SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2005] QCA 204
PARTIES:	**R** v **SMITH, Lori Dayon** (appellant)
FILE NO/S:	CA No 26 of 2005 SC No 367 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2005
JUDGES:	McPherson and Keane JJA and Mullins 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 - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - WHERE GROUNDS FOR INTERFERENCE WITH VERDICT - PARTICULAR CASES - WHERE APPEAL DISMISSED - where appellant had been convicted of burglary and murder after trial - where it had been alleged that the appellant had knowingly assisted another party in the commission of the murder or that the murder was a probable consequence of a common intention to rob or assault the deceased - where the appellant and the other party were tried separately - where other party had conviction quashed on appeal because the jury in that trial had not been instructed by the judge to consider the issue of self-defence under s 272 *Criminal Code* 1899 (Qld) - where different evidence had been adduced at each trial - whether there was any evidentiary basis for the issue of self-defence to be put to the jury in the appellant's trial CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - MISCARRIAGE OF JUSTICE - GENERALLY -

where appellant had been convicted of burglary and murder after trial - where it had been alleged that the appellant had knowingly assisted another party in the commission of the murder or that the murder was a probable consequence of a common intention to rob or assault the deceased - where the appellant and the other party were tried separately - where other party had conviction quashed on appeal and was ordered to have a retrial - where appellant and the other party were originally tried before different juries with different evidence - whether order for retrial of appellant's alleged co-offender required that there be a retrial ordered for the appellant if a miscarriage of justice was to be avoided

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where appellant had been convicted of burglary and murder after trial - where it had been alleged that the appellant had knowingly assisted another party in the commission of the murder or that the murder was a probable consequence of a common intention to rob or assault the deceased - where reliance was placed at trial by the Crown on admissions made by appellant that had been recorded by an acquaintance during conversation - where the trial judge directed the jury that the acquaintance had prior convictions for fraud and that care should be taken before reliance was placed on her evidence - where the trial judge warned the jury that the appellant may have been affected by drugs when the admissions were made - whether the jury were aware of the dangers of acting on the evidence before them to convict the appellant - whether it was open to the jury to safely conclude that the appellant had been knowingly involved in the murder or that the murder had been a probable consequence of a common intention to rob or assault the deceased

Criminal Code 1899 (Qld), s 7, s 8, s 10A(2), s 271, s 272

Dharmasena v The King [1951] AC 1, referred to
M v The Queen (1994) 181 CLR 487, applied
MacKenzie v The Queen (1996) 190 CLR 348, applied
R v Beckett and MacIntosh [1966] Qd R 170, distinguished
R v Corry [2005] QCA 087; CA No 306 of 2004, 1 April 2005, distinguished
R v Hart, Cuzzo & Smith [1980] Qd R 259, cited
R v Lao and Nguyen [2002] VSCA 157; (2002) 5 VR 129, cited
R v Sherrington & Kuchler [2001] QCA 105; CA No 239 and CA No 245 of 2000, 6 April 2001, cited
The Queen v Darby (1982) 148 CLR 668, considered

COUNSEL: B W Farr for appellant
M J Copley for respondent

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

[1] **McPHERSON JA:** I have read and agree with the reasons of Keane JA for dismissing this appeal. There are, however, some matters on which I wish to comment.

[2] The first concerns the criminal responsibility of appellant Lori Smith, given that an appeal by Michael Corry against his conviction for murdering the deceased Robert Hingst was allowed by this Court, which ordered a new trial of the charges against him. That was done because of what was perceived to be a deficiency in the summing up by the trial judge with respect to the matter of self defence under s 272(1) of the Criminal Code: see *R v Corry* [2005] QCA 87. It was not because of any inconsistency in the verdicts returned against each of Corry and the appellant Smith at their respective trials. As explained by Keane JA in his reasons on this appeal, those trials were conducted before different juries on separate occasions and, of course, on evidence that was by no means identical in each trial.

[3] That being so, there can be no legitimate complaint that Smith has been convicted of murder, while Corry has been ordered to stand trial again on the charge of murdering Hingst. It may even be possible, depending on the evidence at that retrial and the view of it formed by the jury on that occasion, for it to produce a verdict of acquittal of murder or a conviction of some lesser offence, such as manslaughter, without affecting the criminal responsibility of Smith for the offence of murdering Robert Hingst.

[4] There is in my opinion ample justification in authority for such an outcome. It is to be found in the decision in *R v Darby* (1982) 148 CLR 668, in which the High Court held (Murphy J dissenting) that, as a general proposition, the conviction of one conspirator, whether tried separately or together with another conspirator, may stand although the latter is acquitted or ordered to be retried, unless in all the circumstances that conviction is inconsistent with the acquittal of that other conspirator. I take this formulation substantially from the headnote to the report of that decision, in which their Honours rejected the old rule which had previously prevailed to the opposite effect. That rule had been applied in *Dharmasena v The King* [1951] AC 1, where the Privy Council held that acquittal of a co-accused on a charge of conspiracy to murder necessarily required acquittal of the appellant indicted on the same charge. It was specifically this decision in *Dharmasena v The King* in 1950 that the High Court of Australia in *R v Darby* declined to follow in 1982.

[5] A closely related consideration which I regard as also fatal to this ground of appeal in the present case is the nature of the criminal responsibility of the appellant Smith in this case. At her trial the Crown advanced alternative bases for her guilt of murdering the deceased Hingst. One, on which it seems likely that the jury acted, was under s 8 of the Code; the other under s 7. Section 8 is predicated on the existence of a common intention between two or more persons to prosecute a common purpose, in which event each is, by force of the section, to be treated as having committed an offence that is in its nature the probable consequence of

prosecuting that common purpose. Section 8 is not in so many words confined to common purposes that are criminal as distinct from "unlawful"; but it would be a rare case indeed for applying s 8 in which the purpose was not criminal as well as unlawful. Proof of something resembling an agreement or understanding, express or inferred from acts or words, to commit an offence is therefore a prerequisite to criminal responsibility under the section. To that extent it is the equivalent of a conspiracy to commit the offence, to which, in my view, the decision in *R v Darby* applies, as it does to a criminal conspiracy in which no other offence is in fact committed. Hence, the fact that Corry's conviction has been quashed and that he may conceivably be acquitted at retrial is, on the authority of *R v Darby*, not a ground for intercepting Smith's conviction of murder on the basis of her own criminal responsibility under s 8 of the Code.

[6] On one view of the evidence at her trial, Smith and Corry formed the common intention that he, armed with a long sharp bladed knife and a meat cleaver, would break into the deceased's house at night with a view to confronting and perhaps punishing him for what they conceived to be his past behaviour towards her. If the jury concluded, as they may well have done, that the murder of Hingst was in its nature the probable consequence of pursuing that common intention, then s 8 imputed criminal responsibility to Smith for that killing. An alternative view is that the verdict against her was founded on one or more of paras (b), (c), or (d) of s 7(1) of the Code. On the evidence it was open to the jury to find that the appellant Smith had encouraged, and so counselled or procured him within the meaning of s 7(1)(d), to commit the offence; or that she aided or assisted him for the purpose of enabling him to murder the deceased. For any one or more of these reasons, s 7(1) declares her to have taken part in committing the offence and to be guilty herself of committing the offence.

[7] It is not, however, in every case that the application of the paras of s 7(1) will depend on the existence of a prior agreement, understanding or arrangement between the parties amounting to or resembling a criminal conspiracy. It is possible for a person to incur criminal responsibility under s 7(1)(b) or s 7(1)(c) by assisting or aiding another to commit an offence without previously disclosing an intention of doing so or justifying an inference of agreement or conspiracy to do so: see, for example, *R v Sherrington & Kuchler* [2001] QCA 105, at §§11-13. Nevertheless, in the vast majority of cases some kind of prior agreement or understanding between them to commit the offence is a feature of criminal responsibility under s 7(1). In this context, I notice that in his dissenting judgment in *R v Darby* (1982) 148 CLR 668, at 685, Murphy J said that the problem (of convicting one and acquitting another participant) was not confined to the offence of conspiracy as such, but "arises in all crimes where the parties are alleged to have acted in concert with one another". Cf also *Tripodi v The Queen* (1961) 104 CLR 1, at 6-7.

[8] Whether the principle in *R v Darby* necessarily applies to all cases of "secondary" responsibility under s 7 (1) of the Code, it certainly does so here. The appellant Smith did not simply chance to be at the scene of the crime very early in the morning when it was committed. She was there because she and Corry were acting in the course of an agreement or understanding to do what they did. In those circumstances in my opinion the principle in *R v Darby* is applicable. From a legal standpoint it therefore cannot matter that Corry's conviction was quashed on appeal or that he might at his retrial be acquitted on grounds of self defence. Smith's criminal responsibility for the murder has now been established independently of

his. She herself had and has no claim to exculpation by reason of self defence under s 272 of the Code of the offence of having murdered Robert Hingst. She advanced no such defence at her trial because none was available to her.

[9] Mr Farr of counsel for the appellant did not disagree with any of these propositions on appeal. His submission was based on *R v Beckett & MacIntosh* [1966] Qd R 170, at 171. There, in ordering the retrial of one accused co-offender by reason of the wrongful exclusion of evidence tendered at his trial, the Court of Criminal Appeal also directed a retrial of the other accused on whose behalf no such complaint was advanced on appeal. As Keane JA remarks in his reasons on this appeal, it is not easy to identify the principle for which *R v Beckett & MacIntosh* stands. In my view, however, the probable explanation for it is that in 1966 the Court in that case was still acting under the shadow of *Dharmasena v The King* [1951] AC 1. It was then regarded as binding on the Court. See *R v Hart, Cuzzo & Smith* [1980] Qd R 259, where that decision was expressly followed by the Court of Criminal Appeal. Since then, however, *R v Hart* has been overruled in *R v Darby* (1982) 148 CLR 668, in which the High Court decided that *Dharmasena v The King* ought not now to be followed in Australia. What I have called the old rule in *Dharmasena* was rejected in that decision, with the consequence that, underlying as I think it did the order for retrial in *R v Beckett & MacIntosh* [1966] Qd R 170, the latter can no longer be considered authority for acquitting the appellant or ordering a retrial in her case simply because of the success of the appeal by her fellow accused Corry.

[10] On the other matters relied on by the appellant, I have nothing to add to what Keane JA has written. The appeal against conviction should be dismissed.

[11] **KEANE JA:** The appellant has been convicted of the murder of Robert Hingst ("the deceased") on 26 March 2002. She has also been convicted of the offence of burglary on the same occasion.

[12] The Crown case against the appellant was that the deceased died as a result of injuries inflicted by a knife and meat cleaver at about 1.30 am when an intruder entered his house at Caboolture. That intruder was Michael Corry who may have been accompanied by the appellant. A struggle occurred between the two men in which the deceased suffered knife and cleaver wounds to many parts of his head and body. Additionally, he sustained a skull fracture underneath the area of a large scalp wound. After the struggle, Corry ran away from the house and the deceased collapsed outside on the driveway. The Crown case was that the appellant was criminally responsible for the murder of the deceased, either by reason of the operation of s 7 or s 8 of the *Criminal Code* 1899 (Qld), or because the appellant herself struck the fatal blow.

[13] On 27 August 2004, Corry was convicted of the murder of the deceased. On 1 April 2005, this Court allowed Corry's appeal against his conviction, quashed the conviction and ordered a retrial.[1] In Corry's case, the learned trial judge had directed the jury to consider the issue of self-defence under s 271 of the *Criminal Code*, that is to say, self-defence against an unprovoked assault. This defence was raised by suggestions in Corry's interviews with the police that he had intended only to scare the deceased and had struck him in self-defence. Corry's appeal was

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1 *R v Corry* [2005] QCA 087; CA No 306 of 2004, 1 April 2005.

allowed because the jury had not been instructed by the learned trial judge to consider also the issue of self-defence under s 272 of the *Criminal Code*, that is to say, self-defence against a provoked assault.

[14] The appellant was convicted on 10 February 2005. She had originally been tried with Corry, but at that trial the jury had been unable to reach a verdict in relation to the charges against the appellant. As a result she was tried again separately.

[15] The appellant's original ground of appeal in this Court was that the convictions were unsafe and unsatisfactory. The Court, by leave, allowed the appellant to add the further ground of appeal:

> "The jury should have been directed as to the provisions of s 272 of the *Criminal Code* insofar as that section was relevant to the case against Corry and therefore also to the appellant."

[16] Before I turn to discuss the appellant's grounds of appeal in more detail, it is necessary to say something about the evidence adduced at her trial.

The Crown case

[17] The deceased's cries for help alerted neighbours who called for police and ambulance assistance. The first police officer to arrive at the scene spoke to the deceased and asked him whether he knew who the person was who had inflicted the injuries upon him. The deceased replied: "No". He died from his injures soon afterwards. The deceased had formerly been in a sexual relationship with the appellant. The deceased's last words suggest that he did not recognize his assailant or assailants. Importantly, for present purposes, that might well indicate that the appellant was not one of those assailants.

[18] It was clear that the deceased met his death by violent means. The Crown invited the jury to infer from the evidence of the severe and extensive injuries inflicted on the deceased that whoever killed the deceased intended to do so, or at least to cause him grievous bodily harm.

[19] To the extent that the evidence pointed to Corry as the actual assailant, the Crown case was that Corry had murdered the deceased. In this regard, Glen Daniels gave evidence that in the early hours of 26 March 2002, Corry appeared at his house and told him he had had a "disagreement with this bloke and I stabbed him a few times". There was a blood stain on Corry's shorts which were later found to have the deceased's DNA on them. Corry also had, on this occasion, a meat cleaver and a knife. There was forensic evidence that traces of Corry's DNA were found under the fingernails of the deceased.

[20] While there was some evidence, in the form of admissions made by the appellant, that the appellant had herself struck the deceased the fatal blow, the Crown relied upon s 7 and s 8 of the *Criminal Code* to extend criminal responsibility for the murder of the deceased to the appellant. In this regard, the jury were asked to infer, either that Corry acted with the knowing assistance of the appellant in that regard, or that Corry and the appellant agreed that Corry should enter the deceased's house, either to rob or to assault him, and in the course of carrying out that purpose the deceased was murdered, the murder being an offence of such a nature that its commission was a probable consequence of the carrying out of their unlawful purpose.

[21] The Crown case, in relation to the role of the appellant in the murder of the deceased, depended upon admissions made by the appellant in a number of conversations with a friend, Elizabeth Hayward. Three of these conversations were tape recorded as a result of Ms Hayward having been fitted by police with a recording device. Ms Hayward's evidence of oral admissions made to her was supported by her notes.

[22] The appellant's admissions to Ms Hayward contained different versions of the appellant's role in the death of the deceased. On one version the appellant had no involvement in the death of the deceased or Corry's intrusion into the home of the deceased. On another version, the appellant asserted that she had "finished off" the deceased after the struggle between Corry and the deceased. Another version was that she and Corry had agreed to rob or assault the deceased and that she assisted Corry in carrying out that plan. It will be necessary to refer in some greater detail to the appellant's admissions and what can be made of them.

[23] As I have mentioned, the appellant had also been charged with an offence of burglary in the night, with violence, while armed in company. The jury found the appellant not guilty on this charge but did find her guilty of burglary in the night, with violence, while armed. It would seem to follow that the jury did not act upon those admissions which involved the appellant actually entering the deceased's home or being part of the struggle therein.

Self-defence

[24] In relation to the appellant's conviction for murder, the jury did not have occasion to consider the possibility that self-defence was a ground of excuse available to the appellant. The jury was also not invited to consider whether the fatal wounds were inflicted on the deceased while Corry was defending himself against an assault by the deceased. The learned trial judge directed the jury that no excuse, such as self-defence, was raised so far as the appellant was concerned. The appellant's counsel at trial did not seek to suggest that self-defence was available in respect of Corry's conduct, and hence by extension, to the appellant. It is difficult to see how the appellant could seek to take advantage of a defence of self-defence which might have been available to Corry. That course would seem to be precluded, as the appellant's counsel accepted, by the provisions of s 10A(2) of the *Criminal Code*. But even if such an argument were available as a matter of legal theory, no sufficient evidentiary basis for it was established.

[25] In this regard, in *R v Corry*[2] the issue of self-defence arose because of assertions made by Corry in an interview with police. Corry had said that when he first confronted the deceased, the deceased was sitting up in bed and that:

> "… things got a bit ugly because he jumped up and had a go at me and that. Um in the struggle a knife that I had on me that I didn't want to use but er it slipped out from up in my sleeve. I was more worried about him getting it off me and attacking me with it. I heard about this bloke before, how dangerous he can be, and um things just got out of hand. In the struggle, he got cut and he just kept coming at me so I striked [sic] at him."

Corry said that the deceased "made the first moves on me and that's - I didn't retaliate or anything I just more defended myself". He said that he had used the

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[2] [2005] QCA 087; CA No 306 of 2004, 1 April 2005 at [17] - [19].

knife because it had fallen out of his sleeve "otherwise I would probably have been beaten up".

[26] As I have mentioned, these assertions were regarded, both by the learned judge at Corry's trial and on appeal by this Court, as sufficient to raise an issue as to self-defence. This Court quashed Corry's conviction because self-defence was left to the jury on the basis that it was available as an excuse only if the assault against which the accused defended himself was unprovoked. Corry's statements to the police and the circumstances of the death of the deceased gave rise to the possibility that, so instructed, the jury might have dismissed the issue of self-defence from its consideration simply on the basis that the assault on Corry by the deceased had been provoked by Corry.

[27] The full text of Corry's statements to the police, which were held to have raised the issue of self-defence in *R v Corry*, were not in evidence at the trial of the appellant. Counsel for the appellant cross-examined Detective Gary Beddoes in relation to the statements made to him by Corry. It was put to Detective Beddoes that Corry had admitted that he had caused the injuries to the deceased, and Detective Beddoes said that this was so. The cross-examination continued:

> "I don't intend taking you through the entire interview, of course, but just so that we have the flavour of what he told you, do you agree that he said this to you at one passage, 'I didn't really intend for it to happen this way. From Saturday when he had gone to Lori's house at Willow Crescent and beat her up a bit and everything, grabbed her by the throat and all that, and he did strike her a few times and that, since I've been seeing Lori I took that a fair bit into offence. I didn't mean to go in there and do what I did. I only went in there to scare him and just warn him off, you know. I don't want him doing that around her again and, ah, things got a bit ugly because he jumped up and had a go at me and that in the struggle, ah, a knife that I had on me that I didn't want to use, but it slipped out from up my - from up in my sleeve.', and he then goes on to speak about the struggle they had about getting the knife and inflicting the injuries?-- That's correct, I believe."

[28] It is not entirely clear on what basis this evidence was admissible for, or against, the appellant.[3] It seems that its purpose was to raise the suggestion that the death of the deceased was not intended when Corry entered the home of the deceased. However that may be, it is clear that what was elicited as to Corry's out-of-court statement to Detective Beddoes did not contain the matters which raised the possibility that continued striking by Corry at the deceased with his knife was necessitated by the dangerous and persistent nature of the deceased's assault on Corry.

[29] Further, at the appellant's trial, the Crown tendered a letter from Corry to the appellant, which was apparently written on or about 8 April 2002, Corry wrote:

> "I'm really sorry about everything the finding out what I've bin [sic] charged for must have shocked the shit out of ya [sic] but I tell ya babe, he should have stayed away and not done them things to you and threatened my life that day. I tell you now, I only wanted to

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[3] Cf *Bannon v The Queen* (1995) 185 CLR 1; *Ali v The Queen* [2005] HCA 8 at [11], [21]; (2005) 79 ALJR 662 at 665, 666.

> scare him, I didn't intend for him to have a go at me in [sic] which made things difficult."

[30] The appellant's admissions included references to the deceased having a baseball bat "and whacked Mick with it, no match for a knife".

[31] On the basis of the evidence to which I have referred, I do not consider that there is any real basis on which the jury might have concluded that Corry should have been excused from criminal responsibility for the murder of the deceased by virtue of s 272(1) of the *Criminal Code*, and that the appellant should have been acquitted of murder as a result. The statements in the letter do not even begin to afford an evidentiary basis for a contention that Corry reasonably apprehended death or grievous bodily harm at the hands of the deceased or for the proposition that Corry's response was no more than was reasonably necessary for his self-defence.[4] In this case, the evidence was not sufficient to raise the issue of self-defence, whether under s 271 or s 272 of the *Criminal Code*.

[32] In my view, the absence of a direction to the jury raising the possibility of such a defence could not have led to a miscarriage of justice in relation to the appellant. At the appellant's trial no direction in relation to self-defence in respect of Corry's killing of the deceased was sought. That circumstance is not of itself fatal to the appeal, but it is some confirmation that there was no evidentiary basis, either from the letter of 8 April 2002 or otherwise, on which this issue could have been put to the jury.

A retrial because of the decision in *R v Corry*

[33] Nevertheless, the appellant contends that the circumstance that this Court has ordered a retrial of the charges against Corry, means there should be an order for a retrial of the appellant. The appellant relies in this regard on the decision in *R v Beckett and MacIntosh*.[5] In that case there was a joint trial of co-accused which miscarried against Beckett. The Court of Criminal Appeal held that although MacIntosh was not:

> "… automatically entitled to a new trial by reason of his co-accused's trial having gone wrong, … in those circumstances … he should be retried so that he can recapture the chance of acquittal that he may have if Beckett is tried again and is acquitted."[6]

[34] In this case, of course, the appellant was convicted after she had been tried alone. The course of her trial was not affected by the course of Corry's trial.

[35] In *R v Beckett and MacIntosh* the Court of Criminal Appeal did not make clear the basis on which it proceeded to quash MacIntosh's conviction. The Court did not, for example, advert to s 668E(1) of the *Criminal Code* and base its order for the retrial of MacIntosh on the proposition that there would be a miscarriage of justice if Beckett were acquitted and MacIntosh stood convicted. It does not seem that the Court of Criminal Appeal was disposed to proceed on the broad basis that it would be unacceptable in terms of the due administration of justice that the co-offender

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4 See *R v Andreassen*; [2005] QCA 107; CA No 334 of 2004, 15 April 2005 at [27] - [30]; *R v Muratovic* [1967] Qd R 15 at 18; *Van Den Hock v The Queen* (1986) 161 CLR 158 at 161; cf *R v Corry* [2005] QCA 087; CA No 306 of 2004, 1 April 2005 at [29] - [31].

5 [1966] Qd R 170.

6 *R v Beckett and MacIntosh* [1966] Qd R 170 at 171.

should stand convicted of an offence for which the principal offender may be acquitted. Wanstall J put the matter more narrowly:

> "… looking at the whole of the circumstances it seems that in relation to the offence as charged [B] can be regarded as the principal offender and [M] as the minor offender, whose exculpation depended to an extent on the defence which [B] had advanced."[7]

This seems to suggest that the focus of the Court's concern was not upon the possibility of inconsistent verdicts, but upon the dependence of the minor offender's case upon the ground of exculpation advanced by the co-offender who was also the co-accused. To that extent, the case may be distinguished on its facts. Beckett and MacIntosh were tried together. The miscarriage of justice identified on appeal involved the trial judge preventing Beckett from fully cross-examining a police officer in relation to a confession that the police officer had allegedly recorded.

[36] In this case, the alleged co-offenders were tried before different juries on different evidence on each occasion. As I have already mentioned, no direction on self defence in relation to the conduct of Corry was sought at the appellant's trial and, in my view, there was insufficient evidence to call for any such direction to be given.

[37] For my part, I have great difficulty in identifying any principle for which *R v Beckett and MacIntosh* stands beyond the facts of the case. It is true that here the order of a retrial for the appellant's alleged co-offender leaves open the possibility that the co-offender might be acquitted while the appellant's conviction will stand. There is nothing unjust in principle about this result as the appellant appears to suggest. Even when alleged co-offenders are tried together on the same charge it is possible that the jury will determine that one alleged offender is innocent and the other is guilty. It is a matter of what is disclosed by the evidence. As Eames JA observed in *R v Lao and Nguyen*:[8]

> "An indictment charging two persons on the one count is both joint and several. Thus, the jury might conclude that the evidence against one of the accused was not sufficient to prove his guilt of the offence and yet be satisfied as to the guilt of the other accused."

[38] That different evidence adduced at different trials may lead to different verdicts in relation to co-offenders simply cannot be regarded as indicative of a miscarriage of justice. It is now well established, for example, that a conviction of one conspirator may stand notwithstanding that a co-conspirator is, or may be, acquitted.[9] And in *MacKenzie v The Queen*, Gaudron, Gummow and Kirby JJ, speaking of the problem of different verdicts affecting co-accused or persons tried separately in relation to connected events, said:[10]

> "The last-mentioned problem is an inevitable risk of the trial system where accused offenders are tried separately. Thus in *R v Rowley* ([1948] 1 All ER 570) the appellant was convicted after a plea of guilty. The principals in the offence were later acquitted after a trial. The appellant gained an order quashing his conviction. Yet it was pointed out that apparently inconsistent verdicts in such circumstances might be no more than the result of 'differences in the

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7 [1966] Qd R 170 at 171.

8 [2002] VSCA 157 at [112]; (2002) 5 VR 129 at 165 (citations omitted).

9 See *The Queen v Darby* (1982) 148 CLR 668 at 678.

10 (1996) 190 CLR 348 at 366 (citations in original).

evidence presented at the two trials' or 'the different views which the juries separately take of the witnesses' (*R v Andrews Weatherfoil Ltd* (1971) 56 Cr App R 31 at 40)."

Unsafe or unreasonable verdict?

[39] That leaves for further consideration the appellant's arguments that the verdicts were unsafe or unsatisfactory. This involves an inquiry into whether a verdict of not guilty should be entered in relation to the offences charged, having regard to the evidence adduced against the appellant, on the basis that a jury could not reasonably have been satisfied of the appellant's guilt beyond a reasonable doubt.[11] The appellant contends, in this regard, that the evidence against her is so inherently unreliable that there should not be a retrial and that verdicts of not guilty should be entered in relation both to the murder and the conviction for burglary.

[40] The tape recorded conversation on which the Crown principally relied was that dated 15 February 2003. This evidence suggested that the appellant was in the house of the deceased when the struggle between Corry and the deceased occurred. This evidence suggests the appellant herself was involved in the struggle. There was other evidence, which also supported the reliability of these admissions, which suggested that the appellant was in the house when the attack on the deceased occurred. The jury's verdict is, however, inconsistent with their acceptance of that version.

[41] It does seems to me, however, that notwithstanding the jury's apparent rejection of that version, a reasonable jury, properly instructed, could have convicted the appellant of murder on the basis that Corry and the appellant had formed the intention that Corry should enter the premises to either assault or rob the deceased and that murder was a probable consequence of the implementation of that plan. That view is supported by the following:

(a) the evidence that Corry was apprehended by the police hiding under a bed at the appellant's house at a time when the police were seeking him in relation to the murder of the deceased. Harbouring Corry in these circumstances was some evidence of complicity in what he had done;

(b) the appellant's admissions which included:

(i) her statement to Ms Hayward in mid-August 2002 at the Goodna RSL that she and Corry had gone together to the deceased's' house on the night of his death and she stood in the park across the road from the deceased's house, that Corry was armed with a knife and she brought a machete, and that she heard the altercation between Corry and the deceased;

(ii) her statement to Ms Hayward on the telephone on 6 September 2002 that the "cops … will not find anything to link [her] … [She] is sure that [she] has been careful";

(iii) her statement to Ms Hayward on 11 September 2002 that "… [she] hopes that they will never put it all together, then [she'll] be really fucked and will need more than a good defence lawyer". On this occasion, Ms Hayward said that she

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[11] *M v The Queen* (1994) 181 CLR 487 at 493. See *R v Sheppard* [2005] QCA 38; CA No 93 and CA No 95 of 2004, 25 February 2005 at [34] - [36].

asked the appellant: "Did you do it?" to which the appellant replied: "Of course I did";

(iv) her statement to Ms Hayward on 12 September 2002 that she "needed to tell [Corry] to remember what she told him before he and she were taken away by the police". She said she "really needs to get the message to Mick about what's happening or it will all blow up";

(v) her statement to Ms Hayward on 3 February 2003, after she had given evidence at Corry's committal proceedings, that she had heard the deceased say to Corry "Who the fuck are you? What the fuck are you doing?". She said "[the deceased] was sitting on the edge of the bed smoking when [Corry] got in" and that the deceased "grabbed the bat near the door and whacked [Corry] with it, no match for a knife". She said that the deceased "was not supposed to be awake. [They] were going to slit his throat while he was sleeping, but he was awake when they got there";

(vi) her recorded statements of 23 September 2002: "I didn't even enter the premises" … and speaking of Corry: "Well, that's what I've got to … talk to Mick for, because he's the only one that can keep me out of gaol". In answer to the question: "And honestly what happens if he does talk?" the appellant said: "I go to gaol … because there's no way I can prove otherwise". The appellant also said: "I just opened the … kitchen window … put me hand in and opened the back door … I didn't do it. I just organized it";

(vii) her recorded statement of 26 September 2002: "I wasn't in the house … I was across the … road … Before … the neighbours even came out I was out of there, in the shadows, gone … And I got home and I just waited for Mick to get back …". And speaking of the machete, she said: "… I wiped it perfectly clean before I put it in his hand … I scrubbed all my prints off, I went … I left it up, put it in his hand … and I said 'Good luck' … I suppose I was betting he wouldn't do it".

(c) the letter from Corry to the appellant which affords support for an inference of complicity in a plan to assault the deceased otherwise suggested by the admissions referred to in (b). The letter tends to confirm Corry's awareness of grievances on the appellant's part against the deceased and, by inference, that the deceased and Corry had discussed those grievances before the night on which Corry broke into the home of the deceased.

[42] The appellant argues that Ms Hayward's evidence was unreliable and that, even if Ms Hayward were regarded as a truthful witness, the appellant's admissions were themselves not sufficiently reliable to constitute a safe basis for a verdict of guilty.

[43] The learned trial judge instructed the jury that it was necessary for them to decide whether the admissions were in fact made by the appellant and, if they were made, whether they were reliable. As to the first of these issues, the learned trial judge directed the jury to Ms Hayward's prior convictions for fraud and said that the jury "should exercise some caution before accepting her as a truthful witness and acting

on her evidence". Her Honour also commented upon the possibility that Ms Hayward may have made false claims about the appellant in the hope of a reduction in her sentence in respect of offences of which she was herself charged. Her Honour said: "… there is every reason for caution in approaching that evidence."

[44] The learned trial judge commented upon Ms Hayward having previously lied in the Magistrates Court and upon Ms Hayward's inconsistent statements about "Marcello", the name attributed to a person from whom Ms Hayward asserted she obtained information in relation to the murder of the deceased.

[45] The evidence of admissions consisted of Ms Hayward's oral evidence supported by her notes and the three tape recorded conversations. As to the notes, the learned trial judge commented on their incompleteness and the difficulty of putting what the appellant was alleged to have said in a proper context so that, even if the notes were genuine, there "may well be errors in the giving of evidence from them". The evidence of the tape recorded conversations was, at best, free of any doubts about the reliability of Ms Hayward's evidence of oral admissions.

[46] As a result of her Honour's directions, the jury were well aware of the dangers involved in acting on the evidence of Ms Hayward.

[47] As to the reliability of the admissions made by the appellant, the learned primary judge commented upon the possibility that the appellant may have been affected by drugs when she made the admissions or by a desire falsely to boast of her prowess. Her Honour drew attention to the different versions reflected in the admissions. A conviction on confessional evidence alone is not for that reason unsafe, provided that the jury's attention is drawn to the need to be satisfied, not only that the confession was made, but also that it was reliable.[12]

[48] It may also be said that, in this case, there was evidence which could have been regarded by the jury as tending to confirm the reliability of the appellant's admission that "she organized it". The appellant's son, Warren Smith, gave evidence of the breakdown of the relationship between the appellant and the deceased including the deceased's threat to burn down the appellant's house. Jason Sinclair gave evidence that Corry was present at the appellant's house on the afternoon before he [Sinclair] heard about the death. According to Sinclair, Corry was holding a knife or two. The appellant's admission that she "was across the … road … Before … the neighbours even came out I was out of there, in the shadows and gone … " was consistent with the evidence of the neighbours of the deceased who did come out into the street to assist the deceased after Corry's assault upon him.

[49] In any event, as a result of her Honour's directions, the jury were well aware of the need for care in determining the weight to be accorded to the appellant's admissions. As is apparent from the verdict in relation to the charge of burglary in company, the jury attended carefully to that warning.

[50] In my opinion, it was open to the jury safely to conclude on the whole of the evidence at the trial that Corry murdered the deceased and that because that murder was a probable consequence of the implementation of a common intention held by

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12 *R v Baker* [2001] QCA 326; CA No 35 of 2001, 10 August 2001 at [22] - [23], *R v Turmaine* [2004] QCA 75; CA No 309 of 2003; 19 March 2004 at [26].

Corry and the appellant that Corry should enter the home of the deceased at night with a view either to robbing him or assaulting him, the appellant was also guilty of murder.

Conclusion

[51] In my opinion the appeal should be dismissed.

[52] **MULLINS J:** I agree with the reasons for judgment of Keane JA and the additional observations made by McPherson JA. I also agree that the appeal should be dismissed.