SUPREME COURT OF QUEENSLAND

CITATION:	*Carter v Attorney-General for the State of Queensland* [2012] QSC 234
PARTIES:	**STEPHEN WAYNE CARTER** (plaintiff) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO:	BS2587/12
DIVISION:	Trial
PROCEEDING:	Judicial review application
DELIVERED ON:	29 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2012
JUDGE:	Margaret Wilson J
ORDER:	**1. Application for extension of time refused.** **2. Application for statutory order of review refused.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – where applicant convicted of murder – where applicant unsuccessfully petitioned Her Excellency the Governor for pardon – where applicant seeks statutory order of review of a decision of the Attorney-General not to refer his whole case to the Court of Appeal for hearing and determination pursuant to s 672A of the *Criminal Code* – where applicant applied for an extension of time for the making of the application – where respondent opposed extension of time on ground that substantive application was without merit – where both parties proceeded on the premise that respondent's exercise of discretion under s 672A of the *Criminal Code* was amenable to judicial review – whether the respondent erred in not referring the whole case to the Court of Appeal – where if applicant's construction of provisions of the *Criminal Code* were arguably correct, respondent's failure to refer the matter to the Court of Appeal would be improper exercise of power CRIMINAL LAW – PARTICULAR OFFENCES – HOMICIDE – CAUSATION – where deceased died from heroin overdose – where applicant pushed the plunger of the syringe which contained the heroin – where applicant alleged

that he could not be charged with murder, but only with aiding suicide under s 311 – where applicant submitted that, because the deceased implored the applicant to kill her, causation must be considered in a broader sense than mere physical causation – whether the applicant's acts or omissions were a substantial cause of the death – whether the deceased's consent to death affected the applicant's criminal responsibility

Crimes Act 1914 (Cth), s 50BA
Criminal Code Act 1899 (Qld), s 284, s 291, s 293, s 300, s 302, s 303, s 311, s 668E, s 672A
Judicial Review Act 1991 (Qld), s 26(1)(b)

Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353, cited.
Campbell v The Queen (1981) WAR 286; (1980) 2 A Crim R 157, cited.
Martens v Commonwealth of Australia [2009] FCA 207, cited.
Minister for Immigration and Citizenship v SZMDS and Anor (2010) 240 CLR 611, cited.
Nudd v Minister for Home Affairs [2011] FCAFC 105, cited.
Pepper v Attorney-General for the State of Queensland [2008] 2 Qd R 353, cited.
R v Main [1999] QCA 148; (1999) 105 A Crim R 412, cited.
R v Sherrington & Kuchler [2001] QCA 105, cited.
Royall v The Queen (1991) 172 CLR 378, cited.

COUNSEL: A Vasta QC and K Leigh for the applicant
P J Davis SC for the respondent

SOLICITORS: Fraser Power for the applicant
Crown Solicitor for the respondent

[1] **MARGARET WILSON J:** The applicant, who was convicted of murder, unsuccessfully petitioned Her Excellency the Governor for pardon. He seeks a statutory order of review of a decision of the Attorney-General for the State of Queensland not to refer his whole case to the Court of Appeal for hearing and determination as in the case of an appeal against conviction.[1]

Background

[2] Gail Marke and Patrick Smyth, both heroin addicts, wanted to end their lives. After repeated requests over about two years, they prevailed on the applicant to supply them with a "weight" of heroin. Satisfied that they really wanted to die, the applicant mixed up the heroin and injected Marke, and helped Smyth inject himself. Both of them died shortly afterwards.

[3] The applicant pleaded not guilty to the murder of Marke, but was convicted after a jury trial. He pleaded guilty to aiding Smyth in killing himself.

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1 *Criminal Code Act* 1899 (Qld) s 672A.

[4] He appealed against the murder conviction. The Court of Appeal held that the incompetence of his counsel had resulted in a miscarriage of justice, set aside the conviction, and ordered a retrial.[2]

[5] On his retrial, he was convicted of the murder of Marke. The Court of Appeal dismissed an appeal against the conviction.[3] In that appeal the issue was causation: whether, having regard to the large cocktail of drugs found in Marke's system, it was open to the jury to be satisfied that his injection of heroin caused her death.

[6] On 4 November 2010 the applicant petitioned the Governor for a pardon or alternatively mercy.[4] In his petition, the applicant contended that, as a matter of law, he could not have been guilty of murder[5] but only of assisting suicide.[6] He had not raised this argument at his trial or on appeal.

[7] By letter dated 15 November 2010 Her Excellency's Official Secretary advised the applicant's solicitors that the matter had been referred to the respondent "for a detailed and thorough examination of [the] case and submission." On 21 December 2011 the applicant's solicitor received a letter from the Official Secretary dated 16 December 2011 advising:

> "The Governor noted the matters recited in the petition and was informed of the result of enquiries made following receipt of the petition. On examining this information, the Governor sought further information and advice in relation to the Criminal Code, notably with reference to Chapter 26, Section 284 concerning 'consent to death and criminal responsibility' and Chapter 28, Section 302 (1)(a) and this has been provided.
>
> After giving consideration to all the material before her in relation to this matter, I am directed to inform you that there is no justification in this case for the exercise of any powers conferred on Her Excellency by the *Constitution of Queensland 2001*."

Section 672A of the *Criminal Code*

[8] Section 672A of the *Criminal Code* provides:

> "**672A Pardoning power preserved**
>
> Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of Her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may—

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2 [2003] 2 Qd R 402.
3 [2003] QCA 515.
4 *Constitution of Queensland* 2001 (Qld) s 36; *Criminal Code* s 18.
5 *Criminal Code* ss 300 and 302.
6 *Criminal Code* s 311

> (a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or
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> (b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly."

[9] "Court" in this section means the Court of Appeal.[7]

[10] The powers conferred by s 672A are enlivened by the presentation of a petition for the exercise of the pardoning power after conviction, and, in the normal case, after an unsuccessful appeal. As Muir JA said in *Pepper v Attorney-General for the State of Queensland*:[8]

> "… A reference under s 672A is a mechanism which the Crown may employ so that the exercise of the pardoning power may be properly informed or so as to grant the petitioner, in effect, a further appeal."

Amenability to judicial review

[11] There have been a number of decisions of this Court and the Federal Court on applications for judicial review of the respondent's exercise of discretion under s 672A of the *Criminal Code* made on the assumption that such a decision is amenable to judicial review, without any detailed consideration of the correctness of that assumption.[9]

[12] Both parties' submissions proceeded on the premise that the decision is one "under an enactment" and amenable to judicial review. In the circumstances, I shall proceed on that premise.

Grounds of review

[13] At the commencement of the hearing, I gave the applicant leave to amend his application by inserting the following grounds in lieu of those in the originating application:

> "1. The decision by the Attorney General not to refer the whole case to the Court of Appeal (*'the decision'*) was an improper exercise of the power conferred by s. 672A of the Criminal Code. (S.20(2)(e) Judicial Review Act 1991).
>
> 2. The decision involved an error of law (S.20(2)(f) Judicial Review Act 1991).

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7 *Criminal Code* s 668.

8 [2008] 2 Qd R 353 at [11]

9 *Pepper v Attorney-General for the State of Queensland; Re Fritz* [1995] 2 Qd R 580; *Martens v Commonwealth* (2009) 253 ALR 457; *Nudd v Minister for Home Affairs* [2011] FCAFC 105; Contrast *Von Einem v Griffin* (1998) 72 SASR 110, which turned on a differently worded provision.

> 3. The decision was otherwise contrary to law. (S.20(2)(i) Judicial Review Act 1991)."

[14] During oral submissions there was some debate about whether the applicant needed to establish that the respondent made an absolute error of law (i.e. that he relied on a construction of the *Criminal Code* which was wrong) or merely that he erred in not identifying that the construction for which the applicant contended was arguably correct.

[15] Counsel for the respondent submitted that this application turns on whether the respondent made an error of law in not adopting the construction of the *Criminal Code* for which the applicant contends. The respondent accepted that if he had wrongly understood the law and the law was as submitted by the applicant, then there had been a miscarriage of justice and the matter should be referred to the Court of Appeal.

[16] Had the respondent exercised his discretion by referring the whole case to the Court of Appeal, then the Court of Appeal would have been called on to hear and determine it "as in the case of an appeal by a person convicted".

[17] Section 668E of the *Criminal Code* provides (so far as presently relevant):

> "**668E Determination of appeal in ordinary cases**
>
> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
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> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
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> (2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.
>
> … "

[18] In *R v Main*[10] the Court of Appeal held that the issue to be determined by the Court of Appeal in considering a matter referred under s 672A(a) is the same as that falling for resolution on an appeal – whether there has been a miscarriage of justice.

[19] In *Martens v Commonwealth of Australia*[11] the applicant was convicted in the Supreme Court of Queensland of one count of having sexual intercourse with a person under the age of 16 years while outside Australia contrary to s 50BA of the *Crimes Act* 1914 (Cth). The Court of Appeal dismissed his appeal against conviction and refused his application for leave to appeal against sentence. He requested the Minister for Home Affairs to recommend to the Governor-General that he be pardoned or, alternatively, that he refer the case to the Court of Appeal pursuant to s 672A of the *Criminal Code*. The basis of his requests was fresh evidence. The Minister declined both requests. Martens made an application to the Federal Court for judicial review of the Minister's decision pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). Logan J set aside the Minister's decision to refuse to refer the case to the Court of Appeal, and remitted the matter to the Minister for further consideration according to law. In the course of his reasons for judgment his Honour said:

> "[53] The existence of a discretion undoubtedly means that a convicted offender has no right to the reference of his case. That the reference power is discretionary indicates that it was contemplated that the Minister would make some evaluative judgment as to whether a reference ought to be made but not in so doing usurp the role that was consigned to an appeal court in the event of a reference. In this sense, the Minister is a 'gatekeeper' who has a role in ensuring that the public interest in the administration of justice as furthered by the efficient allocation of judicial resources is not subverted by the referring of cases to the Court of Appeal which must inevitably fail. That the Court of Appeal on a reference itself had power to disregard grounds which it considered frivolous would not, in my opinion, prevent a Minister from refusing to refer a case where there was neither any new evidence nor even a ground of challenge not previously adversely considered, but care would need to be taken not to treat as frivolous a reasonable argument with which the Minister happened to disagree." (Emphasis added.)

Logan J held that a relevant consideration in exercising the power conferred by s 672A was whether evidence was offered which might, arguably, raise a significant possibility that the jury, acting reasonably, would have acquitted. In *Nudd v Minister for Home Affairs*[12] the Full Court of the Federal Court (Dowsett, Bennett and Greenwood JJ) doubted whether that was an exhaustive statement of the circumstances in which the exercise of the power may be appropriate. Their Honours said:

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10 [1999] QCA 148; (1999) 105 A Crim R 412 at 415, 416. See also *R v Daley; ex parte Attorney-General* [2005] QCA 162; *Pepper v Attorney-General* [2008] QCA 207 at [12].

11 [2009] FCA 207.

12 [2011] FCAFC 105 at [18].

> "… Section 672A prescribes no criteria for its exercise. Although, as suggested by the Minister, a significant doubt about the correctness of a conviction would no doubt be a justifiable basis for taking either of the two contemplated courses, that may not be the only basis for doing so. It is, for example, possible that public concern about a conviction might lead to the conclusion that for political reasons or reasons of public interest, one or other of the approaches prescribed in s 672A should be adopted in order to quell such public concern, even if the decision-maker does not accept that there is any reason to doubt the correctness of the conviction or the fairness of trial."

[20] In my view, if the construction for which the applicant contended was arguably correct, failure to identify it as such and to refer the matter to the Court of Appeal was an improper exercise of the discretion in s 672A.

Extension of time

[21] By s 26(1)(b) of the *Judicial Review Act* 1991 (Qld), an application for statutory review should be brought within 28 days of receipt of the decision sought to be reviewed. The applicant seeks an extension of time for the making of the present application, which was not filed until 20 March 2012.

[22] The respondent opposes an extension of time, but only because, in his submission, the substantive application is without merit. In the circumstances, I shall consider the merits of the substantive application before ruling on the application for an extension of time.

No statement of reasons

[23] The respondent was not obliged to provide a statement of reasons for his decision not to refer the matter to the Court,[13] and he has not done so.

[24] His decision is nevertheless reviewable. In *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[14]a taxpayer appealed against an assessment by the Federal Commissioner of Taxation. The Commissioner gave no reasons for his decision. Dixon J said:[15]

> "13. … [The commissioner's] decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the

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13 *Judicial Review Act* 1991 (Qld) s 31; schedule 2 item 1; *Pepper v Attorney-General for the State of Queensland* [2008] 2 Qd R 353.

14 (1949) 78 CLR 353.

15 At 360.

> material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

His Honour went on to consider and reject the only error suggested. He concluded:[16]

> "21. Both for this reason and because no ground has been shown for interfering with the commissioner's judgment, I think that the appeal should be dismissed with costs."

[25] In *Minister for Immigration and Citizenship v SZMDS and Anor*[17] Gummow ACJ and Kiefel J observed that many of the leading High Court authorities in which administrative decisions were challenged concerned legislative regimes where there was no obligation to give reasons. Their Honours went on:

> "…The decisions at stake in those cases presented an inscrutable face. Thus, in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*,[18] s 80(5) of the *Income Tax Assessment Act 1936* (Cth) required the taxpayer company, if prior losses were to be allowed deductions, to satisfy the Commissioner of the state of its voting power on the last day of the year of income. No reasons were given by the Commissioner for the disallowance of the taxpayer's objections to its assessment. In that context Dixon J explained[19] the circumstances in which the conclusion of the Commissioner was liable to review by the court. Likewise, the inadequacy of the material before the decision maker may support an inference that the decision maker has applied the wrong test or was not 'in reality' satisfied of the requisite matters[20] or from the absence of reasons the court may infer the absence of any good reason.[21]"

The facts

[26] In considering the applicant's contention that, as a matter of law, he could not have been guilty of murder but only of assisting suicide, I respectfully adopt the summary

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16 At 365.
17 (2010) 240 CLR 611 at 623.
18 (1949) 78 CLR 353; [1949] HCA 26.
19 [1949] HCA 26; (1949) 78 CLR 353 at 360.
20 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22; (1953) 88 CLR 100 at 120.
21 *Public Service Board of NSW v Osmond* [1986] HCA 7; (1986) 159 CLR 656 at 663-664.

of his recorded interview with police that is contained in McPherson JA's reasons for judgment in the appeal after the retrial.[22]

> "[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.
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> [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. …"

Relevant provisions of the *Criminal Code*

[27] Section 284 of the *Criminal Code* provides:

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22 *R v Carter* [2003] QCA 515.

"**284 Consent to death immaterial**

Consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused."

[28] Sections 291 and 293 provide:

"**291 Killing of a human being unlawful**

It is unlawful to kill any person unless such killing is authorised or justified or excused by law."

"**293 Definition of *killing***

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."

[29] Sections 300, 302 and 303 provide:

"**300 Unlawful homicide**

Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case."

"**302 Definition of *murder***

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of ***murder***.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result."

"**303 Definition of *manslaughter***

A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter."

[30] Murder is the unlawful killing of another person in any of the circumstances in s 302. Suicide is not within the definition of murder.

[31] Section 311 provides:

"**311 Aiding suicide**

Any person who—

(a) procures another to kill himself or herself; or

(b) counsels another to kill himself or herself and thereby induces the other person to do so; or

(c) aids another in killing himself or herself;

is guilty of a crime, and is liable to imprisonment for life. "

Submissions

[32] Counsel for the applicant submitted that although under the *Criminal Code* the survivor of a suicide pact could not be charged with murder (by aiding or counselling the deceased to take his or her own life) or with being an accessory before the fact of murder (as was the case at common law), that person would not escape criminal responsibility by virtue of ss 284 and 311. Their submissions continued:

> "19. Because suicide is excluded from the definition of murder, a person who embarks upon a course of planning with others to kill himself or herself, cannot be guilty of conspiracy to murder. By the same reasoning, persons who procure, counsel or aid a person in killing himself cannot be charged with murder pursuant to s.7 of the Code. Nor can they be charged with being an accessory after the fact to murder. (s.307 of the Code). It is for this precise reason that the Code has made special provision for such persons to be made criminally responsible for their actions under s.311 of the Code. Their actions are regarded as serious, since the maximum punishment is imprisonment for life.
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> 20. The effect of s.311 of the Code therefore, is to provide an exhaustive provision for both criminal responsibility and punishment in cases where a person embarks upon a course of conduct which involves the procurement, counselling or aiding of another person in killing himself or herself. Accordingly, where the Crown case alleges that the deceased wanted to kill himself or herself, the provisions of s.302 of the Code have no application. It is for this reason that a person who aids another to kill himself or herself and who does an act which falls short of achieving the result intended, cannot be charged with '*attempted murder*' pursuant to section 306 of the Code.
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> 21. Section 311 of the Code is therefore a '*code'* within the Criminal Code and speaks exhaustively in cases where the cornerstone of the Crown case is that the deceased was intent on killing himself or herself."[23]

[33] In oral submissions senior counsel for the applicant submitted that in a case such as this, where the deceased planned and implored the applicant to kill her, causation must be considered in a broader sense than mere physical causation. Having prevailed on the applicant to help her die, Marke ultimately caused her own death: she died, directly or indirectly, by virtue of her own acts. It was suicide, and the most the applicant could have been charged with was assisting suicide under s 311.[24]

[34] The written submissions for the applicant continued:

> "22. On the face of it, this argument may seem to show the existence of an inconsistency between the provisions of s.311 and s.302. That is because in a case where the person prevailed upon to assist in the death, will inevitably do an act or acts which amount to '*unlawful killing'*.[sic] Since that act or acts will be accompanied by an '*intention to kill'* the act will have all of the elements of '*murder*'.

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23 Applicant's Outline of Submissions filed 15 June 2012.

24 Transcript pages 1-16 – 1-19.

23. The High Court observed in *Project Blue Sky v ABA*[25]:-

> *'The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language of all the provisions of the statute.'*[26]

24. The Court further stated (paragraph 70):-

> *'A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.'*[27]

25. The provisions of s.302 and s.311 can be construed '*to give effect to harmonious goals*'. Section 302 of the Code involves all unlawful killings other than suicides. In cases other than suicides, if the unlawful killing is accompanied with the intention to kill, the crime is '*murder*'.

26. On the other hand, in cases where the Crown unequivocally contends that the deceased person was intending to kill himself or herself (as in Mr Carter's case) section 311 speaks exhaustively on the subject. Therefore, any person who comes within the description set out in that provision is liable to prosecution according to this section and no other. This is so, irrespective of whether the act assisting is minor, substantial or (as in Mr Carter's case) the act that causes the cessation of breathing. The distinction among the infinite variety of acts which may be termed '*assisting*' is merely relevant to punishment and not to criminal responsibility for any other offence."

[35] Senior counsel for the respondent submitted that the key issue is whether the offender's acts or omissions were a substantial cause of the other's death. He submitted:

> "17. On a proper construction of those provisions:-
>
> (a) if an offender causes the death of another then he has killed the person;[28]
>
> (b) the killing is unlawful unless authorised, justified or excused by law;[29]
>
> (c) consent of the person killed to the killing is not an authorisation, justification or excuse and the consent

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25 (1998) 194 CLR 355 at 381 (paragraph 69).
26 *Taylor v Public Services Board (NSW)* (1976) 137 CLR 208 at 213 per Barwick CJ.
27 *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J.
28 Section 293.
29 Section 291.

is irrelevant to the criminal responsibility of the offender;[30]

(d) where the offender held an intent to kill when he killed the person then the unlawful killing is murder;[31]

(e) therefore, when an offender, with the consent of the person, intentionally causes the death of the person then in the absence of any lawful excuse, the offender is guilty of murder;

(f) where the person causes his own death any person who assists him is not guilty of murder as that person has not killed the person ie. he has not '*caused'* the death;[32]

(g) however, where a person causes his own death and another person assists the person to cause his own death then the person who has assisted is guilty of the offence of aiding suicide.[33]

18. Therefore, the distinction between a killing which constitutes murder and a killing which constitutes assisted suicide is whether the acts or omissions of the offender caused the death."[34]

[36] He submitted that, because a person's consent to his or her own death is immaterial to the criminal responsibility of any person who causes that death (s 284), it is wrong to say that if a person wishing to die procures another to assist him or her to do so, and that other person's conduct is a substantial cause of the death, the other person cannot be charged with murder under s 302, but only with aiding suicide under s 311.

Discussion

[37] In a criminal trial causation is a question of fact for the jury.

[38] In *R v Sherrington & Kuchler*[35]McPherson JA said of s 293:

"[4] … In the application of that section, courts in Queensland follow the decision in *Royall v The Queen*[36] that a person causes the death of another if his act or conduct is a substantial or significant cause of death, or substantially

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30 Section 284.
31 Section 302.
32 Section 293.
33 Section 311.
34 Outline of Submissions on behalf of the Attorney-General for the State of Queensland filed 20 June 2012.
35 [2001] QCA 105 at [4].
36 (1991) 172 CLR 378 at 411.

> contributed to the death.[37] See *Lowrie & Ross.*[38] As was said in *Royall*, that question is not a philosophical or scientific one, but a question to be determined by the jury applying their common sense to the facts as they find them, at the same time appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter."[39]

[39] In *Royall* the deceased died when she fell from the bathroom window of a sixth floor flat which she shared with the accused. Her relationship with the accused had not been harmonious, and there was a violent argument between them before she died. The deceased went into the bathroom: she locked the door, undressed and began to shower. The accused forced his way into the bathroom, where the violence continued. The lapse of time between his entry into the bathroom and her leaving through the window was insignificant.

[40] The trial judge instructed the jury that there were four alternatives open to them on the evidence – (i) that she was pushed or forced out of the window in a physical way by the accused; (ii) that she fell from the window while avoiding a blow or an attack from the accused; (iii) that immediately before the fall from the window she had a well-founded and reasonable apprehension that, if she remained in the bathroom, she would be subjected to life-threatening violence from the accused, and, in order to escape that violence, she jumped out of the window; (iv) that she jumped of her own volition: that the act of leaving the window was not the result of or causatively linked to the acts of the accused. The Crown case was that the accused had murdered the deceased in one of the first three of these scenarios. His Honour left the case to the jury on the basis it was for them to determine the accused had caused the death in any of the three ways suggested by the Crown. If they were satisfied the accused had caused the deceased's death, then they had to consider whether he had the requisite intent.

[41] The High Court agreed that any of the three possibilities put forward by the Crown could have amounted to an act causative of the death.

[42] Mason CJ and Deane, Dawson, Toohey and Gaudron JJ[40] approved the statement of Burt CJ in *Campbell v The Queen*[41] that it is

> "…enough if juries [are] told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter."

Toohey and Gaudron JJ continued:

> "Burt CJ's comments have much to commend them. In particular, there is little to be gained, but there is a risk of confusion, if the members of a jury are introduced to the sophisticated notions of

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37 (1991) 172 CLR 378, 398, 423.
38 (1999) 106 A Crim R 565, 570-571.
39 *Royall v The Queen* (1991) 172 CLR 378 at 387, 425, 441.
40 At 387, 411 – 412, 423. See also McHugh J at 441.
41 (1981) WAR 286 at 290; (1980) 2 A Crim R 157 at 161.

> causation that tend to bedevil the law of torts. Nevertheless the jury must be told that they need to reach a conclusion as to what caused the deceased's death. 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: *The Queen v. Butcher*;[42] *Reg. v. McKinnon*.[43] 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."[44]
>
> …
>
> "In ordinary circumstances, the jury's task may be made easier if they are asked to determine first the cause of death rather than inquire whether an act of the applicant caused the death. But, in the circumstances in which the deceased met her death, it was not inappropriate for his Honour to put the matter in terms of whether an act of the applicant caused the death. Section 18(1)(a) of the *Crimes Act* requires that there be an 'act of the accused ... causing the death charged'. Unless the jury were satisfied beyond reasonable doubt that the applicant caused the death, that was the end of the Crown case…"[45]

[43] In the applicant's trial for murder, the jury had to decide whether they were satisfied beyond reasonable doubt that he substantially contributed to Marke's death. Even if they were satisfied that her own conduct substantially contributed to her death, it did not necessarily follow that the applicant's conduct did not substantially contribute to it. As Toohey and Gaudron JJ observed in *Royall*, the jury did not have to isolate a single cause of death.

[44] In my view counsel for the applicant's submission that, in the circumstances of this case, s 311 speaks exhaustively as to the applicant's criminal responsibility is not arguably correct.

[45] First, causation is a question of fact. The submission fails to take account of the causative effect of the applicant's conduct in pushing in the plunger of the syringe after he inserted the needle in Marke's arm (in contrast to Smyth's case, where the applicant inserted the needle, but Smyth pushed the plunger in himself). His conduct in pushing in the plunger was the physical act which ultimately caused her to stop breathing. The decision in *Royall* did not signal any "broader" than usual approach to the question of causation. On the contrary, the High Court applied the orthodox approach to causation, reiterating that it was a question of fact to be determined in a common sense way. It accepted that, where the deceased died in the course of escaping someone who had induced a well-founded apprehension of physical harm, that person's conduct was a substantial cause of her death.

[46] Secondly, s 284 is concerned with the criminal responsibility of a person who causes the death of another person. Consent by "a person" to "the causing of the person's own death" does not affect the criminal responsibility of "any person by

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42 [1986] VR 43 at 55-56.
43 [1980] 2 NZLR 31 at 36.
44 At 423.
45 At 424.

whom such death is caused". There may be more than one cause of death. Marke's consent did not affect the applicant's criminal responsibility if his conduct was a substantial cause of her death.

Disposition

[47] Because the construction of the *Criminal Code* for which the applicant contended was not arguably correct, there is no merit in the substantive application.

[48] The application for an extension of time should be refused, and the application for a statutory order of review should be refused.

[49] I will hear the parties on costs.