards had an intention either to kill or cause grievous bodily harm when he discharged the firearm. If that was not established to the satisfaction of the jury then a verdict of murder could still be returned if the death was caused by means of an act done in the prosecution of an unlawful purpose. The offence which was central to that unlawful purpose was the breaking and entering of the chemist shop and stealing drugs therefrom. The submission on behalf of Edwards (and also Heferen) was that the offence of burglary had been completed before the shooting and therefore it could not be said that the shooting was an act done in the prosecution of an unlawful purpose.

[53] It is, however, important to recognise that the section speaks of "unlawful purpose" and not "offence". The unlawful purpose is therefore not limited to the strict elements of an offence. Any act done in the course of attempting to get away after the commission of an offence would be an act done for an unlawful purpose. In particular cases a question may arise as to when the "unlawful purpose" associated with the commission of an offence had ended, but such an issue does not arise here. The killing occurred very shortly after the breaking and entering of the chemist shop, on the street outside the shop, before the burglars had left the scene, and with a view of avoiding apprehension for the offence.

[54] Counsel for Edwards quite properly referred the court to two decisions of the Court of Criminal Appeal in Western Australia which were against his argument. In *R v Raw* (1984) 12 A Crim R 299 and *R v Seiffert and Stupar* (1999) 104 A Crim R 238 it was held that the expression "prosecute an unlawful purpose" could include events subsequent to the acts which actually comprise the unlawful purpose, such as departing the scene and resisting any action on the part of another to interfere with that departure. (*Raw* at 305 per Brinsden J and *Seiffert and Stupar* at 258 per

Pidgeon J). In the latter case at 245-6 Pidgeon J notes that Sir Samuel Griffith in drafting the Code altered the common law by using the term "unlawful purpose" rather than "offence" in s 302(1)(b).

[55] In the circumstances there is no substance in this ground of appeal.

[56] It follows that the appeal by Edwards against his conviction should be dismissed.

GEORGIOU: (CA 234 OF 2001)

[57] Georgiou pleaded guilty to the offence of breaking and entering the pharmacy premises. He pleaded not guilty to murder, but was convicted of manslaughter and sentenced to imprisonment for eight years. He now appeals against his conviction for manslaughter, and the Honourable the Attorney-General appeals against the inadequacy of the sentence imposed on him.

[58] At the hearing of the appeals Mr Callaghan of counsel was given leave to withdraw the existing grounds of appeal and to substitute the following:

Ground 1. That the verdict is unsafe and unsatisfactory.

Ground 2. That the learned trial Judge erred when he refused to accede to a change of venue application.

Ground 3. That the learned trial Judge erred in the manner in which he directed the jury that they might find the Appellant criminally responsible for the offence of manslaughter.

As regards ground 2 (change of venue), Mr Callaghan acknowledged that Georgiou's appeal essentially stood or fell with that of Edwards, whose case for a change of venue was, if anything, stronger than Georgiou's. Since we are dismissing the appeal by Edwards directed to that ground, the same ground in Georgiou's appeal must necessarily also fail. With that in mind, we turn to the other two grounds in Georgiou's appeal. For this purpose it is necessary to repeat some of what has been said about the circumstances leading to the conviction of Edwards on the charge of murder.

Criminal responsibility: Code: Section 8

[59] The prosecution case charging Edwards with murder was based on s 302(1)(a) or alternatively s 302(1)(b) of the Criminal Code. Under the first of these provisions the Crown was required to prove that Edwards fired the shot that killed his victim, and that he did so meaning to kill or do grievous bodily harm. Under the second of them, it was required to prove that the victim's death was caused by means of an act done in the prosecution of an unlawful purpose that was an act of such a nature as to be likely to endanger human life. One may perhaps hazard the guess that the jury found Edwards guilty of murder under s 302(1)(a) rather than s 302(1)(b) but the possibility exists that it might have been the latter.

[60] In either event, criminal responsibility for the murder by Edwards was sought to be attributed to Georgiou on the basis of s 8 of the Criminal Code. Under that section criminal responsibility for an offence attaches when the following requirements are satisfied; that is, that (1) it is an offence of such a nature that (2) its commission was a probable consequence of the prosecution of an unlawful purpose

(3) formed of a common intention by two or more persons to prosecute that purpose in conjunction with each other. In the case of a murder charge based on s 302(1)(a), the application of s 8 is relatively simple. A person in the position of Georgiou is not criminally responsible under s 8 for the murder committed by Edwards unless he knew that Edwards probably meant to kill or do grievous bodily harm. *The Queen v Barlow* (1996) 188 CLR 1.

[61] The application of s 8 to a murder charge under s 302(1)(b) presents greater difficulties partly because there is a considerable degree of overlapping between those two provisions. In both, the relevant homicidal act must have been done in the prosecution of an unlawful purpose, and in both the act or its results must be of such a nature as to be a probable consequence of the prosecution of that purpose: s 8; or be of such a nature as to be likely to endanger human life: s 302(1)(b). There are in this respect slight verbal differences between the two formulations, but their practical effect is in the end much the same. The fundamental difference is, of course, that s 8 postulates two or more persons forming a subjective common intention to prosecute an unlawful purpose, whereas s 302(1)(b) embodies no such requirement. It may be that, before s 8 can operate to impose criminal responsibility for murder as secondary offender in the prosecution of a purpose under s 302(1)(b), it is, by analogy with *Barlow v The Queen*, necessary for the Crown to prove that the secondary offender knew at least that an act likely to endanger human life was going to be done by the primary offender. Subject to those considerations, it seems that the question whether or not the prerequisites of those two provisions are fulfilled is an objective one: cf *Stuart v The Queen* (1974) 134 CLR 426, 442.

[62] It is, however, not necessary for present purposes to pursue this question because Georgiou was found guilty not of murder but of manslaughter. For that outcome to be established by the application of s 8 to a murder under s 302(1)(b) committed by Edwards, it would not have been necessary to prove that Georgiou realised that Edwards meant to kill or do grievous bodily harm. It would have been enough for the prosecution to prove that Georgiou was a party to a common intention or plan to prosecute or carry into effect an unlawful purpose in conjunction with Edwards, as to which it was a probable consequence that Edwards "would if necessary, use violence and such a kind or degree of violence as would probably cause death". The words are quoted from the joint judgment of Dixon and Evatt JJ in *Brennan v The King* (1936) 55 CLR 253, 264; cf per Starke J, at 260, where his Honour spoke of the participants all contemplating and intending "an unlawful act, namely, an assault upon the caretaker". See also *R v Jervis* [1993] 1 Qd R 643, 650.

[63] In the present case, the common intention of prosecuting an unlawful purpose in conjunction was clearly established. Georgiou admitted to police that he was present when the pharmacy was broken into by Edwards and also when the victim was shot. He pleaded guilty to the offence of breaking and entering. He said, however, that his sole function at the pharmacy was to point out the Sudafed tablets to Edwards, who was illiterate and could not identify them without assistance. Standing alone, this would not have been enough to attract to Georgiou criminal responsibility under s 8 for the killing that ensued. He said that the first he knew of the gun was when Edwards produced it and began firing at his victim. There was, nevertheless, evidence from Det Snr Const Gordon that, after holding a series of video taped interviews with Georgiou, there had been a further unrecorded conversation in which Georgiou had said he had seen the gun when he and Edwards

arrived at the shops at Garbutt preparatory to breaking in. Gordon's evidence, or the circumstances in which that statement was obtained from Georgiou, raised suspicions about its reliability; and, in summing up, his Honour clearly stated its weaknesses to the jury. After being fully warned, they nevertheless accepted and acted upon it. They were entitled to do so, and the fact that they did so is, in the light of his Honour's stringent warning, not sufficient to demonstrate that the verdict ought to be set aside as unsafe or unsatisfactory. Counsel for Gerogiou on appeal acknowledged that the summing up on the issues of the reliability and acceptability of Gordon's evidence could not have been bettered. Ground 1 therefore cannot succeed.

[64] In *Brennan v The King*, the applicant for leave to appeal to the High Court had been convicted of manslaughter arising out of a plan formed with others to enter and steal from a jeweller's shop using force if necessary to overcome resistance from the caretaker. In carrying out the plan, the caretaker was killed by the others who entered the shop while the applicant Brennan was keeping watch outside. In their joint judgment, Dixon and Evatt JJ said (55 CLR 253, 265) that under s 8 he would be guilty of manslaughter "only if the plan was of such a nature that the use of enough violence to cause death appeared a probable consequence of carrying it out". Their Honours went on:

> "The practical result is that the applicant would not be guilty of manslaughter unless he knew that his confederates … intended to commit at least a common assault upon the caretaker …".

In that case, a new trial was ordered because, in giving directions at the trial, the judge had withdrawn from the jury the question whether there was a common intention to use violence on the caretaker to carry out the crime of shop breaking.

[65] No difficulty of the kind encountered in *Brennan v The* King arises on the appeal in this case. Once it was proved that, before the breaking and entering took place, Georgiou knew that Edwards had a firearm with him, it was open to the jury to infer that Georgiou also knew and intended that Edwards might use the gun to subdue, or defeat resistance to, their common plan to break into and steal from the pharmacy and make good their escape. The significance of that knowledge was not lost on the jury, one of whom asked several questions about the time at which it was necessary for the appellants other than Edwards to be shown to have had known of the firearm. As in *Brennan v The King*, it therefore became legitimate for the jury to infer beyond reasonable doubt that Edwards would, if necessary, use violence and such a degree of violence as would probably cause death, or that he intended to commit at least a common assault in order to effect their purpose of stealing and escaping from the pharmacy. Given a finding that, before the pharmacy was broken into, Georgiou knew that Edwards had a firearm with him, it was open to the jury to convict Georgiou of manslaughter of the victim as a person killed while trying to prevent their escape from the scene of their crime.

"Possible" and "probable"

[66] The remaining question is whether the learned trial judge correctly directed the jury in accordance with these principles. In relation to manslaughter, s 8 called for a direction that the killing was a probable consequence of carrying out the plan to break into the pharmacy and escape at a time when one of the offenders (Edwards) was known by Georgiou to be carrying a firearm. At some stages in summing up under s 302(1)(b), his Honour used expressions that stated or implied that Edwards would be guilty of manslaughter if he, or somebody in his position, had foreseen

that death was a "likely or possible" outcome of his actions. The reason this was said was because of the provision in s 23(1)(b) relieving a person of criminal responsibility for an event that occurs by accident: see *Stuart v The Queen* (1974) 134 CLR 426, 438. The decision in *Kaporonovski v The Queen* (1973) 133 CLR 209, 231-232, and the later decision of this Court in *R v Taiters, ex p Attorney-General* [1977] 1 Qd R 333, 335, have established that an event like death is not an "accident" within the meaning of s 23(1)(b) if it was an objectively foreseeable possible consequence of an accused person's act. Shooting at or in the direction of a pursuer would ordinarily satisfy that test. In giving his directions on this matter his Honour may on occasions have referred to "likely" and "possible" as if they were synonyms, which does not accord with the generally accepted meaning of those two words. In the case of Edwards, this error, if that is what it was, can only have been favourable to him because he was liable to be found guilty of manslaughter if death was no more than a foreseeable outcome or result of his shooting at his victim. As it is, the question never arose in his case because he was in fact found guilty of murder either under s 302(1)(a) or s 302(1)(b).

[67] Such errors are, however, said to have recurred in the summing up when his Honour gave directions about the potential of Georgiou and Heferen to be found guilty of manslaughter as a result of applying s 8. It is, however, not clear that any of the offending passages in which probability and possibility were equated were directly related to those two appellants as distinct from Edwards. The exempting provisions of s 23(1)(b) (accident) do not apply under s 8, which embodies its own test of criminal responsibility; that is, whether the offence is a *probable* consequence: see *R v Solomon* [1959] Qd R 123, 129, 133; *Stuart v The Queen* (1974) 134 CLR 426, 442, 444. There are, however, some passages in the summing up that appear to be unduly complex or perhaps at times even confused. If matters had been left there, it would be necessary to consider whether the jury had been properly directed. The jury, however, evidently applied themselves to their task with some care and attention. By the time they reached the afternoon of the second-last day of the trial they were, judging by their requests for redirections, focussing on the criminal responsibility, if any, of Georgiou and Heferen, and they asked to be redirected on the operation of s 8 of the Code.

[68] In particular, Juror no 2, who appears to have had a sound grasp of the issues involved, asked for a redirection on manslaughter. His Honour read out s 8 in full and explained that what it meant was that, if two or more people plan to do something unlawful and, in carrying out that plan, another offence is committed, then all who worked out the plan together are guilty of that second offence, provided it was the kind of offence that is likely to have been committed in the course of carrying out the planned offence. He then repeated the same proposition more succinctly, again adding the proviso that it must be the sort of offence that is the probable consequence of carrying out the plan. Having said this, his Honour explained to the jury the significance of knowing, and of not knowing, that one of those carrying out the breaking and entering had a gun. Speaking of "any person involved other than the shooter", he concluded this part of the summing up by saying:

> "They would be liable [under s 8] for the plan to break and enter if they were involved in that; but, unless it was a probable consequence of the break and enter, then they would not be liable for the more serious consequences of the shooting."

Juror no 2 then asked whether, having committed the breaking and entering and left the scene, it was all part of what was done in the execution of the crime planned. As to that, it was, his Honour said, a matter for the jury to decide when the plan or purpose was exhausted and whether it extended to removing the drugs and escaping. This accords with the Western Australian decisions *R v Raw* (1984) 12 A Crim A 229, and *R v Seiffert and Stupar* (1999) 104 A Crim A 238, which have been referred to earlier in these reasons.

[69] On the morning of the final day of the trial a further redirection was given at the request of the jury about the operation of s 8 and the relevance of knowledge that Edwards had a gun. His Honour said:

> "… you will remember that to be liable under s 8 as a secondary offender there has to be a plan, and it has to be a probable consequence of the plan; in order to convict of either manslaughter or murder, the very least or first step is that it has to be a probable consequence that somebody might get shot.
>
> Now if there is not any evidence or is not sufficient evidence to satisfy you that one or other of the two people not alleged to be the shooter, that is either Mr Heferen or Mr Georgiou, did not know there was a gun there, it seems to me to be very difficult to conclude that the fact of a plan to break and enter a chemist shop can have as a probable consequence somebody getting shot. It really needs to have a gun there to make it even arguably a probable consequence, it seems to me."

His Honour then went on to deal with a further question about how long before the event an accused had to know of the gun in order to be convicted of manslaughter; and, in answer to a further inquiry from Juror no 2, to suggest (what was perhaps obvious) that it was unlikely that a break and enter without a gun could lead to a shooting. The jury retired at 11.24 am and, at 3.02 pm on that day, returned verdicts of manslaughter against Heferen and Georgiou.

[70] In our opinion, and irrespective of any earlier confusion, if any, between "possible" and "probable", or "likely", consequences, his Honour had, in what he said in his directions to the jury on the second-last and final days of the summing up, made it clear that verdicts of manslaughter against either Georgiou or Heferen could be arrived at only if they concluded that the shooting and killing was a probable consequence of carrying out a common intention to break and enter the pharmacy with Edwards, knowing him to be carrying a firearm. In our opinion the third of Mr Georgiou's amended grounds of appeal has not been made out, and his appeal against conviction should be dismissed.

HEFEREN: (CA 271 OF 2001)

[71] Like Georgiou, Heferen was convicted of manslaughter, against which he appeals. He was sentenced to imprisonment for eight and a half years, against which the Attorney-General has also appealed on the ground of its inadequacy. Heferen's position differs from that of Georgiou in that it does not appear that he was actually present when the breaking and entering of the pharmacy or the killing of Bast took place. Unlike Edwards and Georgiou, he did not plead guilty to the count of break, enter and steal. He was convicted on that count and of manslaughter by the jury at the trial. With the concurrence of the prosecution, the trial judge ruled

that the prosecution case could not be put on the basis that Heferen was present at or near the pharmacy and therefore physically participating in the break, enter and steal. His Honour so instructed the jury, directing that, as a matter of law, they could not convict Heferen of either count on the basis that he was present at the scene on that night.

[72] Like Edwards and Georgiou, Heferen argued that the learned trial judge should have acceded to his application for a change of venue, but like Georgiou accepted that this ground of appeal stood or fell with that of Edwards. The second ground of appeal which he pursued was the ground of appeal unsuccessfully relied upon by Edwards that the shooting could not be said to have been carried out in the prosecution of an unlawful purpose. For the reasons already given, both of these grounds of appeal must fail. A third ground of appeal raising the inadequacy of the trial judge's directions as to s 8 must also fail for the reasons given with regard to Georgiou.

Sections 7 and 8: Evidence

[73] On appeal Heferen was granted leave to add the following grounds of appeal:

> "23. The verdicts are unreasonable and cannot be supported having regard to the evidence and/or there has been a miscarriage of justice because of a real doubt which is raised as to whether these convictions are safe or just.
>
> 24. That a substantial miscarriage of justice occurred due to the failure of the trial judge, in his directions to the jury, to:
> (a) adequately identify the real issue in this case; and,
> (b) consistently and fully direct the jury as to the legal principles applicable to sections 7 and 8 of the Criminal Code."

[74] These grounds of appeal essentially raise two related questions: whether there was sufficient evidence against Heferen for him to be safely convicted; and whether the jury was properly directed as to the legal basis on which criminal responsibility could be attributed to Heferen. Only if these questions were answered in the affirmative could the conviction of Heferen be considered safe.

[75] The prosecution case against Heferen was that he counselled and procured Edwards to commit the breaking and entering of and stealing from the pharmacy and so was guilty of that offence as a party under s 7(1)(d) of the *Criminal Code*. The proof of that offence established a common intention to prosecute an unlawful purpose in conjunction with another. Like Georgiou, Heferen would be responsible for the killing under s 8 of the *Criminal Code* if it was the kind of offence that was likely to be committed in the course of carrying out the planned offence: *R v Johnston* [2002] QCA 74 at [27]-[28]. The judge's directions made it plain to the jury that the prosecution would have to prove to the requisite standard that Heferen not only counselled and procured Edwards to commit the robbery, but knew that, when he did so, Edwards would be carrying a loaded gun, before the killing could be said to be a probable consequence of the prosecution of that unlawful purpose or plan. It is unnecessary to revisit the directions given with regard to s 8 of the *Criminal Code*.

[76] In order to determine whether it was open to the jury to be satisfied beyond reasonable doubt of the guilt of Heferen, it is necessary to look at the evidence and directions given with regard to the offences of which he was convicted.

Directions on s 7

[77] The directions given to the jury with regard to criminal responsibility pursuant to s 7 of the *Criminal Code* were that Heferen was guilty of the offence of breaking, entering and stealing if he counselled or procured Edwards to commit that offence. On appeal it was argued that the direction was inadequate because it provided no explanation as to what is required to constitute counselling or procuring and that it could not be constituted by mere knowledge that an offence would be committed.

[78] Various synonyms have been used in other cases for the word "counselled". In *Stuart v The Queen* (1976) 134 CLR 426 at 445, Gibbs J used the terms "urged" or "advised" to elucidate the meaning of "counselled". In *R v Calhean* [1985] 1 QB 808 at 813, Parker LJ referred to the trial judge's use of the words "advise" or "solicit" to explain the ordinary meaning of the word "counsel". No doubt such explanation may be useful to a jury where the words chosen are truly synonymous but such explanation is not essential. If the explanation is inaccurate because the words are not synonyms, the direction given will be misleading. In *R v Hutton* (1991) 56 A Crim R 211 at 214-215, for example, it was held that it was incorrect for the trial judge to have used the word "instigated" as synonymous with "counselled".

[79] The words "counselled" and "procured" are ordinary English terms having their usual meaning. Where their meaning is clear, no further explanation is necessary in a direction to the jury. Their ordinary meaning does not encompass simply knowing about the intention to commit an offence and while a direction to that effect could do no harm, it could not be said that the failure to give such a direction rendered this conviction unsafe. It was not alleged by the prosecution that Heferen simply knew about the intention to commit an offence.

The evidence against Heferen

[80] The case against Heferen relied on circumstantial evidence. The Crown relied in particular on the association between Heferen, Edwards and Georgiou, evidence given by Sharon Nangle about Heferen's participation in a plan to break and enter the pharmacy, a drive-by of the pharmacy which was later broken into, a visit by Edwards to Heferen and a phone call from Heferen's phone to Edwards' residence not long before the break and enter, Heferen's involvement in the destruction of the gun on the following day and the contents of his interview with police on 26 May 1997 and a statement signed by him and given to police.

[81] When the evidence is examined in detail, it is apparent that the jury could have been satisfied that the only rational inference open from the whole of that evidence was that Heferen had counselled and procured Edwards to commit the breaking and entering of and stealing from the pharmacy; that Heferen knew that Edwards would be carrying a loaded firearm and that, therefore, killing was a probable consequence of carrying out the unlawful purpose.

[82] The evidence showed that Heferen moved into a motel not far from the Northside Day Night Pharmacy two days before the offences were committed. On the day preceding the break and enter of the pharmacy, Heferen was involved in a

series of meetings with Edwards and Georgiou and another man, Hancock, who was not involved in the commission of the offences. Edwards was armed with a rifle and ammunition. Heferen was, at that time, driving a borrowed utility, Edwards, a white hatchback and Georgiou, an orange car which apparently belonged to Heferen.

[83] Sharon Nangle stayed in the motel with Heferen. She gave evidence as to a meeting on the same day between Heferen, Edwards and Hancock as follows:

> "… What were they doing? … - They were just visiting. They were, yeah, just visiting. We were all just running a big muck.
>
> Mmm. Well, what was talked about, if anything? - Okay, um, getting Sudafed.
>
> Right. Who talked about what? - Um, geez - um, I can't really like - all I can say is that they were talking about getting Sudafed, how they were going to get the Sudafed.
>
> Who was involved in that discussion? - Um, I recall Les [Edwards], um, Stephen [Heferen] and I think Hancock.
>
> And was there any discussion amongst those as to how they were going to get Sudafed? - Ah, from a chemist.
>
> Mmm. But how? - Um, being a break and enter."

[84] Later that night, Edwards and Heferen drove past the Northside Day Night Pharmacy in Belgian Gardens, which was the pharmacy broken into in the early hours of the next morning. Heferen said that Edwards asked him to pull up in front of the pharmacy. In his interview with the police he continued:

> "I was aware that Les [Edwards] couldn't read or write and that Les had recently been into a bit of mischief of helping himself to, ah, grabbing some goods from, ah, the chemists in Mackay, he had a couple of attempts in Mackay, try and steal, um, I think it was Sudafed he was after. Ah, there was a - a dealer in Mackay that had worded him up that if he was able to obtain this, ah - this tablet from the - from the chemist, ah, he in return would get amphetamines for it. Um, I know that Les had a couple of attempts in Mackay and because he couldn't read or write he'd, ah, obtained everything except the drug that this, ah, bloke had wanted him to get. Um, when we pulled up at the chemist there I knew that in mind his motives were to ask me to point out to him whereabouts, ah, on the shelves - if I could see them, ah, where this drug was that he - that he needed. Um, I - I couldn't be sure, and I couldn't see them there to identify them to him positively, um, I told him that because there didn't look like there'd be much security on the chemist didn't mean that there wasn't much, I said that probably once you were inside the alarms would go off and - and whatever. Um, I had no part in wanting to organise any break and enter with him on - on a chemist at all but, um, I felt obliged just to not treat him like an idiot and - and sort of knew what - what he was after. We left from there, um, went around to me mum's, ah, we didn't stop there long for any particular reason

> and went back to the Adobi Motel. This would have been probably about 8.30, 9 o'clock maybe at the latest. Um, I asked, um, told Les to just quit for the night and we'd get another vehicle and go to Mackay the next day. He took the Hilux and left me there, um, with Sharon Nagles on - on our own. He - and took the Hilux over to his place, where he was staying and as far as I know he was, um, stopping there for the night and he - he was stopping with his girlfriend for the night and that was that."

Heferen said he told Edwards not to involve Georgiou. In his signed statement to police, Heferen said of this incident:

> "As we neared Northside Pharmacy on Bundock Street, Belgian Gardens Les indicated for me to pull over outside the Chemist as he wanted me to show him something. This would have been about 7.30 pm. I pulled over right outside the Pharmacy on Bundock Street facing inbound on the inbound lanes. We both got out of the Hilux and went stood right outside the front windows of the Pharmacy. Les then asked me if I could point out the Sudafed to him. Although I saw some Sudafed on the shelves in the Pharmacy, I decided not to tell Les where they were. I also told Les that there was an alarm in the Pharmacy. I know that there is an alarm because some time ago someone I know told me that he had broken in and the alarm went off. I believed that Les was going to try and break into the Pharmacy so I told him that he should forget about it and go home and sleep."

[85] The judge properly instructed the jury that if they accepted Heferen's statement then they would find him not guilty; and that if they did not accept that he was counselling Edwards against breaking and entering the pharmacy, then it did not necessarily follow that he must have been counselling Edwards to commit the break and enter. They could, however, take it into account, together with the evidence given by Ms Nangle of the earlier discussion about breaking into a pharmacy to steal Sudafed, as part of the circumstantial evidence against Heferen.

[86] Part of the case against Heferen was the evidence that he knew that Edwards always carried a loaded rifle with him. The trial judge properly instructed the jury that before they could convict Heferen of manslaughter, they would have to be satisfied (to the requisite standard) that Heferen knew that Edwards would be carrying a loaded rifle and that it was a probable consequence of the plan to break and enter the pharmacy that someone might get shot. There was clear evidence given by Heferen in his statement to the police that he knew Edwards always carried a loaded gun.

[87] There was evidence of further contact between Heferen and Edwards, both in person and by phone, later that night after their visit to the pharmacy. The evidence of contact between Heferen and Edwards shortly before the offences were committed was another part of the circumstantial case against Heferen.

[88] Edwards was then seen to get Georgiou in Heferen's borrowed utility. They then used the white hatchback to commit the offences. The break, enter and steal of the Northside Pharmacy in Belgian Gardens, to which Edwards and Georgiou pleaded guilty, and the shooting of Mr Bast, occurred about an hour later at 1.30am.

Ms Nangle's evidence was that Heferen was beside her in the bed at the motel at that time.

[89] On the next morning, Edwards arrived at the motel in the hatchback and picked up Heferen. Heferen noticed that there was a .22 calibre rifle wedged between the driver's seat and the centre console. Heferen said that Edwards told him, while they were driving, that he had shot a man at the pharmacy "earlier that night". Heferen then received a phone call to the effect that the man who had been shot had died. Heferen got out of the car because, as he said, he did not want to be caught with Edwards. He said Edwards then went on alone and he followed him later on in a taxi. They both went to a steel fabrication business owned by Heferen's brother, David.

[90] At about 9 or 9.30 on the morning of 1 May, i.e. about 8 hours after the offences at the pharmacy, David Heferen arrived at his business to find his brother, Stephen, and Edwards together in a room known as the print room. David Heferen went into the workroom to attend to his work. About 10 minutes later, Stephen Heferen came out of the print room into the workroom with the .22 calibre rifle with which Bast had been shot. The rifle's barrel had been shortened and the stock cut back.

[91] Heferen said he went over to the drop saw and tried to cut through the bolt area of the gun to immobilise it. The saw blade jammed and the motor stalled. Edwards then came into the workroom and started "bashing" the rifle against the vice on the bench. Pieces flew off the gun. Edwards and Stephen Heferen left about 10am or 10.15 taking with them a white carry bag containing the broken pieces from the rifle and a red toolbox which David Heferen had never seen before from the print room. Heferen said the only time he had ever seen Edwards without a loaded gun was when the rifle had been destroyed.

[92] Edwards, Georgiou and Heferen went out in the car later that day with the rifle pieces and Edwards disposed of them in a rubbish bin at a shopping centre. The borrowed utility was later found abandoned in a dead-end street not far from the motel.

[93] At 7 o'clock that night the police arrested Edwards after finding him at a house in another suburb of Townsville where a woman called Stephanie Grant lived. On the following day, 2 May, the morning after Edwards was taken away by the police, a man identifying himself as Cowboy (which was Heferen's nickname) rang Ms Grant and asked to speak to Edwards. She told him that Edwards had been arrested.

[94] Later that day, Heferen and Georgiou left Townsville together and drove to Mackay. Georgiou subsequently went back to Townsville in Heferen's orange car. Heferen went on to Bundaberg as he said to keep out of the way of the police.

[95] On 4 May, Georgiou was found at a residence at Townsville. Heferen's orange car was found in the yard. When the police searched the premises of David Heferen's steel fabrication business that day, they found a bag which contained pharmaceuticals some of which came from the Northside Day Night Pharmacy and an empty .22 calibre ammunition box. Ms Nangle said she took the drugs which she got from Edwards and Hancock as the result of a "botched-up robbery" to David

Heferen's workshop. Heferen, on the other hand, said that Edwards had taken the bag full of prescription drugs to the workshop.

[96] This was the circumstantial evidence from which the jury found, as they were entitled to, that the only rational inference open to them was that Heferen counselled and procured Edwards to break, enter and steal at the pharmacy; and that Heferen knew that Edwards would be carrying a loaded rifle when he committed that offence and that, therefore, a killing was a probable consequence of the carrying out of the unlawful purpose.

[97] It follows that there was sufficient evidence against Heferen for him to be safely convicted and that the jury was properly directed as to the legal basis on which criminal responsibility could be attributed to Heferen. The appeals against conviction must be dismissed.

Sentence appeals

1. Georgiou: CA 265 of 2001

[98] As has been mentioned Georgiou was sentenced to eight years imprisonment for his part in the offences for which he was convicted. They were breaking and entering the pharmacy and manslaughter. At the time of the offence, he was 31 years of age, with a series of prior convictions against his name for offences dating back to at least 1997. They included receiving, false pretences, possession of dangerous drugs and some other drug-related offences and offences of dishonesty. For these offences, sentences of up to nine months imprisonment had been imposed, making it likely that Georgiou had been released not long before the commission of the subject offences on 1 May 1999.

[99] Of those two offences, manslaughter was by far the more serious resulting as it did in the death of a completely innocent man, who evidently believed it to be his duty to pursue those whom he saw breaking into the pharmacy. The verdict of manslaughter against Georgiou necessarily proceeded on the basis that he was aware before the shooting took place, that Edwards was possessed of a firearm. Objectively speaking, his use of it to kill their pursuer was a probable consequence of the plan formed to break into the pharmacy.

[100] The prosecution did not need to prove, and the verdict of manslaughter against Georgiou did not imply, that he knew Edwards would use the firearm, or that in doing so he would kill anyone. Indeed, it might be supposed that breaking into a pharmacy at night would not involve the same high risks of causing death as it would if the criminal enterprise had taken place during daylight hours when members of the staff and public would certainly have been present. Judging by the descriptions or epithets applied to Georgiou by prosecuting counsel in the course of his address, it seems that Georgiou is not a man of great intelligence or imagination who may well not have actually foreseen the extent of the risk involved in accompanying a man like Edwards, armed though he was, in carrying out their common intention to break into the pharmacy and steal drugs.

[101] All these considerations go some way in mitigation of the offence of manslaughter, and appear to be reflected in his Honour's observation in sentencing that Georgiou, and for that matter Heferen, had been convicted by virtue of the operation of s 8 of the Code. Georgiou's sentence could certainly have been fixed at a higher level without inviting intervention on appeal; but, having regard to the

principles applied on an appeal like this by the Attorney-General, it cannot, we consider, be said that a sentence of imprisonment for eight years is so inadequate as to make a substantially larger penalty imperative in this case. The appeal against the sentence imposed on Georgiou should therefore by dismissed.

2. Heferen (CA 266 of 2001)

[102] Heferen was sentenced to 4 years imprisonment on his conviction for break, enter and steal and eight and a half years imprisonment for manslaughter. As well as the matters also relevant to the sentence imposed on Georgiou, the learned sentencing judge took into account that Heferen was not physically present when Bast was killed. His Honour also took into account that, although the break and enter appeared to have been organised in his motel room, Heferen was not the mastermind of the offences. He was, however, well aware of the fact that Edwards would be carrying a loaded firearm while committing the offence of break, enter and steal which Heferen had counselled him to commit.

[103] Heferen had a criminal record going back to 1985 for offences relating to alcohol and drugs including supplying drugs, property offences, minor offences against the person, numerous convictions for possessing weapons whilst not being the holder of a licence, and breach of orders including probation orders, a community service order, a fine option order, bail undertakings and escaping lawful custody.

[104] Heferen's role and serious criminal history justified a slightly longer sentence than that given to Georgiou. Unlike Georgiou, he did not have the benefit of a plea of guilty on the charge of break, enter and steal. He was, however, not present when the killing took place and convicted as a party to it only because of the operation of s 8 of the *Criminal Code*. The sentence of imprisonment for eight and a half years was not so inadequate as to call for appellate intervention. The appeal against his sentence should be dismissed.

[105] **Orders**

1. In CA No 234 of 2001, dismiss the appeal against conviction.
2. In CA No 244 of 2001, dismiss the appeal against conviction.
3. In CA No 271 of 2001, dismiss the appeal against conviction.
4. In CA No 265 of 2001, dismiss the appeal against sentence.
5. In CA No 266 of 2001, dismiss the appeal against sentence.