SUPREME COURT OF QUEENSLAND

CITATION:	*R v Carter* [2003] QCA 515
PARTIES:	**R** **v** **CARTER, Stephen Wayne** (appellant)
FILE NO/S:	CA No 253 of 2003 SC No 587 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2003
JUDGES:	McPherson and Williams JJA and White 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 – PARTICULAR OFFENCES – HOMICIDE – CAUSATION – whether an act can be both a significant and a substantial cause of death – whether the question of cause is to be determined applying common sense *Criminal Code* 1899 (Qld), s 295, s 296, s 302(1)(a), s 311 *Royall v The Queen* (1991) 172 CLR 378, followed
COUNSEL:	C Chowdhury for the appellant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: On the morning of 17 March 2000 Gail Marke was found dead in her bedroom in the house at Tewantin where she lived with others, who found her that morning. The body of Patrick Smyth was found with her in the bedroom.

[2] In July 2003 the appellant Stephen Carter was arraigned in the Supreme Court and pleaded not guilty to a charge of having murdered Gail Marke, but guilty to an alternative count of having aided her in killing herself. The Crown

did not accept the appellant's plea to that lesser charge and the trial proceeded on the murder charge in count 1. The jury returned a verdict of guilty to that charge, and Carter was convicted and sentenced to imprisonment for life. This is his appeal against that conviction.

[3] On 24 March 2000, which was a week after the murder, police conducted a recorded interview with the appellant at the Noosa Heads Police Station concerning the deaths of the two deceased. He lived at Tewantin and said he was a drug user. He knew the deceased and Smyth, who had been asking him for about two years to provide them with a "weight" of heroin. A weight is the equivalent of about a gram. They had repeated the request about a fortnight before the events leading to their deaths. On 16 March, they had come round to collect the heroin. Gail had then gone home, and Smyth had accompanied him in the car to Nambour to pick up the heroin the appellant had arranged to supply them with. The appellant and Smyth had injected some of it on the way back to Tewantin. He and Smyth returned to his place, where they slept until 9 p.m., when the appellant took Smyth back to Gail's house. On arriving there, Smyth said they both wanted him to kill them, but the appellant cautioned them to think it over, and went home. Shortly afterwards, Smyth rang him saying that he and Gail really wanted to do it, so he drove back to their house, where he had a conversation with them, lasting some 20 or 30 minutes in Gail's bedroom, in the course of which they said they really wanted him to do it. He mixed up the heroin and injected Gail, and helped Smyth inject himself. Before leaving, he wiped the syringe of fingerprints and left it on the floor of the bedroom. There is evidence suggesting it was then about 11.00 on the night of 16 March.

[4] The appellant said that he had injected Gail first. She was not able to do it herself, or bring herself to do it. He put the needle in her arm, and asked if she was absolutely sure, to which she said "yes, just do it", and he pushed in the plunger of the syringe. She said "what a rush", and lay down on her back, on the left hand side of the bed. At that stage she was still breathing. In the case of Smyth, the appellant inserted the needle, but Smyth pushed the plunger in himself, and he may also have withdrawn the needle. He just dropped down straight away "like a stone".

[5] When asked in the course of the interview, the appellant said he thought that Gail was going to die. That was, he said, "the intention of the exercise". He knew he was taking their lives. The Crown was thus in a position at the trial to prove not only the death of Gail Marke, but also that the appellant had done what he did with the knowledge and intention of bringing about her death. On his own admissions to the police, it was open to the jury to find that, within the meaning of s 302(1)(a) of the Criminal Code, the appellant had intended to cause the death of Gail Marke. No issue was raised about that element at the trial or on the appeal. The only remaining question, which was the issue on appeal, was whether under s 302(1) the appellant had killed her.

[6] In the definition of murder in s 302(1), and more specifically in speaking in s 300 of murder and manslaughter as forms of homicide, the Code uses the expression "kills another". In other provisions, such as ss 295, 297 and 298, it refers to an act or omission "which results in the death" of another person, or from which death results; and in s 293 killing a person is equated with causing the death of another:

> **"293**Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person."

In consequence, courts in Queensland acting under the Code have applied to killing and causing death the meaning that was ascribed to those expressions at common law in *Royall v The Queen* (1991) 172 CLR 378. See, for example, *Lowrie & Ross* (1999) 106 A Crim R 565, 570-571; and *R v Sherrington* [2001] QCA 105 §4.

[7] In *Royall v The Queen*, which was a case that in Queensland would probably have been seen as falling within the terms of s 295 of the Code, the High Court had occasion to consider the common law meaning of killing or causing death. After referring to cases in which there "may be no single cause of the death of the deceased", Deane and Dawson JJ went on to say (172 CLR 378, 411):

> "but if the accused's conduct is a substantial or significant cause of death that will be sufficient, given the requisite intent, to sustain a conviction for murder. It is for the jury to determine whether the connexion between the conduct of the accused and the death of the deceased was sufficient to attribute causal responsibility to the accused."

In the same case Toohey and Gaudron JJ, after saying that the jury must be told that they need to reach a conclusion as to what caused the deceased's death, said (172 CLR 378, 423):

> "That does not mean that the jury must be able to isolate a single cause of death; there may be more than one such cause … In that event it is inevitable that the jury will concentrate their attention on whether an act of the accused substantially contributed to the death."

See also the reasons of McHugh J at (1981) 172 CLR 378, 441.

[8] From this, it will be seen that, while Toohey and Gaudron JJ spoke of an act "substantially contributing" to the death, Deane and Dawson referred to conduct that was a "substantial or significant" cause of death. Their Honours appear to have used those expressions not with the intention of differentiating between them, but, in the context in which their observations were made, as synonyms. Here the jury were directed to that effect. Standard dictionaries tend to confirm the impression that it accords with everyday English usage, although there may have been a time not long past in England, as distinct from Australia and the United States, when "significant" tended to bear the meaning "not insignificant". I do not consider that that is what their Honours had in mind in what they said in *Royall's* case.

[9] The problem here arises from the fact that one of the principal Crown witnesses in giving his evidence at the trial appeared to be making a distinction between a "significant" and a "substantial" cause of the death of Gail Marke. Dr Pillans, who is the director of clinical pharmacology at Princess Alexandra Hospital, gave evidence of having examined the toxicology screening of the drugs found in the body of Gail Marke after her death. He said that her blood contained morphine, which could have come from heroin, as well as glucuronides, which are produced when the body metabolises heroin. In the case of the deceased, the proportion of morphine and glucuronides at death was about

40% to 60%. It generally took about half an hour for the glucuronides to exceed the morphine in the bloodstream, which suggested either one of two things. One was that the deceased had absorbed significant quantities of morphine in the 24 hours preceding her death; the other that, for her body to have broken down the heroin to the proportions shown in the screening, she had survived for up to half an hour after having been injected with heroin by the appellant.

[10] Dr Pillans said that morphine had provided a "substantial contribution" to the deceased's death. The difficulty was in saying whether it had its origin in the heroin injection given by the appellant on the night of 16 March, or some other source. The deceased had very high levels of codeine in her blood. Codeine contains up to 10% morphine, and part of what was found in her body post mortem was attributable to codeine. For the heroin injection alone to have caused her death, it would have been necessary for the deceased to have survived the injection for at least half an hour. Dr Pillans said he would have been surprised if she had lived as long as that.

[11] The deceased was found to have other drugs in her body that were central nervous system depressants. On their own they could not have caused her death; but Dr Pillans said it was very important to remember "the additive effect of all these products", which resulted in a process of "stacking it up". Adding morphine at the level of that in the injection to some already in her system which she had herself consumed was dangerous because it was like adding one brick to another, or "just adding one contributory factor to another". In cross-examination Dr Pillans agreed that he could not conclude, or couldn't give an opinion, that the heroin injection was a "substantial significant" cause of death. His final word on the subject was given in re-examination, where, speaking of the heroin injection and its relation to Gail Marke's death, he said:

> "I think we can say that it could be a significant contribution but … I don't think we can say it's a substantial contribution given all of the other confounders."

[12] At the trial, the defence unsuccessfully submitted that, on the prosecution evidence about the cause of death, there was no case for the appellant to answer. On appeal, this submission was repeated; but the issue having proceeded to verdict, the question before this Court is now whether, confronted with the expert opinion of Dr Pillans, a reasonable jury could properly have arrived at a verdict of guilty on the evidence before them at the trial. No challenge of any kind was made to her Honour's summing up.

[13] Unlike some other legal systems, the common law has never insisted on proof of guilt to the level of scientific certainty. What is required is proof beyond reasonable doubt of all elements of the offence to the satisfaction of a jury of 12 ordinary members of the community. The function of scientific evidence at a trial at common law is not to usurp the function of the jury but to assist them in reaching their conclusion with the requisite degree of satisfaction. In relation to the element of causing death in homicide, this has been expressly recognised by the High Court in *Royall v The Queen* (1991) 172 CLR 378, 387, where Mason CJ approved a statement by Burt CJ that it is enough if juries are told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them, while appreciating that the purpose

is to attribute legal responsibility in a criminal matter. To similar effect are statements in the judgment of Deane and Dawson JJ (at 411-412) and Toohey and Gaudron JJ (at 423).

[14] With this in mind, it is necessary to turn to the evidence at this trial, which was not, of course, limited to the testimony or opinion of Dr Pillans. That evidence included the appellant's statement to the police that the intention of those concerned was to bring about the deaths of Gail Marke and Smyth by injecting a large amount of heroin in each case; and that their deaths took place at some moment between the time when the heroin was administered at about 11:00 pm and about 8:50 am on the following day when their bodies were discovered by Noeleen Jacobson, who was also living in the house. On the face of it, therefore, there was reason to infer that the injection had had the effect it was expected and intended to have of ending Gail Marke's life.

[15] Against this was the possibility raised by Dr Pillans that the heroin in the deceased's body, while making a significant contribution to the deceased's death, might not all have come from the injection administered by the appellant. Theoretically, there were other possible sources. The appellant might, after receiving the injection, have consumed a further and fatal quantity of heroin drawn from sources in her bedroom. There was, however, no direct evidence that she had any such quantity in her possession on the night in question, or that she had roused herself to take it after receiving the injection. Indeed, to predicate that she had other heroin available to her is essentially at odds with the appellant's statement that he had been pressed for some time by Marke and Smyth to procure a weight of the drug for them, and had done so at their request with a view to enabling them to end their lives by that means. If they were already sufficiently provided with heroin, there would have been no need to engage the appellant's services to obtain heroin from his supplier at Nambour.

[16] The possibility that Ms Marke had accessed drugs available to her after the appellant had left at 11:00 pm was to some extent also discounted by evidence from the ambulance officer who attended on the morning of 17 March that he found her on the bed in a position corresponding with that in which the appellant had last seen her when he left on the preceding evening after administering the injection. The other residents of the house who found her on the following morning testified that they had not interfered with the body, but had simply called the ambulance. The theoretical possibility that some other person had entered the bedroom in the night and administered the fatal dose was not supported by any evidence, and was not advanced by the appellant.

[17] That left for consideration the other possibility that the injected heroin was only one among other causes of Gail Marke's death. Her death might have resulted from the impact of the injected heroin or a combination of it and other heroin, morphine or drugs ingested by her at some earlier time within the 24 hours preceding the injection. There was evidence that she had for some time been in a depressed condition, for which she had been receiving treatment and taking medication. There was conflicting evidence from friends or acquaintances as to whether she was a heroin addict or user. Dr Scott, who conducted the post mortem examination, said that if she had been a user, he would have expected to see scars or signs on her body, whereas he found only a single bruise and probable puncture site on the inside of her elbow. This was met in evidence by

Dr Pillans saying that whether signs or marks of injections are visible depends to a large degree on the site and how big and how sterile the needle is. When Dr Scott conducted the post mortem examination he believed that morphine or heroin overdose was the cause of death; but he had not seen the results of the toxicological scan.

[18] Material obtained from the Health Insurance Commission, going back as far as January 1999, showed that for some time before her death, Ms Marke had been regularly receiving quantities of morphine in the form both of injections and tablets, as well as of codeine and benzodiazepines. It suggested that she had worked up a tolerance to heroin. This in turn was capable of being interpreted as signifying that she might at first have survived the heroin injection and ingested more of it on the night of 16 March; or that she might have taken longer to die than Dr Pillans had expected judging by the proportion of glucuronides present in her system at death. The Commission records showed some reduction over the preceding month in the quantities of morphine acquired from that source; but on or after 12 March she had obtained a total of 60 codeine tablets from the commission. A search of her room failed to locate any codeine tablets; but it is not impossible that she had sold them to someone else. She and Smyth provided the appellant with $350 to purchase the heroin in Nambour.

[19] In the search for another source of the heroin detected at death, it was the preceding 24 hours that, according to Dr Pillans, were critical, which would have extended back to about the earliest hours of 16 March. The evidence of those who saw Ms Marke on that day said that physically she was well, but had been suffering from depression during the past fortnight. Ms Jacobsen said that, when she woke on 16 March, she saw Gail Marke was having coffee and also that she was upset. Mr Calikes said that in the morning Gail was "fine" and was tidying the house in preparation for an inspection by the real estate agent to take place at some time in the first half of that day. In the afternoon he and Ms Jacobsen had watched television and Gail had been watching it too. He then went to band practice. When he saw her again at about 9.00 that evening, she was walking and talking normally. There was therefore no overt indication that she had been taking drugs. According to the appellant's account of it, the conversation with her and Smyth later that evening in which they discussed ending their lives was quite rational and dispassionate.

[20] The jury were evidently somewhat perplexed by the evidence of Dr Pillans and the distinction he made between a "significant" and a "substantial" contribution, and they sought and were given redirections on the subject before finally returning their verdict. The question they had to decide was whether the evidence of Dr Pillans raised in their minds a reasonable doubt as to whether the heroin injection administered by the appellant had caused Gail Marke's death. They were in the end satisfied on that point and brought in a verdict of guilty. Mr Chowdhury for the appellant submitted that in doing so they were wrong. He relied on *R v Chester* [1982] Qd R 252, in which the Court of Criminal Appeal (Williams J dissenting) held that it was unreasonable for the jury to reject the clear and definite evidence of a psychiatrist when it was not inconsistent with any other evidence: cf. what was said on this subject in *R v Morgan, ex parte Attorney-General (Qld)* [1987] 2 Qd R 627. Whatever else might be said about the decision in *R v Chester*, the issue there was one of diminished responsibility,

on which it might be said that the jury would not have been able to reach a conclusion without the evidence of an expert in that field.

[21] In the present context the decision in *Royall v The Queen* (1991) 172 CLR 378 stands as authority for the proposition that determining whether the act of the appellant was a substantial or significant cause of or contributor to the death of Gail Marke was for the jury to decide on all evidence, not as a philosophical or scientific question, but by applying their common sense to the facts as they found them. In my opinion there was evidence on which, in doing so, they were entitled to be satisfied beyond reasonable doubt that the accused had killed her.

[22] There are two other matters that merit passing notice. One is that it would have been open to the jury to regard the appellant's plea of guilty to the lesser charge in count 3 of aiding Gail Marke in killing herself (Code s 311) as evidence against him. It appears to involve the same element (killing or causing death) as forms part of the offence of murder under s 302(1)(a). Of course, it is true that, because the plea to that charge was not accepted by the Crown or the court at trial, it amounted to no more than an admission on his part that was perhaps capable of being explained away by saying that when he pleaded guilty he was not aware of the evidence Dr Pillans was about to give; and that, in making that admission, he did not himself possess the scientific expertise needed to infer his own guilt from what he knew he had done. Nevertheless, it was some evidence against him which the jury might have been entitled to consider along with other matters.

[23] The second point arises out of s 296 of the Code, which is concerned with acceleration of death. Briefly stated, it provides that a person who does an act which hastens the death of another person who, when the act is done, "is labouring under some disorder or disease arising from another cause", is deemed to have killed that other person. The section was referred to by her Honour at the trial in discussion with counsel; but in the end she decided not to direct the jury in terms of it because of the lack of decided authority on the meaning of the word "disorder" in this context. No doubt that was a wise counsel of prudence. In other parts of the world some criminal or penal codes that are based on that of Queensland in effect have substituted the word "injury" for "disorder". See for example s 200(d) of the Solomon Islands Penal Code, which was applied in *Jimmy Viu v The Queen* (CA 7 of 1994; 17 June 1994) by a Court of Appeal consisting of P D Connolly P, Kapi and McPherson JJA, to a case in which a man kicked his sister to death when she was already suffering a serious injury from falling out of a tree. The word "disordered" also appears in s 28(1) of the Code where it is used in reference to the case of a person whose mind is disordered by intoxication or stupefaction caused by drugs or intoxicating liquor or other means. It does not seem to be a long step to say, in the light of Dr Pillans's evidence, that Gail Marke was "labouring under some disorder … arising from another cause" at the time when the appellant injected her with heroin which, at the very least, hastened her death.

[24] Because, however, neither of the foregoing two matters went before the jury for their consideration, it would not be right to base our decision on them now. Quite independently of them, the appeal against conviction should be dismissed.

[25] **WILLIAMS JA:** I have the advantage of reading the reasons for judgment of McPherson JA and I agree with all that he has said therein. The appeal against conviction should be dismissed.

[26] **WHITE J:** I have read the reasons for judgment of McPherson JA and agree with the reasons given by him. The appeal against conviction should be dismissed.