SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hawke* [2016] QCA 144
PARTIES:	**R** **v** **HAWKE, Laurence Eliot** (appellant)
FILE NO/S:	CA No 302 of 2014 DC No 1115 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 23 October 2014
DELIVERED ON:	7 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2015
JUDGES:	Fraser and Philippides JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant and his girlfriend were charged with armed robbery with personal violence – where the appellant and his girlfriend were charged on the basis that they were parties to the offence, rather than the person who physically committed the offence – where the appellant was found guilty by the jury – where the appellant's girlfriend was acquitted – where the prosecution's case relied upon evidence of a co-offender who had pleaded guilty – where the appellant alleged that the co-offender's evidence was inherently dangerous – where this evidence was not contradicted in any material respect by other evidence – where the trial judge gave strong directions to the jury regarding the credibility of the co-offender and the reliability of his evidence – whether it was reasonably open to the jury to accept and act upon the co-offender's evidence – whether the verdict was insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where both the appellant and his girlfriend were charged with

armed robbery with personal violence – where the appellant's girlfriend was acquitted – where the prosecution's case against both the appellant and his girlfriend required acceptance of the co-offender as a witness of truth – where the co-offender was adamant that the girlfriend was complicit in the planning of the offence – where the appellant argued that the credibility of a witness like the co-offender is not an 'easily divisible concept' – where the appellant alleged that doubt about the co-offender's evidence concerning the appellant's girlfriend's involvement necessarily involved doubt about the evidence as a whole – where there was no independent evidence supporting the co-offender's evidence about the appellant's girlfriend's involvement in the offence – whether the jury's acquittal of the appellant's girlfriend necessarily reflected doubt about the accuracy and reliability of the evidence concerning the appellant's involvement – whether the jury's verdict was insupportable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – TAKING OBJECTION TO SUMMING UP – where the prosecution alleged that the appellant could be found guilty of the offence as a party under s 7(1)(d) of the *Criminal Code* (Qld) – where to be found guilty the appellant 'must have intentionally participated in the principal offences and so must have had knowledge of the essential matters which went to make up the offences – where the trial judge directed the jury about s 7(1)(d) – where the appellant argued that the trial judge's directions contained no reference to that knowledge or intent – where the appellant alleged that the trial judge's directions to the jury were thus wrong in law – where the trial judge repeatedly directed the jury that the prosecution was obliged to prove beyond reasonable doubt that the appellant counselled the co-offender to commit each of the elements of 'the offence' which the trial judge had clearly identified, and that the co-offender did so after being so counselled and when carrying out that counsel – where the directions did not use the words 'intend' or 'know' – where the appellant did not seek re-directions – whether the trial judge's directions were wrong in law – whether the jury was misdirected

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – TAKING OBJECTION TO SUMMING UP – where the prosecution alleged that the appellant could be found guilty of the offence pursuant to s 8 of the *Criminal Code* – where the trial judge gave extensive directions about s 8 of the *Criminal Code* – where the trial judge, on a number of occasions, directed the jury to the effect that a conviction on the basis of s 8 required that there be a 'common intention to prosecute an unlawful purpose in conjunction with

one another' – whether it was necessary for the trial judge to, on each occasion, repeat the requirement of s 8 that the common intention must involve the prosecution of the unlawful purpose 'in conjunction with one another' – whether the jury was insufficiently directed

Criminal Code (Qld), s 7(1)(d), s 7(2), s 7(3), s 8

Attorney-General's Reference (No 1 of 1975) [1975] QB 773; [1975] EWCA Crim 1, considered
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
Georgiou & Ors; R v Georgiou & Anor; ex parte Attorney-General (Qld) (2002) 131 A Crim R 150 [2002] QCA 206, applied
Giorgianni v The Queen (1985) 156 CLR 473; [1985] HCA 29, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Adams; ex parte Attorney-General of Qld [1998] QCA 64, cited
R v F; ex parte Attorney-General (Qld) [2004] 1 Qd R 162; [2003] QCA 70, cited
R v Jeffrey [2003] 2 Qd R 306; [1997] QCA 460, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: P J Callaghan SC for the appellant
B J Merrin for the respondent

SOLICITORS: Burns Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** On 22 November 2010, Turner pleaded guilty to the offence that on 20 August 2009 he committed an armed robbery, with personal violence, of the Browns Plains Hotel. He was convicted and sentenced to four years imprisonment, suspended after serving 12 months. The appellant and his girlfriend, Smith, were charged as parties to the same offence. On the ninth day of the trial of those charges in the District Court the jury found the appellant guilty. Smith was acquitted.

[2] The appellant has appealed against his conviction on three grounds: (Ground 1) the trial judge erred in the directions given to the jury about s 7(1)(d) of the *Criminal Code*; (Ground 2) the trial judge erred in the directions given to the jury about s 8 of the *Criminal Code*; and (Ground 3) the verdict was unreasonable. The appellant gave particulars of ground 3.

Ground 3: the verdict was unreasonable

[3] It is useful first to discuss ground 3, since it requires some reference to the evidence and to some of the trial judge's directions to the jury. Under this ground of appeal, the Court is required to independently assess the sufficiency and quality of the evidence and to decide whether upon the whole of the evidence it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty

of the offences with which he was charged.[1] If the Court holds a reasonable doubt about the appellant's guilt, it will only be if the jury's advantage of seeing and hearing the evidence can explain their verdict that the Court may decide that no miscarriage of justice has occurred; if, after "making full allowance for the advantages enjoyed by the jury, there is a *significant possibility* that an innocent person has been convicted, then the court is bound to act and set aside a verdict based upon that evidence."[2]

Summary of the evidence

[4] The Crown case depended upon evidence given by Turner. He gave evidence that he committed the offence and that, as a result of his co-operation with the authorities, including an undertaking to give evidence in relation to the robbery, his sentence was less severe than it otherwise would have been. He had a lengthy and very serious criminal history. Turner committed the armed robbery because he needed money quickly to pay off a substantial debt owed to a man named Long, in relation to which Turner had been badly injured in an assault.

[5] Turner went to stay with Murphy, who both he and Long knew. Turner subsequently acted on a suggestion by Murphy that he stay with the appellant, who Turner knew, and the appellant's girlfriend, Smith. Turner discussed his debt with the appellant. The appellant advised him that the only way that he could get the money he needed to pay off the debt was to commit a robbery; the Browns Plains Tavern would be the likely spot for that robbery because the appellant's girlfriend (Smith) worked there in the poker machine area. The appellant told Turner that between $40,000 and $50,000 was taken from the poker machines each night. The robbery would be easy because there were usually only a couple of females working at the end of the shift. The money would enable Turner to pay off his debt and the appellant would receive $20,000 for helping Turner.

[6] Turner and the appellant had four or five conversations about this at the appellant's house and Smith was present on a couple of these occasions. In one of the conversations Turner told the appellant he was thinking very seriously about doing the robbery. During the second conversation, the appellant mentioned that Turner should assault Smith. She did not like her job there and wanted time off on compensation. By the time of that conversation, Turner had made up his mind to do the robbery. There was discussion about the layout of the hotel and how many people would be working. In other conversations between Turner and the appellant they went over what they had talked about earlier. The appellant also suggested that before doing the robbery Turner should hide in the disabled person's toilet at the back of the gaming room. However the plan for the robbery was devised on the night it was committed. Turner agreed that Smith had little to do with that plan but he rejected the suggestion that she had not known about the robbery in advance.

[7] The appellant told Turner that he should not stay at the appellant's house before the robbery, because he did not want to give the impression that anyone at the house was involved. About three days before the robbery Turner moved back to Murphy's house. Late in the afternoon or in the early evening of 20 August, the appellant rang Turner and told him that it was okay for the robbery to occur that night. Turner

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1 *MFA v The Queen* (2002) 213 CLR 606 at 614-615; *SKA v The Queen* (2011) 243 CLR 400 at 406 [14], 408 [21].

2 *MFA v The Queen* (2002) 213 CLR 606 at 623-624 quoting from *M v The Queen* (1994) 181 CLR 487 at 525.

obtained from Murphy a bag, mask, gloves, and a large knife and Murphy drove Turner to a hotel, where Turner met the appellant. (CCTV footage from that hotel showed them together.) The appellant later drove Turner towards the Browns Plains Hotel. On the way they talked about the robbery. After looking around at the Hotel they drove to an industrial area where the appellant had a depot. There they discussed what Turner would do in the robbery. Turner intended to tie people up with electrical tape but the appellant suggested that he use cable ties, which the appellant supplied. Turner got changed into his black jumper and took out his gloves, mask and knife. After discussing further details about the robbery, the appellant drove Turner to the Browns Plains Hotel. Turner got out at a place behind the Hotel and he saw the appellant drive into the Hotel carpark and go inside the Hotel. They had arranged that the appellant would signal Turner when to go into the Hotel by ringing Turner's phone and hanging up.

[8] When Turner heard the phone call he went through the back doors of the Hotel and waited in a toilet before committing the robbery. Turner went to the gaming area. He saw Smith on the way and thought she looked at him before she turned around and went back to the cashier's area. The doors which Turner thought would be open, through which he was to go to the gaming area, were locked. He went by a different route to the gaming area. He saw an employee, Mr Meredith. Turner, armed with the knife, pulled Mr Meredith down and started to tie him up with cable ties. He asked Smith to help him. The appellant was yelling out, "where's the money, where's the money". (Mr Meredith gave evidence that Turner was as aggressive to Smith as he was to Mr Meredith.) Turner and Smith collected the money. Smith obeyed Turner's demand that she open the back door. He tied her with cable ties and ran out.

[9] Turner rang the appellant and told him that the robbery was finished and to come and pick him up. The appellant drove to the place where he had dropped Turner off. They interrupted their journey to stop and put Turner's bag in the boot. Turner showed the appellant the bag full of money. Turner had wads of money in his pocket and asked the appellant about that money. The appellant said to give it to him. That amounted to about $1,500 or $2,000. The appellant put that money in his pocket and they drove off. Turner asked the appellant to slow the car down whilst they were over a bridge so he could throw the knife in the river. The appellant dropped Turner off in front of Murphy's house. The appellant opened the boot. Turner took the bag containing the money. Some had fallen out of the bag into the boot. The appellant told Turner to leave that money and that he, the appellant, would hang on to it. The appellant said that he would call Turner later and drove off. Turner and a friend of his (who dealt with some of the proceeds of the robbery) counted the money he retained. It amounted to between about $48,000 and $52,000. Turner thought that Murphy took $20,000 or $25,000 of the money. At a later time which Turner could not specify, Turner met the appellant, Smith, and Murphy at a hotel. Turner professed to have little recollection of what was said at this meeting, but said that there would have been discussion about when the appellant was going to get his money.

[10] The respondent summarised other significant evidence in the Crown case in terms which were not criticised by the appellant, as follows:

> "…
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> (a) Exhibit 1: footage at Kensington Hotel on 19 August 2009. The footage depicts the appellant and Turner in company with one another at the hotel before leaving at 22.03;

(b) Exhibit 21: footage at Browns Plains Hotel on 20 August 2009. The footage depicted the appellant arriving at 1.1am. At 1.44, 2.02 and 2.15 the appellant can be seen smoking in the designated area. After the appellant returned to inside of the hotel, and at s.17.07 Turner entered the hotel, in his disguise and entered the area where toilets are located. At 2.22.25 the appellant left the premises. At 2.36 Turner looked out into the main area of the hotel and at 2.38 (approximately 20 minutes after the appellant had entered the hotel) the robbery commenced and ends at .58;

(c) Telephone records establish that Turner contacted the appellant at 13.28 on 19 August, a text message was sent by the appellant at 18.47 to Turner who responded at 20.31. Contact between the two men occurred at 20.42 20.47, 21.24, 21.33, and further on 20 August at 00.57, 1.44, 1.45, 2.15, 2.16 and 2.59;"

Some of the trial judge's directions to the jury

[11] In summing up to the jury, the trial judge reminded the jury that the Crown case was that the appellant and Smith were parties to Turner's offence. The trial judge referred the jury to the charge against the appellant and Smith and directed the jury that the Crown had to prove beyond reasonable doubt that the offence occurred on 20 August 2009. The trial judge referred the jury to the CCTV footage which showed Turner committing the offence in the early hours of that morning at the Browns Plains Hotel. As to the element that something was stolen, the trial judge reminded the jury of evidence that in excess of $50,000 was taken from the hotel. As to the element that immediately before or immediately after stealing the money the accused used or threatened to use actual violence, the trial judge reminded the jury of the evidence that Turner bound Mr Meredith and threatened him with a knife. The evidence of Mr Meredith and the CCTV showed that, whilst Smith was emptying some poker machines, Turner appeared and attacked Mr Meredith, holding a knife to his throat, tying him up, and dragging him to a separate area and asking for the office key. Turner continued to threaten Mr Meredith with the knife during the robbery. The trial judge referred to that evidence in the context of directing the jury that violence must be used or threatened to obtain the thing stolen or to prevent or overcome resistance to the thing being stolen. The trial judge referred also to the circumstance of aggravation that the appellants were armed, meaning that there must have been a weapon in the accused's possession and available for immediate use as a weapon. The trial judge also referred the jury to the other circumstance of aggravation that personal violence was used and directed the jury that tying up someone could amount to personal violence. The trial judge reminded the jury of the evidence, including the evidence of Turner and CCTV footage showing that Turner tied up Mr Meredith, dragged him across the floor, and threatened him with a knife.

[12] The trial judge directed the jury that:

> "The Crown case is not that the accused people were the actual robbers, but the Crown case is that [it] was Turner who was the robber. What the Crown says is that these two people in the dock were parties to the offence, that is, that they were part of the offence in a way that made them criminally liable for the offence without actually being the person who physically committed the offence."

[13] The trial judge then directed the jury that the Crown's case was that there were a number of different pathways by which the jury could reach that conclusion beyond

reasonable doubt. The trial judge's directions about those matters are discussed in these reasons in connection with the other grounds of appeal.

Consideration

[14] I will discuss the appellant's arguments in support of ground 3 under headings which state the appellant's particulars of that ground.

(a) unless Turner's evidence about the appellant's involvement in the robbery on 19 and 20 August 2009 was accepted beyond reasonable doubt, the jury was bound to acquit.

(b) Turner's evidence was inherently dangerous. It was tainted by his status as an accomplice and his motive to reduce his sentence.

[15] The trial judge gave strong directions to the jury to the effect of (a) and (b) of the appellant's particulars. However the jury could also take into account that Turner's evidence was not contradicted in any material respect by other evidence and that there was uncontroversial evidence which supported Turner's account. The evidence summarised in [10] of these reasons is significant. In particular:

(a) Telephone records showed that at 2:15:05 on the date of the robbery Turner sent an SMS to the appellant enquiring, "whats goin on?" and at 2:16:08 the appellant's phone called Turner's phone, which did not answer.
(b) CCTV footage shows Turner entering the Browns Plains Hotel in his disguise about one minute later and the appellant leaving the designated area in the hotel very shortly before Turner entered.
(c) CCTV footage shows that Turner commenced the robbery about 20 minutes later and that the robbery concluded at 2.58;
(d) Telephone records show that about a minute later Turner called the appellant.

[16] The jury had the benefit of seeing and hearing Turner giving evidence and being extensively cross-examined by counsel for the appellant and Smith over a period extending beyond a day. With that in mind, and notwithstanding the various bases for challenging the credibility of Turner and the reliability of his evidence, in the context of the other evidence which was capable of supporting important aspects of Turner's account about the appellant's involvement, it was reasonably open to this properly directed jury to accept and act upon the essential components of Turner's evidence.

(c) [Turner's evidence] was inadequate in at least two critical respects –

i. in his version of the story, the appellant was unusually and implausibly uninterested in the proceeds of a robbery he had supposedly masterminded, and

ii. Turner could offer no explanation for his failure, in the pretext call, to even suggest any of the many things he would subsequently assert about the appellant's involvement

[17] As to paragraph (c)(i) of the appellant's particulars, Turner's evidence was that the appellant benefited from the robbery to the extent of some thousands of dollars as a result of the appellant taking possession of wads of money that had been in Turner's

pockets and also money which fell out of the bag in the boot. That Turner could not explain why the appellant did not insist on counting the money in Turner's presence to ensure that he received the $20,000 discussed between them did not necessarily reflect adversely upon Turner's credibility or the reliability of his evidence. Turner may not necessarily have been aware of all of the dealings between the appellant and others who may have been involved in the offence. The evidence certainly suggests that at least one other person may have been involved in and substantially benefited from the offence, but that did not require the jury to doubt the accuracy of Turner's evidence about the appellant's involvement.

[18] As to paragraph (c)(ii), after Turner admitted to police that he had committed the robbery he participated in a pretext call with the appellant with the object of engaging the appellant in a conversation in which the appellant might implicate himself. The appellant relied upon an answer given by Turner in cross-examination in which he agreed that the pretext phone call was his "big opportunity", meaning his opportunity to obtain an admission which would assist him in being given a reduced sentence. The appellant submitted that it was telling that Turner did not attempt to press the appellant or contradict the appellant's assertions which were inconsistent with him having been involved in the robbery, and it was also significant that Turner could not explain his failure to attempt to engage the appellant on those issues.

[19] Early in that conversation Turner asked the appellant what was going on, the appellant responded to the effect that he did not know and Turner said, "yeah?". It is noteworthy that the appellant then added, "phone's hot I'd say." In circumstances in which at the outset the appellant revealed his belief that others – presumably police – were listening to the telephone conversation, it must have seemed unlikely that the appellant would make any admissions. That tends to support Turner's explanation for not attempting to draw the appellant into making admissions, that this was first time he had ever participated in anything like the pretext telephone conversation. In any event, the matters relied upon by the appellant, whilst relevant, did not require the jury to doubt the accuracy of Turner's account.

(d) although there were obvious differences in the cases made against each accused, they both required acceptance of Turner as a witness of truth. He was adamant that the co-accused Smith was complicit in the planning of the offence. Given her role in the robbery itself, acceptance of that evidence would have ensured her conviction. The reasonable doubt that must have been felt by the jury about Turner's honesty when considering the case against Smith ought to have been experienced when considering the case against the appellant.

[20] As to paragraph (d) of the appellant's particulars, the appellant argued that, "the credibility of a witness like Turner is not such an easily divisible concept" and a doubt about Turner's evidence concerning Smith's involvement necessarily involved doubt about his evidence as a whole.

[21] I accept the respondent's submission that there was a distinction between the quality of Turner's evidence concerning the appellant and the quality of Turner's evidence concerning Smith. Unlike in relation to his evidence about the appellant's involvement, there was no independent evidence which supported Turner's evidence about Smith's involvement. As the respondent also submitted, on many occasions Turner's evidence of conversations about Smith's involvement commenced with words such as, "I think…" or "I can't really recall." I will give a few examples of this. I earlier mentioned Turner's

evidence that he had four or five conversations with the appellant about the robbery. He gave evidence that Smith was present for conversations "on a couple of occasions". Immediately thereafter, Turner was asked to identify the first conversation in time where Smith was present and he answered, "I think it was – oh – three or four days after I – I first got there…". After referring to a conversation in which there was discussion about the fact that he was thinking very seriously about doing the crime, Turner stated that, "I think Nicole confirmed how much money would be there …". Much of Turner's evidence about Smith was given in similarly unpersuasive terms.

[22] Furthermore, in summing up to the jury the trial judge referred in detail to the cross-examination of Turner by counsel for Smith in which Turner made many concessions about the imprecision of his memory and as to matters about which Smith had no knowledge. For example, Turner agreed that he did not speak to Smith about cable ties, a knife being used, or a specific plan to rob the hotel. The trial judge also referred the jury to concessions by Turner that when he was interviewed by police he said that Smith was just a worker at the hotel and played no part in it. At the committal hearing, Turner gave evidence that he did not have any conversation with Smith about what her actions were at the robbery, and he said that she was just a worker and not involved in any way, and he "may have" spoken to Smith about what was going to happen but "can't recall exactly".

[23] There were aspects of Smith's conduct during the robbery which the jury could regard as implicating her in it, and the fact that she sought worker's compensation after the event (which was consistent with Turner's evidence) also supported such a conclusion. Even so, having regard to the vagueness and apparent uncertainty of Turner's evidence of Smith's involvement, the jury's acquittal of her does not necessarily reflect any doubt about the accuracy and reliability of Turner's evidence concerning the appellant's involvement.

(e) even if these circumstances can individually be explained away, they combine to create a real sense of "anxiety and discomfort" that cannot be rationalised, and which ought to have raised doubt in the mind of a reasonable jury.

[24] The appellant did not argue that, if it was open to the jury to accept and act upon Turner's evidence, that evidence was not capable of establishing beyond reasonable doubt that the appellant was criminally responsible as a party to the offence committed by Turner. That plainly was open upon the extensive evidence of the appellant's role. This evidence included urging Turner, and agreeing upon and implementing together with him a plan, to commit the offence in the way Turner did commit it as a means of providing him with funds sufficient to enable him to pay his debt, and aiding Turner to commit the offence in many ways, including by supplying him with cable ties to restrain Smith and driving him to and from the scene of the offence.

[25] For the reasons I have given, I am persuaded that it was reasonably open to the jury to conclude that the Crown had proved beyond reasonable doubt that the appellant was guilty of the offence.

Ground 1: Directions about s 7(1)(d) of the *Code*

[26] Section 7(1)(d) of the *Criminal Code* attributes criminal responsibility for the commission of an offence to "any person who counsels or procures any other person to commit the offence." In such a case, "the person may be charged either with committing the offence or with counselling or procuring its commission" and a conviction upon either basis "entails the same consequences in all respects as a conviction of committing the offence".[3]

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3 *Criminal Code*, ss 7(2) and 7(3).

[27] The parties agreed that for the appellant to be guilty of the offence as a party under s 7(1)(d) the appellant, "must have intentionally participated in the principal offences and so must have had knowledge of the essential matters which went to make up the offences … whether or not he knew that those matters amounted to a crime."[4] The appellant argued that the trial judge's directions to the jury about s 7(1)(d) were wrong in law and apt to cause a miscarriage of justice because they contained no reference to that knowledge or intent. The respondent argued that the directions appropriately conveyed the requirement for the necessary intent and knowledge and that in any event they were not apt to cause a miscarriage of justice.

[28] The parties' arguments require extensive reference to parts of the trial judge's summing up.

[29] After giving the directions summarised earlier in these reasons, the trial judge directed the jury about the Crown case under s 8 and s 7(1)(c) of the *Code*. When directing the jury about s 8, the trial judge observed that, "a great deal depends on the precise nature of any common unlawful purpose proved by the evidence in the light of the circumstances of the case and particular the state of knowledge of the accused. It's the accused's own subjective state of mind as established by evidence which decides that [sic: what] was the content of the common intention to prosecute an unlawful purpose…".

[30] In relation to s 7(1)(c) ("every person who aids another person in committing the offence") the trial judge gave the following directions:

> "You may find the accused guilty of the offence of armed robbery with personal violence only if you are satisfied beyond reasonable doubt of four things. The first is that Turner committed the offence. The second is that the accused either in some way assisted Turner to commit the offence or [did an act] with the purpose of assisting or enabling him to commit the offence, even if that act did not, in fact, assist. The third is that they assisted or did the act with the intention of helping him to commit the offence and the fourth is that when they assisted or did the act with that purpose, they knew that Turner intended to commit the armed robbery with personal violence at the Browns Plains Hotel.
>
> …
>
> The Crown case in relation to Hawke for aiding is that, again with the requisite knowledge, Hawke provided Turner with relevant information in respect of the layout and the security of the hotel. He also provided Hawke with advice as to the method by which he should perform the robbery and/or, with the requisite knowledge, Hawke assisted in the concealing of items used in the robbery by allowing them to be placed in his car and/or, with the requisite knowledge, Hawke provided Turner with equipment used in the robbery. That is namely the ties. With the requisite knowledge, Hawke drove Turner to a location near the hotel to enable easy access to the hotel and/or, with the requisite knowledge, Hawke entered the hotel and signalled to Turner when it was safe to enter the hotel and/or, with the requisite knowledge, Hawke drove Turner away from the crime scene and/or, with the requisite knowledge, Hawke stopped the vehicle to enable the knife to be discarded and/or, with the requisite knowledge, Hawke took some of the money off Turner in order to reduce the chances of detection.

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4 *Giorgianni v The Queen* (1985) 156 CLR 473 at 500 (Wilson, Deane and Dawson JJ).

> So, again, the Crown only has to prove beyond reasonable doubt one of those matters for aiding to be established but it has to be beyond reasonable doubt.
>
> Now, both of the accused or either of the accused can be found guilty of the offence of armed robbery with personal violence only if you are satisfied beyond reasonable doubt that when they did any of those acts, they did so intending to help Turner, knowing that he was going to commit this armed robbery of the hotel. If you are not satisfied that he knew – that the accused knew that he meant to do those things or if you have a reasonable doubt about it, then you must find them not guilty."

[31] The trial judge then gave the directions about s 7(1)(d) which are in issue:

> "Now finally, there is this question of counselling which is the third pathway the Crown says you can go to find a verdict of guilty. For the prosecution to prove beyond reasonable doubt that the accused are guilty because they counselled Turner to commit the offence of armed robbery, the prosecution must prove beyond reasonable doubt again that Turner committed the offence; secondly, that the accused counselled in the sense of urging or advising Turner to commit the offence; thirdly, that Turner committed the offence after being urged or advised by the accused to commit the offence and, finally, that he committed the offence when carrying out that counsel. So, again, in considering whether the defendant urged or advised the perpetrator to commit the offence, you must consider with care what it was that the defendant urged or advised the perpetrator, if anything, to do; that is, Turner.
>
> So the Crown says, in relation to Smith, in a conversation at the residence of Smith and Hawke, Smith counselled Turner to do the robbery by agreeing with Hawke that Turner should strike her during the robbery. So that is what the Crown says is the case against Smith. In relation to Hawke, the Crown says Hawke put the proposition to Turner that he should commit the robbery at the Browns Plains to pay off the debt that he owed."

[32] Those directions were given late on the eighth day of the trial. On the following day the trial judge told the jury that she was "going to go over, in short form" the directions about parties given on the previous day because those directions were at the crux of the case. In relation to s 7(1)(d) the trial judge gave the following directions:

> "[The] [t]hird path is that the accused counselled Turner to commit the offence. So for the prosecution to prove beyond reasonable doubt that they are guilty because they counselled Turner to commit the offence, the prosecution must prove beyond reasonable doubt again, firstly, that Turner committed the offence. Secondly, that they counselled in the sense of urging or advising Turner to commit the offence. Thirdly, that he committed the offence after being urged or advised by them to commit it and fourthly, that he committed the offence when carrying out that counsel. So in relation to that particular limb, the Crown says, in relation to Smith, in a conversation at the residence of Smith and Hawke, Smith counselled Turner to do the robbery by agreeing with Hawke that Turner should strike her during the robbery. In relation to Hawke, the Crown says Hawke put the proposition to Turner that he should commit the robbery at the Browns Plains Hotel to pay off his debt."

[33] Thereafter the trial judge summarised the evidence and the jury retired to consider its verdict. Subsequently the jury asked for further directions about the various "pathways" to conviction. In relation to s 7(1)(d) the trial judge gave further directions which substantially repeated those set out in the two preceding paragraphs apart from the last sentence of those directions.

[34] The appellant argued that the directions quoted in [30]-[32] omitted necessary references to the intention and knowledge required for secondary criminal liability under s 7(1)(d). The appellant also argued that the last sentence of the directions in [31] and [32] fell short of communicating the requirement for the necessary intention and knowledge. They were apt to focus the jury's attention upon a short passage of Turner's evidence which did not include reference to the essential facts constituting the future offence, that part of the evidence could not have established that the appellant then possessed the necessary intention, and nor did Turner at that time actually intend to commit the offence. The appellant argued that the absence of reference to the requisite intention and knowledge in her Honour's directions was emphasised by the appropriate references to intention and knowledge in the directions about s 7(1)(c).

[35] For the following reasons, which accept submissions by the respondent, those arguments should not be accepted.

[36] The trial judge repeatedly directed the jury that the prosecution was obliged to prove beyond reasonable doubt that Turner committed "the offence", that the appellant "counselled in the sense of urging or advising Turner to commit the offence", that Turner committed "the offence after being urged or advised" by the appellant to commit "the offence", and that Turner committed "the offence when carrying out that counsel". The jury cannot have been under any doubt that the repeated references to "the offence" were to the offence of armed robbery with personal violence. The trial judge identified the elements of "the offence" immediately before her Honour described the "pathways" by which the Crown alleged that the appellant and Smith were criminally liable for "the offence". The trial judge repeatedly referred to "the offence" in giving directions about s 7(1)(c), and the trial judge also reminded the jury that "the offence" was "the offence of armed robbery with personal violence". In that context the trial judge's directions about s 7(1)(d) clearly conveyed to the jury that for the prosecution to prove beyond reasonable doubt that the appellant was guilty, the prosecution must prove beyond reasonable doubt that the appellant "counselled in the sense of urging or advising" Turner to commit each of the elements of "the offence" which the trial judge had clearly identified, and that Turner did so after being counselled, in the sense of being urged or advised by the appellant to do so and "when carrying out that counsel".

[37] Although those directions did not use words such as "intend" or "know", they clearly required the jury to be satisfied beyond reasonable doubt that the appellant intentionally participated in the offence committed by Turner when the appellant had knowledge of each of the elements which went to make up the offence committed by Turner. That follows from the ordinary meaning of the word "counselled". In *R v Georgiou & Ors*; *R v Georgiou & Anor; ex parte Attorney-General (Qld)*, McPherson, Williams JJA, and Atkinson J held:[5]

> "The words "counselled" and "procured" are ordinary English terms having their usual meaning. Where their meaning is clear, no further explanation is necessary in a direction to the jury. Their ordinary

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5 [2002] QCA 206 at [79].

> meaning does not encompass simply knowing about the intention to commit an offence and while a direction to that effect could do no harm, it could not be said that the failure to give such a direction rendered this conviction unsafe."

[38] Whilst each case must depend upon its own circumstances, nothing in the circumstances of this case suggested any need for the trial judge to expound further upon the necessary intention and knowledge implicit in the words "counselled, in the sense of urging or advising".

[39] The appellant argued that the trial judge's directions left open the possibility of the appellant having counselled the commission of the offence unintentionally but recklessly, which would be insufficient to establish criminal liability. The submission that recklessness is not sufficient to amount to aiding, abetting, counselling or procuring under s 7 of the *Code* is supported by *Giorgianni v The Queen*, in which Wilson, Deane and Dawson JJ held that recklessness was insufficient and that what was required was "the intentional assistance or encouragement of the doing of those things which go to make up the offence"; the "participation must be intentionally aimed at the commission of the acts which constitute" the criminal offence.[6] That is what the trial judge's directions required. A conclusion that the appellant "counselled", "in the sense of urging or advising" Turner to commit the offence of armed robbery with personal violence which he in fact did commit after and when carrying out that counsel inevitably involved conclusions that the appellant knew that he was encouraging Turner to do the acts which constituted the commission of that offence and that he intended that Turner do those acts.

[40] Nor does the last sentence of the directions quoted in [31] and [32] of these reasons suggest a different view. That sentence amounted only to a succinct statement of the Crown case under s 7(1)(d). Immediately after repeating the directions about s 7(1)(d) on the last day of the trial, the trial judge summarised the evidence in the Crown case. In that context the trial judge's statement of the Crown case that the appellant "put the proposition to Turner that he should commit the robbery … to pay off the debt that he owed" would not have been understood by the jury as confining the Crown case under s 7(1)(d) to the initial conversation between the appellant and Turner. The evidence that Turner should commit the robbery to pay off his debt included Turner's detailed evidence that the appellant urged and advised him very specifically when and how to carry out the offence which Turner committed "when carrying out that counsel".

[41] The appellant did not seek re-directions at the trial along the lines of the directions which the appellant now contends should have been given. If, contrary to my conclusion, those directions should have been given, a re-trial should not be ordered unless the appellant establishes that, if the directions had been given, there was a reasonable possibility that the appellant would have been acquitted.[7] In that respect it is relevant to note that, when the jury sought re-directions about the pathways to a conviction for which the Crown contended, trial counsel for the appellant submitted that the trial judge "has very carefully not once, but twice, on two different days, taken them through those pathways … your Honour has done a very thorough job in that respect …". A forensic reason for the appellant not to wish to have more detailed directions upon that topic is apparent. The appellant's case was that no plans to commit the offence were discussed between the appellant and Turner, so that it was not necessary for the

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6 (1985) 156 CLR 473 at 505, 506.

7 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38] (McHugh and Gummow JJ).

jury to consider in detail the bases of liability upon which the Crown relied. Further directions upon the topic would likely have focussed the jury's attention even more closely upon Turner's evidence of the appellant's very extensive participation in the offence. In a case in which the jury must have accepted Turner's evidence that the appellant counselled him to commit the offence in order to obtain the funds necessary to repay his debt, it does not seem reasonably possible that further directions about s 7(1)(d) would have resulted in a different verdict.

Ground 2: the trial judge erred in directions given to the jury about s 8 of the *Code*

[42] The trial judge commenced the directions about s 8 by reading that section to the jury:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

[43] The trial judge gave detailed directions upon that provision. For ease of reference I have added paragraph numbers in the following extract from the summing up:

> "1. So if two or more people plan to do something unlawful together and in carrying out that plan an offence is committed, the law is that each of those people is taken to have committed that offence if, but only if, it is the kind of offence likely to be committed as a result of carrying out the plan. So for the Prosecution to prove the accused guilty relying on this section, it's necessary for you the jury to be satisfied beyond reasonable doubt, firstly, that there was a common intention to prosecute an unlawful purpose, …
>
> 2. …and you need to consider fully and in detail what was the alleged unlawful purpose and what its prosecution was intended to involve; secondly, that the offence was committed in the prosecution or carrying out of that purpose, …
>
> 3. …and you must consider carefully what was the nature of that [sic] actual crime committed; and then, thirdly, that the offence was of such a nature that its commission was a probable consequence of the prosecution of that purpose.
>
> So, obviously, a great deal depends on the precise nature of any common unlawful purpose proved by the evidence in the light of the circumstances of the case and particularly the state of knowledge of the accused. It's the accused's own subjective state of mind as established by the evidence which decides that was the content of the common intention to prosecute an unlawful purpose. That common intention is critical because it defines the restrictions on the nature of the acts done or omissions made which the defendant is deemed by the section to have done or made. When considering what any common intention was and what was any common unlawful purpose, you should consider whether you are satisfied beyond reasonable doubt that the accused agreed to a common purpose that, by way of example, involved the possible use of violence of [sic] force, or to carry out a specific act, or that involved inflicting some sort of physical harm on the victim, or in this case the pretend victim.

> If you are satisfied beyond reasonable doubt that there was a common intention to prosecute an unlawful purpose…
>
> 4. …and what that was, you must ask if you are satisfied beyond reasonable doubt that an offence of armed robbery was committed in the prosecution or furtherance of carrying out that purpose."

[44] The trial judge gave other directions about s 8 before describing the Crown case in relation to Smith and the appellant. In relation to the appellant, the trial judge directed the jury as follows:

> "…the Crown says that Turner, Hawke and Smith formed a common intention to commit a robbery at the Browns Plains Hotel in the early hours of a morning when two staff would still be on duty. The robbery would involve the theft of a substantial amount of money. One of the two staff would be Smith; the other would have no criminal involvement in the robbery. Turner would conduct the robbery as if he was the sole perpetrator. It was anticipated that personal violence may be inflicted on Smith. Hawke was aware that a knife would be used in the robbery. He was aware that it was proposed to tie up an employee or employees. The armed robbery that was committed was an offence of such a nature that its commission was a probable consequence of the prosecution of such a purpose.
>
> So consider each accused separately when you consider that question and ask yourself was there a common intention formed to rob the Browns Plains Hotel with Turner. Was the robbery that occurred on the night in question committed in the prosecution of that purpose, and was the robbery a probable consequence of the prosecution of that common purpose?"

[45] On the following day, the trial judge gave similar directions, starting with this statement about s 8:

> "So the first way [the Crown] says you could be satisfied beyond reasonable doubt that they were parties to the offences is that they, with Turner and possibly others, planned to rob the hotel. So if two or more people plan to do something unlawful together and in carrying out the plan an offence is committed, the law is that each of those people is taken to have committed that offence if – but only if – it is the kind of offence likely to be committed as a result of carrying out the plan.
>
> So for the prosecution to prove the accused guilty, relying on this section, it is necessary for you … to be satisfied beyond reasonable doubt firstly that there was a common intention to prosecute an unlawful purpose."

[46] When again summarising the Crown case in relation to the appellant the trial judge told the jury that the Crown case was,

> "that Turner, [the appellant], and Smith formed a common intention to commit a robbery at the Browns Plains Hotel in the early hours of the morning when two staff would still be on duty. That robbery would involve the theft of a substantial amount of money. One of the two staff would be Smith. The other would have no criminal involvement

> in the robbery. Turner would conduct the robbery as if he were the sole perpetrator. It was anticipated that personal violence may be inflicted on Smith. Hawke was aware that a knife would be used in the robbery…".

[47] In re-directions later on the last day of the trial, the trial judge directed the jury as follows:

> "…So as I said to you, the Crown in this case says that these two accused were parties to the offence and they say you can reach this conclusion by three different pathways. So the first way they say you can reach it is that you would be satisfied that with Turner, and possibly others, they planned to rob the hotel. So that's number 1. So a law provides that if two or more people plan to do something unlawful together, and in carrying out that plan an offence is committed, the law is that each of the people are taken to have committed the offence if, but only if it's the kind of offence likely to be committed as a result of carrying out the plan.
>
> So the prosecution, to prove that the accused are guilty, relying on this particular section, there's three things the Crown has to prove beyond a reasonable doubt. Firstly, that there was a common intention to prosecute an unlawful purpose and you need to consider fully and in detail what was the alleged unlawful purpose and what its prosecution was intended to involve. So in relation to each of the accused – and you have to consider them separately – ask yourself was there a common intention formed to rob the Browns Plains Hotel?
>
> The second thing is that the armed robbery with person [sic] violence that did occur was committed in the prosecution or carrying out of that purpose. So was the robbery that occurred on the night in question committed in prosecution of that purpose?"

[48] In relation to the directions quoted in [43] of these reasons, the appellant pointed out that the words "in conjunction with one another" were not present to qualify the expression "an unlawful purpose" at the end of any of the paragraphs I have numbered as 1-4. Similarly, the appellant pointed out that in the re-directions quoted in [47] the words "in conjunction with one another" did not qualify any of the references to "unlawful purpose". The appellant argued that, in that context, the trial judge's explanation of the Crown case in relation to the appellant required the jury to find only that the appellant and Turner agreed that together they should commit the offence, and that such a finding, whilst it might have involved an unlawful conspiracy, was insufficient to attract liability under s 8 of the *Code*. That was submitted to be so because the directions did not require the jury to find that two or more of the parties took steps together to carry out the plan or that the offence committed was a consequence of carrying out a plan which had called for them to commit the offence together. The appellant argued that the directions allowed the jury to convict the appellant even if Turner embarked upon the commission of the offence independently, albeit that he was the beneficiary of ideas and information he gathered whilst he resided with the appellant and Smith.

[49] I am unable to accept that there is any reasonable possibility that the jury reasoned in that way or that the trial judge's directions had any such effect. The trial judge introduced the directions about s 8 by referring to the requirement of s 8 that there be a common intention to prosecute an unlawful purpose "in conjunction with one another".

Then at the commencement of the paragraph I have numbered 1 in [43] of these reasons, the trial judge referred to the requirement that the plan be "to do something unlawful together". In that context, the trial judge's subsequent references to "a common intention to prosecute an unlawful purpose" must surely have been understood by the jury as referring to the Crown's case that the appellant, Turner and Smith formed a common intention that they would together rob the Browns Plains Hotel; thus, in describing the Crown case, the trial judge included the statement that Turner would conduct the robbery "as if he was the sole perpetrator", thereby reflecting the Crown case that the appellant and Smith actually, though not obviously to anyone at the hotel, acted in conjunction with Turner.

[50] Similarly, at the commencement of the directions on the following day, the trial judge reminded the jury that the first way in which the Crown contended that the jury could be satisfied beyond reasonable doubt that the appellant and Smith were parties to the offences "is that they, with Turner and possibly others, planned to rob the hotel", and the trial judge again directed the jury that, "if two or more people plan to do something unlawful together and in carrying out the plan and offence is committed…" Again, in that context the trial judge's subsequent description of the Crown case as being "that Turner, Hawke, and Smith formed a common intention to commit a robbery …" and that "Turner would conduct the robbery as if he were the sole perpetrator" conveyed the Crown's case that the appellant and Turner formed a common intention to prosecute that unlawful purpose in conjunction with one another. Similarly, at the commencement of the re-directions, the trial judge accurately referred to the provision of s 8 that "if two or more people plan to do something unlawful together …", before giving directions which were similar to the earlier directions.

[51] It was not necessary for the trial judge on each occasion to repeat the requirement of s 8 that the common intention must involve the prosecution of the unlawful purpose "in conjunction with one another". As the respondent argued, the defence case was that there was no common intention to rob the hotel and the appellant's acts at the time of the offence were not done with any such common intention in mind, whereas on the Crown case the prosecution of the unlawful purpose involved matters such as the appellant acting as a scout, driving Turner to and from the hotel, and calling Turner at the appropriate time to signal him to enter the hotel. There was no realistic possibility of the jury finding that, although the appellant and Turner formed a common intention to prosecute the unlawful purpose of robbing the hotel, their common intention was not to prosecute that unlawful purpose in conjunction with one another.

Proposed orders

[52] I would dismiss the appeal.

[53] **PHILIPPIDES JA:** I have had the advantage of reading the draft reasons for judgment of Fraser JA. I agree with what his Honour has said concerning grounds 1, 2 and 3.

[54] As to ground 1, which concerned whether the trial judge erred in the directions given to the jury as to s 7(1)(d) of the *Criminal Code* (the Code), the appellant's complaint was that the trial judge erred in omitting to refer to the requirement for intention and knowledge. In respect of this ground, I make the following additional comments. There can be no argument that both intention and knowledge are required for liability

as a secondary offender. In *Giorganni v The Queen*,[8] the common law position as to the mens rea requirement was stated by Gibbs CJ[9] as being that "both knowledge of the circumstances and intention to aid, abet, counsel or procure are necessary to render a person liable as a secondary party". What was required was that the secondary offender, "knowing all the essential facts which made what was done a crime, … intentionally … counselled or procured the acts of the principal offender".[10] Likewise, Wilson, Deane and Dawson JJ emphasised[11] the common law requirement of intentional participation in the principal offence by the secondary participant (as an aider, abettor, counsellor or procurer), being "intent based upon knowledge of the essential facts which constitute the offence".[12] The secondary offender, to be liable as such, must have "intentionally participated in the principal offences and so must have had knowledge of the essential matters which went to make up the offences".[13] "Aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of those things which go to make up the offence".[14] Recklessness is not sufficient to establish the requisite state of mind.[15]

[55] The common law requirements apply to s 7. Thus, just as intention and knowledge are required for criminal liability under s 7(1)(a), s 7(1)(b) and s 7(1)(c) of the Code, so are they required for s 7(1)(d).[16] Nor did the parties dispute that, for the appellant to be guilty as a party to the offence under s 7(1)(d), it was necessary to establish that the appellant, knowing the essential matters which went to make up the offence of armed robbery with personal violence, intentionally counselled or procured the commission of that offence.

[56] The appellant referred to *R v Georgiou & Ors; Ex parte Attorney-General (Qld)* where the Court observed:[17]

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

[57] *Georgiou* concerned directions given to the jury with regard to the criminal responsibility of a secondary offender for the offence of breaking, entering and stealing on the basis

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8 (1985) 156 CLR 473.
9 (1985) 156 CLR 473 at 482.
10 (1985) 156 CLR 473 at 488 per Gibbs CJ.
11 (1985) 156 CLR 473 at 500-508.
12 (1985) 156 CLR 473 at 503 per Wilson, Deane and Dawson JJ.
13 (1985) 156 CLR 473 at 500 per Wilson, Deane and Dawson JJ.
14 (1985) 156 CLR 473 at 505 per Wilson, Deane and Dawson JJ.
15 (1985) 156 CLR 473 at 487-488 per Gibbs CJ and at 500, 506, 508 per Wilson, Deane and Dawson JJ.
16 *R v Jeffrey* [1997] QCA 306 at 326 per Davies JA; *R v Lowrie and Ross* [2000] 2 Qd R 529 at 535 per McPherson JA; *R v Lui & Johnston* [2011] QCA 284 at [80] per McMurdo J.
17 [2002] QCA 206 at [78].

of counselling or procuring another to commit that offence. The question before the Court was whether the direction given was inadequate because it provided no explanation as to "what is required to constitute counselling or procuring"[18] and, in particular, that it could not be constituted by mere knowledge that an offence would be committed. The Court observed:[19]

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

[58] Likewise, the word "procure" is an ordinary English word and not a term of art but as Davies JA noted in *R v F*; *Ex parte Attorney-General (Qld)*,[20] its meaning may change depending on the context in which it is used.[21] In particular, the degree of proximity between procurement and what is procured may vary depending on the context in which the word is used. Williams JA observed[22] that there was not a great deal of authority on the meaning of the term "procure" in the criminal law. Williams JA referred to the observation by Lord Hewart CJ (with the concurrence of Swift and Branson JJ) in *Gough v Rees*[23] that a person "cannot counsel or procure unless he knows and intends what is to be done". His Honour also referred[24] to the following statement of Lord Widgery CJ, with whom Bristow and May JJ agreed, in *Attorney-General's Reference (No 1 of 1975)*:[25]

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening."

[59] In the context of s 7(1)(d) of the Code, it has been held that "procure" means more than "mere encouragement" and means successful persuasion to do something.[26]

[60] In considering the responsibility of a secondary offender, it is necessary to keep in mind that the expression "the offence" in s 7(1) bears the meaning assigned to it by s 2 of the Code; that is, "the element of conduct … which, if accompanied by the prescribed circumstances, or if causing a prescribed result, or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment".[27]

[61] It is possible that a person may, by his or her conduct, counsel or procure a result in circumstances where what was said or done by way of persuasion was in jest or

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18 [2002] QCA 206 at [77].
19 [2002] QCA 206 at [79].
20 [2004] 1 Qd R 162.
21 [2004] 1 Qd R 162 at 167 [33]. See also at [28] per Williams JA.
22 [2004] 1 Qd R 162 at 167 [34].
23 (1929) 46 TLR 103 at 105. That analysis of the term "procure" was also referred to in *Meyers v The Queen* (unreported, 1990, Western Australian Court of Criminal Appeal).
24 [2004] 1 Qd R 162 at 167 [34].
25 [1975] QB 773 at 779-780. This was applied in *R v Broadfoot* (1976) 64 Cr App R 71 at 74.
26 See *R v Adams; ex parte Attorney-General of Qld* [1998] QCA 64 at 7; see also *R v Oberbillig* [1989] 1 Qd R 342 at 345.
27 *R v Jeffrey* [1997] QCA 460 at 310.

reckless and without any intention that the offence be committed. It may have been better had the trial judge followed the bench book direction more closely, particularly in respect of s 7(1)(d). However, for the reasons outlined by Fraser JA, in the circumstances of this case, the trial judge's directions were sufficient to explain that it was necessary for the jury to be satisfied that the appellant, knowing the essential facts constituting the offence, intended to counsel or procure the commission of that offence.

[62] In any event, it is not sufficient for an appellant merely to identify an error in the direction given; it must be shown that the error resulted in the conviction being unsafe.[28] In this case, I am not persuaded that the failure to expressly direct the jury that the appellant could only be convicted if he intentionally counselled or procured the commission of the offence or, for that matter, the failure to make specific reference to the need for the appellant to have "knowledge" of the essential elements of the offence deprived the appellant of the reasonable possibility of an acquittal. The issue of knowledge by the appellant of the facts constituting the offence were explained to the jury. There was no issue of the counselling or procuring occurring recklessly or in jest. Nor would the judge's direction have left the jury with the erroneous understanding that mere knowledge about the intention by the principal offender to commit the offence was sufficient.

[63] **JACKSON J:** I agree with Fraser JA.

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[28] See *Dhanoa v The Queen* (2003) 217 CLR 1 at [38].