IN THE COURT OF APPEAL [1997] QCA 460

SUPREME COURT OF QUEENSLAND

C.A. No. 154 of 1997

Brisbane

Before McPherson J.A.
Pincus J.A.
Davies J.A.

[R. v. Jeffrey]

THE QUEEN

v.

ANDREW JOHN JEFFREY Appellant

McPherson J.A.
Pincus J.A.
Davies J.A.

Judgment delivered 19 December 1997

Separate reasons for judgment of each member of the Court; each concurring as to the order made.

APPEAL AGAINST CONVICTION DISMISSED.

CATCHWORDS: **CRIMINAL LAW - MURDER - Co-accused - Appeal against conviction - Whether misdirections to jury on ss.7 & 8 *Criminal Code Act 1899* gave rise to miscarriage of justice - Whether s.668E(1) *Criminal Code Act 1899* applied. *Miraz v. The Queen* (1955) 93 C.L.R. 493; *R. v. Beck* [1990] Qd.R. 30; *R. v. Barlow* (1997) 188 C.L.R. 1; *R. v. Iannazzone* [1983] V.R. 858; *Royall v. The Queen* [1987] W.A.R. 314; *R. v. Ross* (1922) 30 C.L.R. 246.**

Counsel: Mr G. Long for the appellant
Mr R. Martin for the respondent

Solicitors:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent
Hearing Date:	14 August 1997

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 19 December 1997

This is an appeal by Andrew John Jeffrey against his conviction of murder at a trial in the Supreme Court in June 1996. He was one of four men accused of that murder, of whom he and Mark Donald were tried jointly in the Supreme Court in June 1996, and Stuart Pascoe was tried in May 1997. All three of them have now appealed to this Court against their convictions. The fourth participant Aaron Johnson was a juvenile at the time of the killing. He was arraigned at the same trial as Donald and Jeffrey; but, after a voir dire had been held, Johnson's confession to the police was excluded and the Crown entered a nolle prosequi in respect of the charge against him. The appellant and Donald were then tried together; but, because the Crown case against them rested essentially on distinct admissions made by each of them during separate interviews by the police, it is, I think, preferable to determine their appeals in separate sets of reasons.

The body of the deceased was found lying in Eenie Creek Road at about 9 am on Sunday 18 December 1994. He had died earlier that morning after sustaining multiple injuries manifested externally in the form of severe bruising to the head, face, chest and limbs. Post mortem examination of the body disclosed that the cheek bones were broken on either side; five ribs had been fractured on the left side of the chest and four on the right, those fractures being randomly distributed; both lungs were bruised; there was a rupture of the left kidney comprising three 1 cm. lacerations, resulting in bleeding into the abdominal cavity; and a 3 cm. laceration of the liver from which blood had also issued. There were numerous other areas of bruising, abrasion, impact and injury in various parts of the body. In life, he had been a man of about 34 years of age, tall but sparely built.

Dr Zillman, the pathologist who conducted the examination on the morning of Monday 19 December and gave evidence at the trial, formed the opinion that there were at

least 10 separate sites of impact of blows or other applications of force to the trunk of the deceased, and at least three more distinct impact sites to the head, together with similar and distinct sites on the limbs. Dr Zillman said it was not possible to identify a single injury as the cause of death; but that in his opinion death had resulted not from the injuries to the head, but from a combination of the three sets of injuries to the chest and lungs, to the kidney, and to the liver. He added, however, that, if taken alone, any one of those categories of injury was "potentially survivable". They were consistent with having been caused by blunt impact from a fist or a foot with a shoe on it, and "severe force" would have been needed to inflict each of those sets of injuries. The random distribution of the rib fractures led Dr Zillman to say that the evidence did not support a conclusion that someone had jumped on the victim's chest as he lay on the ground. Rather the distribution of these factures suggested they had resulted from separate blows or kicks.

Neither the appellant Jeffrey, who was 18 years old at the time of these events, nor any of the other three assailants testified at his trial; but he was interviewed by the police for several hours on Monday 19 December 1994 and it was on the admissions made by him in that interview that the prosecution largely relied. From this and other sources at the trial, it emerged that the appellant lived at Noosaville with some other young men including Mark Donald, Stuart Pascoe and Aaron Johnson, of whom Donald (C.A. 309 of 1996) and Pascoe (C.A. 242 of 1997) have also appealed to this Court against their convictions for murder arising from the death of Timms. On the afternoon of Saturday 17 December 1994 they began drinking together, and by evening they had made their way to a nightclub at Noosa.

It was at the nightclub that they met the deceased, who was a stranger to them. Late that night or early on the morning of Sunday 18 December, the deceased accepted a lift home with them in a car driven by Mark Donald. The car was halted on the Eumundi Road, where

there was an argument with the deceased. He was said to have offered to provide them with cannabis, but then reneged on his promise. Like the others, he had been drinking heavily, and the appellant said he became abusive. According to the appellant's account, the four of them decided after discussion that the deceased should be "beaten up". The car was driven from the Eumundi Road into a remote section of Eenie Creek Road, where he was assaulted by all four men. They then drove off and went home, but came back some time afterwards and resumed their assault. The appellant said they returned on the second occasion because, after talking about it among themselves, someone had said "he might remember"; so they decided to go back there and "hit him a couple more times", to make sure that he would not remember.

As regards the appellant's own part in the assault, he admitted that on the first occasion he had kicked and punched the deceased about ten times in the lower back, the legs, and the head. He was wearing leather boots; but said he used only the top or laced part of the boot to kick him. They did not "toe bash" him, he said. It may be interpolated that Dr Zillman's post mortem identified nothing to support that assertion, and many indications on the body of the deceased that tended to contradict it. The appellant said he had not punched or kicked the deceased in the back of the head, but in the jaw and in the face, and in doing so, had broken his nose, although he was quick to add he was not sure about that. After being hit first by Donald, the deceased had fallen to the ground and curled himself into a ball. The headlights of the car were left on, and they all stood around him punching and kicking him all over the body. They were not all kicking him at the same time. Rather, he said, it was like "he has a few kicks, then Stevie (? Stewie Pascoe) moves in, then ....". They were taking it in turns, "but not like 'its your shot'"; it just happened that way. It was Pascoe, he claimed, who had done most of the kicking.

The first series of assaults lasted for about five minutes. On the second occasion, when they returned to the scene, the deceased was sitting up, and all four of them struck him again. The appellant kicked or hit him about three times, but only in the leg, "as I didn't wanna kick him in the head any more". On that occasion Mark Donald had kicked him in the side of the ribs about three times. At one stage, Pascoe had wanted to hit the deceased with a piece of wood like a fence post, but Johnson had taken it from him. The second series of assaults ended, or so he claimed, with Pascoe jumping on the man's chest. Before they left, the appellant had, he told the police, asked the man if he wanted an ambulance, but he had said No. The appellant also made some such statement to the same effect afterwards on the Sunday morning to another person, who gave evidence at the trial. The appellant said they had meant to hurt the deceased, but not to hurt him seriously. He himself intended just to hit him, but "nothing serious ... I did not intend that to happen". He was not delivering powerful punches or "full pressure" kicks: they were hard enough to bruise, but not to break bones. The appellant said that he and the others were pretty drunk at the time and they were all in a "stupid mood". They were all shocked when they heard next day that the man had died.

Given this evidence, the questions for the jury at the trial were, first, whether the appellant himself caused the death of the deceased, and had done so with the requisite intent for the offence of murder, which is to kill or do grievous bodily harm; or, secondly, whether he was criminally responsible for the act of one or more of the other assailants in doing so. The second question raised an issue or issues as to whether the appellant was responsible for the murder of the deceased under either s.7 or s.8 of the *Criminal Code*. With respect to that question, the principal issue on appeal was whether the learned trial judge ought, in view of the decision of the High Court in *The Queen v. Barlow* (1997) 188 C.L.R. 1; 71 A.L.J.R. 680,

reversing (1996) 86 A. Crim R.77, to have directed the jury that it was open to them to find the appellant guilty only of manslaughter.

Section 7 of the *Code* contemplates that, when an offence is committed, more than one person may be criminally responsible for it. It provides that each of the following persons "is deemed to have taken part in committing the offence" and to be guilty of it; that is to say:

> "(a) Every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) Every person who aids another person in committing the offence;
>
> (d) Any person who counsels or procures any other person to commit the offence".

In considering the responsibility of the appellant under s.7, it is necessary to keep in mind that the expression "offence" in s.7, and in sub-s. (a), (b), (c) and (d) of that section, bears the same meaning as in s.8 (*The Queen v. Barlow* (1997) 188 C.L.R. 1, 10; 71 A.L.J.R. 680, 684 col. 1E to 1F) which is the meaning assigned to it in s.2 of the *Code*; that is, as was said in *The Queen v. Barlow* (1997) 188 C.L.R. 1, 10; 71 A.L.J.R. 680, 684 col.1A to 1B, "the element of conduct (an act or omission) which if accompanied by 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". There is no need here to refer to omissions, since it is not suggested that the death of the deceased resulted from an omission on the part of the appellant or anyone else. So far as s.7 is concerned, the appellant was responsible, if at all, for the murder of the deceased either because, in the terms of s.7(a), some act of his own, carried out with the requisite intent under s.302(1)(a), caused the death

of Timms; or because in terms of s.7(c) he aided one or more of the others in killing him; or because under s.7(b) he did an act or acts for the purpose of enabling one or more of them to kill him.

It may be accepted that, to bring the appellant within s.7(a), the prosecution was bound to prove that the appellant was the person who actually did the act or acts which caused the death, and that he did so with the necessary intent to kill or do grievous bodily harm. See *Meyers v. R.* (1997) 147 A.L.R. 440, 442. The requirement that the death should have been caused by the appellant was, as the trial judge explained to the jury, fulfilled if they were satisfied that, as a matter of common sense, the appellant had contributed significantly to it: *Royall v. The Queen* (1991) 172 C.L.R. 378, 398, 411, 441 Having regard to the evidence of Dr Zillman, it was not scientifically possible for that to be established, which is why the Crown relied on 7(c) of the *Code*. As regards both s.7(b) and s.7(c) of the *Code*, it is settled that the accused is criminally responsible only if, in giving aid or assistance, he knows that the offence is being committed or is intended: see *R. v. Beck* [1990] 1 Qd.R. 30, 38; *R. v. Jervis* [1993] 1 Qd.R. 643, 647-648; which means that it must be proved that he knows the essential facts constituting or making up the offence that is being or about to be committed by the person he is aiding or assisting. See *Giorgianni v. The Queen* (1985) 156 C.L.R. 473. The requisite state of mind which had to be established against the appellant to make him criminally responsible under s.7(c) was that he knew that one or more of the others was intending to kill or to do grievous bodily harm.

The notion, which seems to have been implicit in some of Mr Long's submissions on behalf of Jeffrey, that, to establish responsibility of a secondary offender under s.7(b) or s.7(c), the prosecutor is also bound to prove that that offender in fact caused the death of the victim misconceives the operation and effect of those provisions of the *Code*. In relying on

s.7(b) or s.7(c) to establish the guilt of a person as a secondary offender, it is not incumbent on the prosecution to prove that any act on the part of that person caused the death or even significantly contributed to it, or to prove on the part of that person a specific intention to kill or do grievous bodily harm to the victim. Proof of those matters would tend to show that that person was not merely a secondary offender under s.7(b) or 7(c), but the actual perpetrator of the offence under s.7(a). In the prosecution case against the secondary offender, the prosecution is, of course, bound to prove all the elements of the principal offence to which the secondary offender is alleged to have been a party; but, when that is done, all that is necessary to establish the criminal responsibility of such an offender is that, with the requisite knowledge or state of mind, he did an act for the purpose of aiding or assisting another person or persons to commit that offence. This is so whether the rule being applied was that in *Barlow* (1996) 86 A.Crim.R. 77 or, as it now must be, that in *The Queen v. Barlow* (1997)188 C.L.R. 1; 71 A.L.J.R. 680. The effect of the High Court decision is to enable a secondary offender to be found guilty of an offence which is, or may be, in some respect different from the offence that is shown to have been committed by the actual perpetrator.

The application of ss.7 (b) and 7(c) in particular circumstances is capable of throwing up some difficult questions. The present is not a case of that kind. Mr Timms died from the injuries inflicted in the course of the assaults. Any one or more of his four assailants might have caused or significantly contributed to his death and done so with intent to kill or inflict bodily harm on him. If the jury were satisfied of that, then they were satisfied that a murder had been committed. For the purpose of establishing criminal responsibility against the appellant Jeffrey, it was not necessary in this instance for the prosecution to identify precisely who the actual killer was, or to show that the appellant himself had an intention to do grievous bodily harm. It was sufficient to prove that one or more of the others taking part in

the assault was aided or assisted in the killing of Timms by some act of the appellant done with the knowledge that at least one of those others intended to kill or do grievous bodily harm. That was the requisite state of mind which had to be established to make the appellant responsible for the murder of Timms under s.7(c) of the *Code*, which was the particular provision to which the trial judge referred in directing the jury.

The reason why it was sufficient here to prove no more than that is that the acts of all four of them were done in the presence of and in full view of all the others. Each of them was helping the others to carry out their assaults Hence if, as this appellant suggested in his answers in the interview, the major share in the assault was contributed by Pascoe, or by the other three apart from himself, the appellant nevertheless did an act or acts aiding Pascoe, or some or all of the others, to commit the offence of murder by causing the death with intent to do grievous bodily harm. He admitted to having kicked and punched the man about ten times in the lower back, the legs, and the head; and even if, as he claimed in the interview, his kicks or punches were only mild or modest blows, he nevertheless did an act or acts which aided one or more or all of the others to do the act of killing their victim or of inflicting grievous bodily harm on him. Where four assailants together attack a person, each succeeding blow, whether great or small, aids the others in brining about the death or grievous bodily harm that ensues. Even a moderate blow helps to subdue the victim and diminish his ability or will to resist or survive, and so paves the way for a later and more severe blow, or blows, and so on, until grievous harm or death results from the combined impact of their joint efforts. By assisting in the combination of assaults that led to the death of Timms, the appellant was, always assuming he had the requisite state of mind, deemed by the first sentence of s.7 "to have taken part in committing the offence and to be guilty of" it.

Here each of the four assailants aided and assisted each and all of the others in inflicting the fatal blow or blows which either individually or in combination caused the death of the deceased. A clearer case for the application of s.7(c) of the *Code* can scarcely be imagined. On what the appellant said, they all stood around their victim in the light afforded by the car headlights punching him in succession and taking turns at kicking him on the ground. It was the combined effect of those acts, carried out in the presence and full view of each other, that killed him. The only question was whether, in the case of the appellant, his acts were done knowing that one or more of the others had the intention of causing death or of inflicting grievous bodily harm. Despite some of the disavowals in his recorded interview, it would have been impossible for him not to have been aware of it. The medical evidence as to the number, the severity and the distribution of the injuries discovered on the deceased's body is indisputable evidence of the intention with which the blows were inflicted. The appellant saw all that happened. Stewie [Pascoe] was the one "doing the mean shit". He was wearing steel-capped boots. Any possible doubt about his state of mind is set to rest by his admission that, after the first round of assaults, they all had driven home; and, in the course of a discussion, had decided that they should return to the scene and administer a further beating to Timms with the object of ensuring that his injuries were so serious that he would not remember what had happened to him; or, it may be inferred, the identity of those who had done it. Given that admission, the jury were, despite evidence that the four assailants were affected by alcohol, rationally bound to reach the conclusion that, even if the appellant himself did not intend to cause death or grievous bodily harm, he was aware that one or more of the others intended to.

It was nevertheless submitted that the learned trial judge had in his directions to the jury not sufficiently emphasised the need to find beyond reasonable doubt a specific intent to

cause grievous bodily harm to the victim. The submission is not borne out by a reading of the summing up, and there was no request for redirection in respect of it. The jury were directed that, if satisfied there was an attack on the deceased by a number of persons acting together which resulted in his being unlawfully killed, "but you are not satisfied that the attackers intended to cause Mr Timms' death or to do some grievously bodily harm, they will be guilty of manslaughter and not murder". Specifically as regards the state of mind needed to attract responsibility under s.7(c), his Honour said:

> "To be guilty of an offence, a person accused of aiding in its commission must have done so knowingly. A person who unwittingly aids another or others in committing an offence will not be guilty of it. The aider must have known what offence was to be, or might be, committed."

In addition, his Honour's directions on the appellant's state of intoxication and its relevance under s.28 to the matter of intention would have had no significance except in relation to the issue of specific intent. The attention of the jury was directed to the need to make a finding of intent on the part at least of someone to kill or do grievous bodily harm before they would be in a position to find the appellant guilty of murder in reliance on s.7(c).

The substantial complaint on this appeal by Jeffrey is, however, that the trial judge directed the jury that it was not open to them to return a verdict of manslaughter against him even if satisfied that Timms had been murdered. For the jury to have done so in relation to the appellant's responsibility under s.7(c), it would have been necessary for them to have entertained a doubt about the intention to kill or do grievous bodily harm, or the appellant's knowledge of that intention when he assisted the others. Because of the judge's direction, it is submitted that the appellant lost a chance of acquittal of murder by being deprived of the opportunity of having the jury consider his case as one of manslaughter only.

There was, it may be said, no application for a redirection on the point. That is understandable given the state of the law at the time; but the option was nevertheless not contended for. The submission of Mr Martin for the Crown in answer to this ground of appeal has the virtue of simplicity. It is that the jury were instructed that they could reach a verdict of guilty of murder only if they were satisfied beyond reasonable doubt of all the elements of that offence, and were directed that, otherwise on this branch of the case, they were to acquit him altogether. By returning a verdict of murder, they showed that they were satisfied to the required standard of all of those elements. In those circumstances, he submitted, it was not open to the appellant to complain that, if the jury had been instructed to consider manslaughter, they might have been false to their oaths as jurors and returned a verdict for the lesser offence of manslaughter, even though, as we now know, they were in fact satisfied beyond reasonable doubt that the appellant was guilty of murder. Reliance was placed on what was said in *Ross v. The King* (1922) 30 C.L.R. 246, 253, affirming the decision of the Full Court of Victoria in *Ross v. The King* [1922] V.L.R. 329, 325, and on *Apted v. The Queen* [1981] Tas. S.R. 140; *R. v. Evans & Lewis* [1969] V.R. 858, 871; *R. v. Iannazzone* [1983] V.R. 649, 653-654 and *Spratt* (1982) 8 A.Crim.R. 361. In response to that submission, the appellant referred to *Mraz v. The Queen* (1955) 93 C.L.R. 493, which, as Mr Martin pointed out, was, however, a case which was the precise reverse of this, in which the jury were, illegitimately as the High Court held, invited to consider the lesser option of a manslaughter verdict in circumstances where the proved facts showed it was really one of "murder or nothing".

Having examined these and a number of other decisions, beginning with *Gammage v. The Queen* (1969) 122 C.L.R. 444, on the subject of alternative verdicts of murder or manslaughter, I am persuaded that, in determining whether, on a trial of murder, a failure to

invite the jury to consider a verdict of manslaughter, much depends on the facts established at the trial. If the proved facts show the case to be essentially one of murder or nothing (that is, of guilty or outright acquittal of murder), then it is or may be an error for the judge to invite the jury to consider an alternative verdict of manslaughter where there cannot be a reason for such a verdict: see *Mraz v. The Queen* (1955) 93 C.L.R. 493. In such a case, said Barwick C.J. in *Gammage v. The Queen* (1969) 122 C.L.R. 444, 451-452:

> "It would not be a misdirection, in my opinion, to refuse to inform the jury that they may return a verdict of manslaughter. But, in almost every case, if asked, the judge would be bound to tell the jury of the alternative verdict open to them. When it becomes necessary thus to direct a jury, the jury should be told that if they are not satisfied to the requisite degree that the crime of murder was committed by the accused, but are satisfied that the accused killed the deceased unlawfully ... they may return a verdict of manslaughter."

These principles were applied in Queensland in *R. v. Russell* [1973] Qd.R. 295, where, as in New South Wales, there is a statutory provision (s.576 of the *Code*) providing for a manslaughter verdict on an indictment charging murder. They have continued to be a source of difficulty in a number of cases. Where a killing was said to have been accidental, a verdict of murder was set aside in *Wilkinson* (1985) 20 A.Crim.R. 230, because manslaughter was not left to the jury as a possible alternative. The opposite result was reached in *R. v. Singh* (1977) 17 S.A.S.R. 73, where the trial judge told the jury that they had no power to return a verdict of manslaughter if satisfied beyond reasonable doubt that on the evidence murder had been made out. It is difficult to resist the impression that the proper course for the trial judge may, at least in some circumstances, depend not only on the nature of the evidence, but on the way in which the case was conducted at trial. In *Gammage v. The Queen* (1969) 122 C.L.R. 444, 451-452, Barwick C.J. spoke of the trial judge being *asked* to tell the jury of the alternative verdict. See also the authorities referred to in *R. v. Holden* [1974] 2 N.S.W.L.R. 548, 558. On some occasions counsel for the accused may be bound by

instructions from the client not to ask for the jury to be directed to consider an alternative verdict of manslaughter.

In the present case, counsel for the appellant, as well as counsel for Jeffrey and for the prosecution, agreed that the trial judge should not direct the jury on manslaughter. It may be accepted that counsel, as well as his Honour, properly adopted that course in deference to the state of existing authority in this Court which has since been disapproved by the High Court. Nevertheless, the omission at the trial of the appellant to direct that a verdict of manslaughter was available for consideration by the jury is, in my opinion, not such a misdirection as to entitle the appellant as a matter of right to a retrial on the indictment if this Court is satisfied that no substantial miscarriage of justice has, within the meaning of s.668E(1), "actually occurred". The adequacy of the direction in such cases is, as has more than once been said, not to be determined in a vacuum, but according to what was the real issue between the Crown and the accused: *R. v . Holden* [1974] 2 N.S.W.L.R. 548, 558, citing what was said by Menzies J. in *Ryan v. The Queen* (1967) 121 C.L.R. 205, 232.

Assuming, however, that, because of the direction to the jury not to consider manslaughter, a verdict based on s.7(c) would have been fatally flawed, the appellant's criminal responsibility for the murder of the deceased also fell to be considered under s.8 of the *Code*. Section 8 is in the following form:

> **"8. Offences committed in prosecution of common purpose.** 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."

Keeping in mind what was said in the passage referred to from *Barlow v. The Queen* about the meaning of the expression "offence" in s.8, it is appropriate here to set out in full an

extract from the reasons for judgment of Brennan C.J., Dawson and Toohey JJ. in which the operation of s.8 was explained. In *Barlow v. The Queen* (1997) 188 C.L.R. 1, 10; 71 A.L.J.R. 680, 684 col. 2 B-2F, their Honours said:

> "In the light of these provisions, 'offence' in s 8 must be understood to refer to an act done or omission made. So interpreting the section, it deems a person falling within its terms to have done the act or to have made the omission which the principal offender has done or made. It fastens on the conduct of the principal offender, but it does not deem the secondary party to be liable to the same extent as the principal offender. It sheets home to the secondary offender such conduct (act or omission) of the principal offender as (1) renders the principal offender liable to punishment but (2) only to the extent that that conduct (the doing of the act or the making of the omission) was a probable consequence of prosecuting a common unlawful purpose. The secondary party is deemed to have done an act or made an omission but only to the extent that the act was done or the omission was made in such circumstances or with such a result or with such a state of mind (which may include a specific intent) as was a probable consequence of prosecuting the common unlawful purpose. Those circumstances, that result and that state of mind are factors which, either together or separately but in combination with a proscribed act or omission, define an offence of a particular 'nature'. Thus the unlawful striking of a blow by a principal offender will constitute an offence the nature of which depends on whether the blow causes bodily harm or grievous bodily harm or death and on the specific intent with which the blow is inflicted."

Applying these principles here, the first step is to identify the acts or acts of the principal offender or offenders that caused the death of the deceased. In the present case the medical evidence shows that the death was brought about by one or more of the punches and kicks delivered by all or one or more of the assailants to the chest, back and sides of the deceased which fatally damaged his lungs, liver and kidney. For his own contribution, if significant, to that result, the appellant was personally and directly criminally responsible under s.7(a). For that of the other assailants, his responsibility under s.8 depended on whether the requirements of that section as interpreted in *Barlow v. The Queen* were satisfied.

The first question is whether it was proved that the four assailants had formed a common intention to prosecute an unlawful purpose in conjunction with one another. Having

regard to the admissions made by the appellant in the record of interview, there can be no doubt whatever about that matter. With respect to the first series of assaults in Eenie Creek Road, the appellant said that, before those assaults were committed, they had a discussion in which they decided that the deceased should be beaten up. In doing so they formed a common intention to prosecute the unlawful purpose of assaulting their victim, which intention they then carried into effect. Having driven back home and deliberated again, they then formed the common purpose of assaulting the deceased a second time in order to prevent him from remembering what had happened. That common purpose they also prosecuted or carried into effect in conjunction by returning to Eenie Creek Road and delivering a further series of kicks or blows which, according to the appellant's account, they all participated in inflicting.

The first and second requirements of s.8 are therefore established beyond any doubt. This left for determination of the jury only the third and remaining question, which was whether the offence committed in the prosecution or carrying out of that purpose of jointly assaulting the deceased was "of such a nature that its commission was a probable consequence of the prosecution of" that purpose. The nature of the offence being considered here is murder, which under s.302(1)(a) of the *Code* is an offence constituted by an act or acts resulting in death if carried out with the intention of causing that result or at least of inflicting grievous bodily harm. It might be possible to view the nature of the offence in a more general way simply as homicide; but the appellant was charged with and convicted of murder, and it is in the context of that offence that s.8 falls to be considered here.

The question for the jury therefore was whether it was a probable consequence of carrying out the purpose of jointly assaulting the deceased that some one or more of the assailants would probably form such an intention to do grievous bodily harm. It is an issue,

which it is not disputed, falls to be determined according to an objective assessment of the common intention to prosecute that purpose and the process of carrying it into effect. See *Stuart v. The Queen* (1974) 134 C.L.R. 426, 442, and the authorities referred to there. As to that, it can scarcely be doubted that, objectively considered, this requirement for the operation of s.8 was also satisfied. If there was any substance in the notion that the original purpose was to inflict on the deceased only a mild degree of injury without doing grievous bodily harm, it became objectively apparent once the assault progressed that the probable consequence of prosecuting or continuing to pursue that purpose was that one or more of the assailants would form, was forming, or had formed an intention either to kill or at least to injure the deceased in a serious and permanent way. The number of blows inflicted, the violence with which the attack was pressed home, and the manner in which it was carried out discloses and would have demonstrated to any objective observer what the intention of one or more of them really was. It was to inflict grievous bodily harm on their victim.

In approaching the matter in this fashion, there is necessarily some risk, which is always to be guarded against, that the objectively determined probable consequence will be discovered in what hindsight later discloses did in fact ensue; but, when the common intention of a number of drink-inspired and aggressively disposed young men is to engage in beating someone who is taken for that purpose to a secluded place at night, it is impossible to doubt that, determined objectively, it was likely that one or more of them would, in carrying out the plan, decide to exceed any limit which may originally have been intended. Neither the initial plan itself, nor the manner of carrying it out, was such as to raise an expectation that it would be executed with any degree of precision or refinement by those taking part in it. It is, at least to some extent, because such excesses are so often the probable, even if it may be originally unintended, consequence of prosecuting an unlawful purpose that the *Code*

incorporates a provision in the form of s.8. It is the risk, determined objectively, that such excesses will occur that underlies the policy, which is at least partly deterrent, of making each of the participants criminally responsible for an act or acts committed by other parties to the plan.

The directions of the learned trial judge in summing up to the jury on s.8 sufficiently and satisfactorily instructed them to consider these matters, and in particular to consider the question whether the murder of the deceased was, objectively speaking, a probable consequence of prosecuting or carrying out the common purpose of assaulting the deceased. The specific question put to the jury was whether the murder, or at least the manslaughter, of Timms was "a real or substantial possibility, or a real or substantial chance" of prosecuting the common purpose of assaulting him. No issue is taken with that part of the summing up. The complaint in the appellant's written outline that there was not the requisite "focus" on the state of mind of the appellant, rather than that of the other or others involved, is, as regards criminal responsibility under s.8, misconceived. Assuming proof of a common intention to carry out the joint assault, and that the ensuing death resulted from an act or acts done in prosecuting it, the only question on this branch of the charge of murder was whether the result (which was the death of the deceased by an act or acts of one or more of them done with intent to kill or do grievous bodily harm) was objectively a probable consequence of carrying out that common intention.

The appellant's submission that the judge's direction to the jury, that they were not to consider manslaughter if satisfied that Timms was murdered was fatal to the summing up, extends equally to the criminal responsibility of the appellant under s.8 of the *Code*. Accepting, however, as is plainly the case, that, of the three requirements to be satisfied under s.8, only that relating to probable consequence could have been affected by that defect in

summing up, the question which now arises is whether the Court can, in the exercise of the power conferred by the proviso to s.668E(1) of the *Code*, properly sustain the verdict of murder against the appellant on the basis that, despite the defect, no substantial miscarriage of justice has occurred. As to that question, I am in no doubt as to the result in the case of this appellant.

In arriving at a verdict based on either s.7(c) or s.8, the jury must necessarily have found that grievous bodily harm was intended by at least one of the four assailants. That is a consideration of some weight in determining whether it was inevitable that the same verdict of murder would have been returned if the manslaughter verdict had been available to them. For the purpose of criminal responsibility under s.7(c), but not s.8, it would have been necessary, in addition for them to have been satisfied that the appellant knew of that intention. A conclusion to that effect involves an inference as to the state of mind of the accused. By contrast, for the purpose of s.8 it would have been sufficient for the jury to be satisfied that the murder of the victim was an offence "of such a nature that its commission was a probable consequence of" carrying out the proved common intention of assaulting him in conjunction. That is, that it was probable that, in carrying out the joint assault, the victim would be killed by someone who had the intention of killing or doing grievous bodily harm to him. The question is one to be determined according to the probability, objectively assessed, that any one or more of the assailants would form an intention to kill or do grievous bodily harm to the victim in the course of prosecuting either or both of the two series of assaults. That the event of death would probably ensue as a consequence is also a requirement; but so it is for a murder verdict under s.8, and the appellant's complaint is that the jury were not invited to consider the alternative that his personal responsibility for the death of Timms was limited to manslaughter.

In deciding the question whether the jury would under s.8 inevitably have arrived at the same verdict of murder, no inquiry is called for or inference required as to the actual state of mind or knowledge of the deceased at the time. The function of this Court in arriving at a conclusion on that issue is therefore considerably more limited than it is in many other appeals in which such a prediction is required for the purpose of applying the proviso to s.668E(1). In the circumstances disclosed by the evidence in this case, it is my conclusion that, even if the jury had been presented with the alternative verdict of manslaughter, they would nevertheless have arrived at the verdict of murder which they returned. The nature, the number and the violence of the assaults carried out is more than sufficient to demonstrate that at least one of the four assailants had an intention to cause grievous bodily harm. Quite apart from the first series of assaults, but given the intention shared by all four of them in returning to inflict the second attack on their helpless victim for the purpose of destroying his memory, the prospect that such an intention already existed or would be formed, was, on any objective assessment of that evidence, not merely probable but virtually certain. Stated in reverse, no twelve rational jurors would have accepted that none of the four assailants had formed an intention to do grievous bodily harm; or that there was any reasonable doubt that, viewed objectively, one of them probably would do so in carrying out this series of two assaults.

In my opinion the appellant was rightly convicted of murder. The appeal should be dismissed.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 19 December 1997

I have had the advantage of reading drafts of the reasons of McPherson J.A. as well as those of Davies J.A. in relation to these three appeals. In each of the two trials, that of Pascoe and Donald and that of Jeffrey, the jury were given directions under s. 8 of the Criminal Code based on the reasoning of this Court in Alexanderson & Ors. (1996) 86 A.Crim.R. 77; since that reasoning has been held to be wrong, by the decision of the High Court reported in Barlow (1997) 188 C.L.R. 1, the only question on that aspect of the case is whether there was a substantial miscarriage of justice.

A second group of issues concerns whether, in any respect other than in following this Court's decision in Barlow, the trial judges gave erroneous directions and, of course, if they did whether a substantial miscarriage of justice ensued. It appears to me convenient to consider the s. 8 point first.

Did the misdirections with respect to s. 8 give rise to a substantial miscarriage of

justice?

As is explained in the reasons of McPherson J.A. and in those of Davies J.A., in each trial the jury were told in effect that there could be no verdict of manslaughter, under s. 8, if they were satisfied that Mr Timms was murdered. The first question, in determining whether the failure to give a proper direction under s. 8 was fatal, is to consider what a proper direction would have been. In my brothers' reasons there is to be found discussion of this point, which appears to me not to be without difficulty. The source of that is the circumstance that in the principal High Court judgment there are two main passages explanatory of the effect of s. 8. The first, quoted by McPherson J.A. in his Honour's reasons in relation to Jeffrey and in relation to Donald begins, ‘‘In the light of these provisions . . . ‘‘ and concludes ‘‘ . . . with which the blow is inflicted’’ (188 C.L.R. 1 at 10). The meaning of that passage is, with respect, quite clear. But there is another passage beginning, ‘‘As the operation of s. 8 is limited . . . ‘‘ and concluding ‘‘ . . . merely to commit the minor offence’’, the effect of which is open to argument (188 C.L.R. 1 at 13, 14). It is my opinion that it is the former passage, that quoted by McPherson J.A. and summarised in the Commonwealth Law

Reports headnote, which should be regarded as guiding if there is, as I think there is, a difference between the indications given in the two passages I have identified.

A secondary party may be held guilty of manslaughter under s. 8, although the principal offender has committed murder. That is so, not because in such a case the term ‘‘an offence’’ in s. 8 means unlawful killing, but for a reason having application beyond the law of homicide. By s. 8 a secondary party may, in general, be made guilty of an offence different from that committed by the principal offender; one reads s. 8 as if there were added to it, ‘‘but if the offence committed in the prosecution of such purpose is not of that nature, then each of the persons other than the principal offender is deemed to have committed such offence as would be constituted by so much of the criminal conduct of the principal offender as was a probable consequence of prosecuting the common unlawful purpose’’. So to express the matter slightly understates its complexity, for, as is made clear by the High Court, the construction of a notional offence which is then attributed to the secondary party includes consideration of matters other than the principal offender's physical acts or omissions: ‘‘[t]he second

party is deemed to have done an act or made an omission but only to the extent that the act was done or the omission was made in such circumstances or with such a result or with such a state of mind (which may include a specific intent) as was a probable consequence of prosecuting the common unlawful purpose".

In the present case it was inevitable that the jury would be satisfied that there was a common intention to prosecute an unlawful purpose and that in the prosecution of that purpose an offence was committed. And the jury were satisfied that that offence was murder. A direction in accordance with the High Court decision in Barlow could have assisted any of the three appellants only if the jury, although satisfied that there was a murder, were in doubt on the question whether murder, as opposed to manslaughter, was a probable consequence of the prosecution of the unlawful purpose.

That is, a direction in accordance with the High Court's decision in Barlow could not have helped any of the appellants unless the jury, being satisfied that there was a murder, could have had a doubt as to whether that was a probable consequence of the

prosecution of the purpose. As is pointed out by Davies J.A. the s. 8 directions contended for on behalf of the appellants in this Court would themselves have been erroneous; the critical point was whether, even if the jury were satisfied that a murder was committed by one of the appellants, they were also satisfied that murder (involving an intention in the perpetrator to cause death or grievous bodily harm) was a probable consequence of the prosecution of the unlawful purpose. Only if they were not satisfied of this second element would it have been necessary for the jury to consider that part of the operation of s. 8 which I have attempted to expound above by adding words to the section.

It was argued for the respondent that, on the basis of a line of authority beginning with Ross (1922) 30 C.L.R. 246 at 254, the fact that the judge in each trial did not tell the jury that, even if they thought the principal offender was guilty of murder, any other offender could, under s. 8, be held guilty of manslaughter, was not a vitiating error. I think Ross is well explained, with respect, by Neasey J. in Apted [1981] Tas.R. 140 at 146:

> "It should be observed . . . that the conclusion which the Full Court of Victoria and the High Court . . . reached in Ross's case depended upon its factual and legal context. That is, the conclusion did not follow from the direct application of any rule of law. Both courts considered whether any injustice was caused in the circumstances of the case, and decided that the judge's exercise of discretion produced no adverse effect but was in fact favourable to the accused."

A view less favourable to appellants has been adopted in Victoria:

> "If the trial judge correctly instructs the jury on the essential elements of the crime of which the appellant is convicted and fully and fairly puts to the jury the defence set up by the appellant the verdict of guilty amounts to a finding by the jury of every essential element of the crime and if those findings negate a verdict of guilty of a lesser offence then the verdict cannot be disturbed by a suggestion that the jury might have found him guilty of that lesser offence if the judge had informed them they were at liberty to do so". (Evans and Lewis [1969] V.R. 858 at 871, see also Iannazzone [1983] V.R. 649 at 653, 654.)

If this means that failure to tell the jury that they may bring in a lesser verdict cannot be a misdirection, so long as the guilty verdict returned is inconsistent with the lesser verdict, then I respectfully disagree. Circumstances can well be imagined in which failure to direct the jury of the possibility of a verdict of guilty of a lesser offence than that of which an offender has been convicted may cause injustice. That will surely be so, in general, if the lesser verdict is open on the evidence and has been raised as a

possibility by the defence. In the present cases, the defence did not ask that the jury be directed that, even if they found that Mr Timms had been murdered, s. 8 might justify a verdict, against persons other than the actual perpetrator, of manslaughter only; but that might have well been because of the decision in Hind and Harwood (1995) 80 A.Crim.R. 105. I agree with McPherson J.A. and with Davies J.A. that the Ross line of authority does not conclude this point in favour of the Crown. The real question is whether, in all the circumstances, the failure to direct in accordance with what has been held by the High Court to be the true interpretation of s. 8 caused either of the trials in question to miscarry. In relation to each of the appellants, McPherson J.A. has given reasons based on the evidence for concluding that the trial judges' failure to sum-up, under s. 8, in accordance with the High Court's decision in Barlow did not bring about a substantial miscarriage of justice; I am in respectful agreement with those reasons and with his Honour's conclusion. I am, as will appear, of the view that in any event there was no room for doubt that the appellants were guilty of murder under s. 7 of the Code.

Complaints about directions other than those based on the decision in Barlow

As to the other matters raised in these appeals, I am in agreement with the reasons of Davies J.A., but will direct some remarks to the application of s. 7(1)(c) of the Code under which, when an offence is committed "every person who aids another person in committing the offence" is deemed to be guilty of it.

It is difficult to see how the jury could have reached the conclusion, on the evidence admissible against any of the three appellants, that that appellant caused Mr Timms' death. If each attacked Mr Timms only in the way he admitted, Mr Timms could have hardly been in the condition in which the evidence showed him to be, after his death. That condition was consistent with more, and more savage, beating and kicking than the total of all the assaults conceded by each of the three appellants in relation to his own participation, when interviewed by the police.

There was, however, no room for rational doubt about the propositions that the three appellants set out to assault Mr Timms, that in the course of those assaults he

was beaten and kicked to death, that all the appellants were present on each of the occasions when Mr Timms was assaulted and that all participated in assaulting him. Of the three the appellant who admitted to least in the way of assaulting Mr Timms was Donald, but his role as an assistant to the others was very clear; he drove Mr Timms and the assailants to Eumundi Road where the first assault on Mr Timms took place and then to Eenie Creek Road where Mr Timms was assaulted again. Then, according to Donald, having left Mr Timms, "still alive as far as I knew", he later drove the others back to enable them "to knock him out and put him unconscious so he didn't remember who done it to him". It was clear that each of the three assisted the others in this affair, that they acted positively and not passively (Beck [1990] 1 Qd.R. 30 at 37, Jefferies v. Sturcke [1992] 2 Qd.R. 392) and that each was aware of the assaults being committed by the others. That those assaults included blows of such a character as to be intended to cause grievous bodily harm is beyond the possibility of rational dispute.

In short, on the admissions made, as summarised in the reasons of Davies J.A.,

and the evidence as to Mr Timms' condition after death, it does not appear to me that any jury acting rationally could have failed to have been satisfied that each of the appellants was guilty of murder under s. 7(1)(c), of the Code, if not under s. 7(1)(a).

I agree that all the appeals should be dismissed.

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 19 December 1997

Each of the appellants was convicted of the murder of John Edward Timms after a trial by jury. Each appealed against his conviction on the ground that the jury was misdirected with respect to the meaning and application of s.8 of the Criminal Code. Jeffrey also appealed on the ground that the jury was also misdirected with respect to the meaning and application of s.7.[1] The main argument in the appeals relied on the decision of the High Court in R. v. Barlow[2] in which, by a majority, the court reversed a decision of this Court in that case and in doing so overruled R. v. Hind and Harwood[3] as to the meaning and

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[1] Donald's grounds of appeal referred to s.7 and the written outlines of argument on behalf of both Pascoe and Donald also referred to s.7 but the arguments in each of their appeals were, in the end, limited to s.8.

[2] (1997) 188 C.L.R. 1.

[3] (1995) 80 A.Crim.R. 105; also Wood, Paterson, Brien and Petersen (1996) 87

application of s.8.

A.Crim.R. 346.

Donald and Jeffrey were tried together. Pascoe was tried separately. In each trial the learned trial Judge directed the jury upon the application to the facts of the case of ss.7(a) (liability as a principal offender), 7(c) (liability as an aider) and 8; and with respect to s.8, in accordance with the decision of this Court in R. v. Hind and Harwood. All appeals were, by consent, heard together. Pascoe and Donald, who were represented in this Court by Mr. Jerrard Q.C., sought the substitution by this Court of a verdict of manslaughter or alternatively a new trial. Jeffrey, represented in this Court by Mr. Long, sought only a new trial.

None of the appellants gave evidence at his trial. The main evidence in each trial consisted of admissions against interest by each of the accused and medical evidence about the extensive injuries suffered by Timms. Those injuries included serious bruising and multiple abrasions to the head and face; bruising and swelling to both lips; a laceration of the upper lip; the loss of one tooth; several discrete bruises across the front of the right side of the chest; abrasion of the upper chest; abrasion of the right shoulder; multiple small abrasions across the back; two abrasions and areas of bruising to the left loin; bruising to the left chest; multiple bruising and abrasions over the left hip, right thigh, both knees, upper left chin and over both ankles; abrasions and bruising to both hands; bruising over the scalp; a fractured left cheek bone, five fractured left ribs and four fractured right ribs, all fractures being randomly scattered; bruising to the surface of both lungs; a 30 centimetre laceration to the liver; and three one centimetre lacerations to the left kidney from which bleeding had extended down at the back of the abdominal cavity.

The medical evidence was that there was a minimum of ten impact sites to the trunk

of the deceased and at least three separate impact sites to his head plus separate impact sites to his limbs. Death was caused by a combination of injuries to the ribs, liver and kidney, the most serious being to the chest and kidney which together would have caused death even without the liver injury. Having regard to the number of injuries, especially to the chest, the number of impact sites and the fact that the degree of force required to cause the kidney injury in particular must have been severe, it was open to the jury to infer that whoever delivered the fatal blows attacked Timms with such ferocity that their intention must have been to cause grievous bodily harm.[4]

Up to a point the appellants, in their admissions, gave similar versions of relevant events, the main differences between them, unsurprisingly, being as to the extent to which each hit and kicked Timms and as to the intentions or apparent intentions of each at material times. All admitted to punching and kicking him. There does not appear to be any significant dispute as to the events leading up to what were, on any view, sustained attacks on Timms.

On the night of 17 December 1994 the appellants, who were aged respectively 20, 18 and 18, together with a fourth youth, Aaron Johnson, were drinking at Noosa. They had been drinking together since about 2.00 p.m. In the early hours of 18 December they met Timms near the Rolling Rock Nightclub at Noosa. They were by then each, to some extent, affected by alcohol. Up to then Timms was a stranger to them.

Timms, who was an older and extremely thin man, had been at the Reef Hotel, Noosa, earlier that night where he was described as being very intoxicated. He was later at the Rolling Rock Nightclub where he was described as placid but intoxicated and "staggering about falling around the ground". His blood alcohol level after death, .192%, confirmed that

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[4] See R. v. Clough (1992) 28 N.S.W.L.R. 396 at 399.

he must have been very drunk.

He apparently promised the four youths (the appellants and Johnson) some marijuana if they drove him home. He later told them that he did not have any and "things got all fired up after that, everybody got a bit angry ... ". The youths then drove Timms, Donald being the driver of the car, to a place on the Eumundi Road where all alighted and there were some assaults upon him. They all then re-entered the car and drove to a more remote location on Eenie Creek Road. There all alighted again and each of the youths assaulted Timms.

Pascoe admitted to punching Timms five or six times and observing his companions do likewise. He also admitted to kicking him "a couple of times" and observing his companions do likewise. He denied kicking Timms in the head but said that Donald and Jeffrey did so. It was conceded on his behalf before this Court that, in view of a contact blood smear on his discarded jeans, he had lied to police in denying having kicked Timms in the head.

After first making a false denial and giving a false alibi, Donald also admitted to being involved in the attack on Timms. He admitted that on the drive to the location at Eenie Creek Road he knew that "something was going down" from which, in the context, it may be inferred that he knew that the others intended to give Timms a beating. But even before he joined in the others were "kicking the shit" out of Timms. He said that "that guy copped a fucking beating"; and he said that "we belted him to a pulp". He admitted to kicking him only once and punching him only once. But he said that, whilst he was doing that, Pascoe hit and kicked Timms "hundreds of times", and that Pascoe had steel capped boots. And he said that Jeffrey was "just getting stuck into him ... kicking him both feet", that he was "going hard out hitting and kicking" him and that, after they returned to the car Jeffrey and Pascoe went back and started kicking him. He said that it was "just kick, kick, kick, yeah, and then having

stop a second and change positions and then kick, kick, kick, hit, hit". At the end of this "he was messed him up big-time ... they just hammered him." He said that they just kicked his head like a rugby ball. On the drive back to their residence he said to the others "You better not have killed the cunt." He said that when they left Timms "was a mess ... one of his eyes was out there, blood was pissing out of his face ..." and that he "had a bad feeling about it all". He did not know, in the end, whether or not Timms was conscious but had described him earlier as "half unconscious". However he was told by the others that Timms was healthy.

Jeffrey said that, when they stopped in Eumundi Road, it was agreed that they would beat Timms up and take his drugs. He admitted to kicking Timms ten times in the head, ribs and back and to punching him three or four times in the face. He said that Pascoe "punched him heaps and kicked him heaps ... in the ribs, in the face and all over his body". He said he was "going hammer and tongs ... he was really into it". Pascoe had on a pair of steel-capped boots and at one stage he, Jeffrey, told Pascoe to stop. He said that Donald kicked Timms four, five or six times and punched him. He said "We all went and did a heap of shit" and "it was chaos" with everyone punching and kicking Timms who just rolled into a ball on the ground.

After the sustained beating I have described the appellants and Johnson, who was also involved, left Timms and returned to their residence. All later returned to the scene, again with Donald driving. Pascoe said that this was to see if Timms was alright. He said that they did not further assault the deceased. He admitted that he picked up a tree branch but threw it away when Donald told him to.

Donald said that the others wanted to return to knock Timms unconscious: "they didn't want the guy to remember who had done it to him". He told them he was not taking them back out there to kill him. They said they weren't going to. "They just said that they were going to knock him out and put him unconscious so he didn't remember who done it to

him". He said that he assumed that they would do this by hitting "him across the head a few more times and I knew that if we went back out there it was just going to turn into a disaster". Asked whether he agreed that hitting a person across the head a few times could do permanent damage he said: "Yeah, that's what I told him ... Even Andrew said we could have given him brain damage". He also said that, before they arrived at the scene on the second occasion, he knew there was a chance that Timms was going to end up dead. Before that, according to Donald, whilst they were at their residence, Pascoe and Jeffrey panicked saying "Oh, we killed a man". Then, apparently, they expressed concern that Timms would remember them. When they got back to Timms, according to Donald, he was still conscious but didn't look it. Nevertheless Pascoe and Jeffrey kicked him - "they were kicking him and kicking him" - and he, Donald, walked away.

Jeffrey said that, after they had returned home after the first beating of Timms "someone said 'He might remember' and we all sat there and thought 'Well, we should go back out there and hit him a couple more times so he might not remember' ". When they returned, according to Jeffrey, Timms was sitting up. Jeffrey said that they hit and kicked him again but not for as long, only a few times.

According to Jeffrey, Pascoe also jumped up and down on Timms' chest. Jeffrey also said that it was on this occasion that Pascoe picked up a piece of wood which looked like a fence post but Johnson took it from him. Despite the beatings on both occasions, according to Jeffrey, Timms was both alive (he felt his pulse) and conscious (he appeared to respond to questions) when they left him on the second occasion.

On the following day all admitted to a friend, Darryl Newman, that they had "beat some guy up and kicked him around a bit and messed him up pretty bad."

In summary:

the principal evidence admissible against Pascoe consisted of:

1. his admissions that, on the first occasion at Eenie Creek Road he punched Timms five or six times and kicked him a couple of times when he was on the ground, but not in the head, whilst his companions did much the same though some of them kicked him in the head;
2. the evidence of the blood on his trousers which, it was admitted, proved that he had kicked Timms in the head;
3. his admission that they had beaten Timms up, kicked him around and "messed him up badly";
4. his admission that he picked up a piece of wood with which, apparently, to hit the helpless Timms but was disarmed by one of the others; and
5. Timms' injuries and the inferences drawn from them of the number of impact sites and the severity of the blows which caused them.

The principal evidence against Donald consisted of:

1. his admission from which it could be inferred that before the first set of serious assaults he knew of a plan to give Timms a beating;
2. his admission that on the first occasion he kicked and punched Timms only once but that he did so whilst Pascoe hit and kicked him hundreds of times whilst wearing steel capped boots and that each of the others kicked him many times;
3. his admission that he agreed to drive the others back to the scene of the first beating knowing that they intended to beat Timms into a state where he could not remember, that this would involve them hitting Timms "across the head a few more times" and that he was aware that there was a chance of Timms "ending up dead"; furthermore this was after the others had expressed the view that they might have already killed him;
4. his admission that, at the scene on this occasion, he stood by while Pascoe and Jeffrey

kicked Timms again;

5. his admissions that Timms "copped a beating" and that they had kicked him around and "messed him up badly"; and

6. Timms' injuries and the inferences from them referred to above.

And the principal evidence against Jeffrey consisted of:

1. his admission that, before the first beating, he was party to a plan to beat Timms up;

2. his admission that on the first occasion he kicked Timms ten times in the head, ribs and back and punched him three or four times in the face whilst the others did much the same, Pascoe kicking with steel capped boots;

3. his admission that, after they returned home, "we" thought they should go back and hit him a couple more times so he might not remember;

4. his admission that, when they went back they hit him again, but not as long, only a few times; and Pascoe jumped up and down on Timms' chest;

5. his admission that they had beaten Timms up, kicked him around and "messed him up badly"; and

6. Timms' injuries and the inferences already referred to.

At the joint trial the Crown prosecutor, on several occasions during his opening address, the learned trial Judge several times during the trial and in his summing up and, no doubt, both counsel in their closing addresses, instructed the jury that Jeffrey's out-of-court statements were admissible only against Jeffrey and that Donald's such statements were admissible only against Donald. No complaint is made on behalf of either appellant in that respect.

Unsurprisingly it was unclear in this case which of the appellants or Johnson had

inflicted the injuries which substantially or significantly[5] contributed to Timms' death. That is no doubt why, in each trial, the Crown relied on ss.7(c) and 8. It is unlikely that the jury would have been satisfied beyond reasonable doubt that any specified one or more of the appellants delivered fatal blows.

Section 7(c) is in the following terms:

> "7. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:-
> ...
> (c) every person who aids another person in committing the offence;
> ... ".

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[5] Royall v. The Queen (1991) 172 C.L.R. 378 at 398, 411, 444.

In Barlow the Court was concerned primarily with s.8. No question arose in that appeal as to the application of s.7 or the Judge's direction on that section.[6] Nevertheless the Court said that s.2 of the Code made it clear that "offence" is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by 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. It bore that meaning, they said, in both s.7(c) and s.8.[7]

It may be accepted that "offence" in both ss.7(c) and 8 means, in this case, the acts of kicking or punching by the principal offender or offenders which caused Timms' death, the nature of that offence being murder or manslaughter depending on whether, in this case, his or each of their intentions, at the time the blows causing death were delivered, were to cause grievous bodily harm.

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[6] Barlow at 5.

[7] Barlow at 9.

The difficulty in identifying a principal offender does not mean that none of the appellants could have been convicted under ss.7(c) or 8.[8] To prove that a murder was committed it is sufficient to prove that, whoever delivered the blows causing death, even if that person or those persons cannot be identified, must have done so with the intention of causing grievous bodily harm. It would not have been difficult to infer that. As mentioned earlier, the number of injuries, especially to Timms' chest, the number of impact sites and the degree of force required to inflict some of the injuries would have been sufficient to enable the jury to infer that whoever inflicted the injuries which caused death did so with the intention of causing grievous bodily harm.

Mr. Jerrard Q.C., for Pascoe and Donald, did not attack the directions of either trial Judge on the application of s.7(c). However Mr. Long, for Jeffrey, submitted that the learned trial Judge's directions in his trial were inadequate with respect to the application of s.7(c).

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[8] Warren v. The Queen [1987] W.A.R. 314 at 321.

To aid in the commission of an offence of the nature of murder a person, not himself a principal offender, must know of the intention of the principal offenders to cause grievous bodily harm. That is because "aids" in s.7(c) means "knowingly aids"; otherwise there would be no distinction between the innocent taxi driver who conveys a robber to the bank he intends to rob and the driver of the getaway car who does so.[9] That is, in effect, the way in which each of the learned trial Judges directed the jury on the meaning of s.7(c). Each directed the jury that, to be guilty of aiding in the commission of an offence of the nature of murder, a person must have done so with knowledge of the murderer's intention to cause death or grievous bodily harm.

There was evidence on which the jury could reasonably have concluded that each

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[9] R. v. Beck [1990] 1 Qd.R. 30 at 38; R. v. Jervis [1993] 1 Qd.R. 643 at 647-8.

appellant knew of the intention of each of the principal offenders to cause grievous bodily harm. That could reasonably have been inferred from what they said they heard and observed of the conduct of the other attackers and the medical evidence. And there was evidence from which a jury could reasonably have inferred that, with that knowledge, they aided in committing the offence. Nor was there any contention to the contrary of these propositions.

Nevertheless Mr. Long contended that his Honour's direction on s.7(c) was inadequate because, the offence having as an element a specific state of mind, it failed to instruct the jury that they must be satisfied that the appellant had that state of mind at the relevant time. It is not clear whether Mr. Long relied for this submission on Beck[10] or Barlow (both are cited in the paragraph of his written submission in which this contention is made) but neither supports the contention and, in my view, it is wrong. To be guilty of murder under s.7(c) it is not necessary that the aider have the intention of committing grievous bodily harm; it is sufficient that he knows the principal offender to have that intention. The appeal on the ground of misdirection on s.7(c) must therefore fail.

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[10] Supra fn.9.

The main argument in all appeals concerned the directions on s.8. It was that the learned trial Judge, in each case, failed to direct the jury that, even if they were satisfied that a murder had been committed, a verdict of manslaughter against the appellant was open; and directed them that if they were satisfied that a murder had been committed the only verdicts open under s.8 were guilty of murder and not guilty.

Section 8 provides:

> "8. 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."

I have already made the point that "offence" in that section denotes the element of conduct (an act or omission) which, if accompanied by 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, in this case the acts of kicking and punching which caused Timms' death; the nature of that offence, murder or manslaughter, depending on whether those whose acts caused Timms' death had the intention of causing grievous bodily harm.

Questions which arose in the present case under s.8 with respect to each appellant, on the test stated in Barlow, were:

1. was there a common intention to prosecute an unlawful purpose to which he was a party and if so what was it? and
2. to what extent, if at all, was the nature of the offence committed a probable consequence of the prosecution of that purpose?[11]

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[11] Barlow at 10.

The relevant common intention to which the jury would have been entitled to infer each appellant was a party, before the commission of the first assault on Timms at Eenie Creek Road, was to give him a beating. And because, on the evidence against each, he did not withdraw from the prosecution of that purpose, the nature and extent of the assault then committed on Timms may be looked at to ascertain the nature and extent of the common intention. The jury would have been entitled to infer from the admissions of each of the appellants as to what was said by others or known by him, in the cases of Jeffrey and Donald, and in all cases from their participation in the drive with Timms down a secluded road and the nature of their joint attack on Timms, that the common intention involved as a probable

consequence an assault by the principal offender or offenders so serious that it must have been committed with the intention of causing grievous bodily harm to Timms. And the jury would have been entitled to infer against each of Donald and Jeffrey that when they returned to Eenie Creek on the second occasion the common intention was to beat Timms by assaulting him so seriously that he would be unable to remember who had assaulted him; again an intention which involved as a probable consequence an assault so serious that it must have been committed with the intention of causing grievous bodily harm. For that reason it would not have mattered as against Donald and Jeffrey whether Timms died from blows inflicted on the first or on the second occasion. And as against Pascoe there was no room for the view that any blows were inflicted on the second occasion.

It is common ground in this appeal that the learned trial Judge in each trial directed the jury that, under s.8, they could convict an accused of manslaughter only if they concluded that Timms' death was manslaughter; that a verdict of manslaughter was not open in respect of the accused in either case if the jury were satisfied that a murder had been committed. The learned trial Judge and all parties accepted that to be the correct view of the law in consequence of Hind and Harwood. It is not contended that, in consequence of Barlow, those were not misdirections.

In each appeal it was contended that there were further misdirections with respect to the application of s.8.

On behalf of Pascoe and Donald it was submitted that, for a person to be liable for murder under s.8 it was necessary to establish that he realized or foresaw that at least an assault with intent to do grievous bodily harm was contemplated or intended by one or another of his associates; and that each of the learned trial Judges failed to give this direction. On Jeffrey's behalf it was contended that, for him to have been liable under s.8, it was

necessary to prove that he intended to kill Timms or to do him grievous bodily harm; and there was no direction to that effect.

Neither of these submissions is, in my view, correct. Each misunderstands the construction placed on s.8 in the joint judgment in Barlow. The relevant common intention contemplated by s.8 in this case, in order to found a verdict of guilty of murder, was one to commit an assault of sufficient seriousness that an intention to cause death or grievous bodily harm on the part of the principal offender was a probable consequence of the prosecution of that purpose. If that probable consequence was absent but the assault the subject of the common intention was nevertheless of sufficient seriousness that death was a probable consequence, and it occurred, the proper verdict was manslaughter. But it is not necessary in either case that these consequences were intended or even foreseen by the secondary offender.

On behalf of Pascoe a further ground of appeal was argued with respect to s.8. It arose out of a question by the jury in that trial to which the learned trial Judge gave a redirection. The question was:

> "In relation to paragraph 8, the matter of intent, does one or all four need to have intent? If only one, are all others guilty by association?"

In answer to that question the learned trial Judge redirected as follows:

> "For the offence to be murder, only one person who struck a fatal blow need to have the intent referred to in s.302. That is the intent to cause death or do grievous bodily harm. It is necessary for you to be satisfied there was at least one such person."

In the light of the decision in Barlow the direction was plainly correct. However it was submitted that the learned trial Judge should have corrected what may have been a misapprehension that, merely in the event that the principal offender had the relevant intent, all others were guilty by association. However, shortly prior to this redirection, the learned trial Judge had directed the jury in considerable detail as to the elements of s.8 and what was

necessary for their satisfaction in this case. It is not a realistic possibility that the jury would have been under such a misunderstanding. That must also have been the view of the appellant's experienced counsel who did not seek a redirection on any aspect of the above answer which the learned trial Judge gave to the jury.

The question then is whether, in consequence of the learned trial Judge's conceded misdirection with respect to s.8 in each case, there has been a miscarriage of justice. If there has been no substantial miscarriage of justice, notwithstanding that misdirection, each appeal should be dismissed. That question must be considered in the light of the directions which were given in each case and the verdicts reached on those directions.

In Pascoe's trial the learned trial Judge told the jury that, before either s.7(c) or s.8 could apply, they had to be satisfied that an offence had been committed. Then on four occasions during the course of his directions the learned trial Judge told them that, because it was unclear who killed Timms, in order to be satisfied that the offence was murder, they had to be satisfied beyond reasonable doubt that all four of his attackers intended at least to cause him grievous bodily harm. First his Honour said:

> "If you cannot be satisfied beyond reasonable doubt that any identifiable person struck the fatal blows in this case, and I have already suggested that you will not be able to be satisfied beyond reasonable doubt that an identifiable person struck them, it follows that you can find that Timms was murdered only if you are satisfied beyond reasonable doubt that everyone who struck him did so with the specific intent set out in section 302.
>
> It is a matter of logic, really. Unless you can identify a person who struck a fatal blow, and I suggest you cannot in this case, then you have to be satisfied that everyone who might have struck the fatal blow had the intent, the specific intent referred to in section 302. If you are satisfied of that, then it does not really matter how many of them or which of them struck the fatal blows. If they all had that intent, then whoever it was that struck the fatal blows must have had the necessary intent and it follows that Timms was murdered."

A little later he said:

> "Since we do not know who did the killing, that means the question is whether the prosecution has satisfied you beyond reasonable doubt that all four of them had the intention of doing grievous bodily harm or causing death."

Later again, his Honour said, speaking of evidence that Pascoe had disposed of the clothes he wore that night:

> "It is not evidence that all four of them had the necessary intention and remember you have to be able to reach the conclusion beyond reasonable doubt that all four of them had the intention to cause death or grievous bodily harm on the basis I have been putting to you."

And finally he said:

> "You can find that Timms was murdered only if you are satisfied beyond reasonable doubt that all four of those assaulting him intended to cause him death or to do grievous bodily harm to him. Unless you are so satisfied you must, assuming of course you are already satisfied he was unlawfully killed, you must in that case find that the unlawful killing was manslaughter."

It is plain that his Honour gave those directions, on each occasion, on the basis that the jury could not determine who had killed Timms. The redirection referred to earlier "For the offence to be murder, only one person who struck a fatal blow need to have the intent referred to in s.302" must be read as a general direction as to the meaning of s.8 subject to those specific directions.

It follows from what I have said that those directions were incorrect. It was sufficient if the jury could infer from the evidence that whoever killed Timms must have had the intention of causing him at least grievous bodily harm; and it was possible to infer that without being able to identify the killer. The jury would then have been obliged to consider the application of ss.7(c) and 8 on the basis that because the killer could not be identified, each accused was entitled to the benefit of a conclusion in his favour that it was not he.

His Honour's directions prohibited the jury from considering whether Pascoe was guilty of murder under ss.7 and 8 until they were satisfied that he and his fellow attackers all

had the intention of causing Timms grievous bodily harm. If the jury concluded, as they must have in obedience to those directions, that each appellant intended to cause Timms grievous bodily harm, it is almost inconceivable that they would not have convicted Pascoe of murder under ss.7(c) and 8. The evidence upon which the jury must have concluded that each of the attackers had the intention of causing Timms grievous bodily harm in their combined attack on him would inevitably[12] have been sufficient for them to infer, in Pascoe, knowledge of that intention in the others. And from that evidence a reasonable jury must have inferred that he aided with that knowledge.

Moreover, given that, with that intention, they combined to attack Timms, that intention must have been common and death was plainly a probable consequence of the prosecution of that purpose. Therefore, in my view, there has been no substantial miscarriage in Pascoe's trial in consequence of the conceded misdirection.

The learned trial Judge in the joint trial directed the jury that all attackers could be guilty of murder under s.7(c) notwithstanding that the jury could not say who had delivered the fatal blow. He said:

> "You may be unable to determine which heavy blow or blows actually caused Mr. Timms' death but if you are satisfied beyond a reasonable doubt that the attackers acted together, intending to cause Mr. Timms' death, or to do him some grievous bodily harm, and that as a result of the attack Mr. Timms was unlawfully killed, each of the attackers striking the heavy blows will be guilty of murder.
> ...

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[12] Glennon v. The Queen (1994) 179 C.L.R. 1 at 8-9.

> It requires no evidence of express agreement to establish the existence and scope of such a criminal combination. It may be inferred from all the proven circumstances of the case. In those circumstances, although one assailant may have struck the fatal blow, the other assailants are in the eyes of the law, equally guilty of his offence because they directly and immediately aided him in committing it."

His Honour then went on to direct them that they could conclude that either appellant had

aided in a way which was less direct and immediate.

It appears from these passages that, in directing the jury with respect to aiding "directly", his Honour was saying that, notwithstanding that an appellant may not have struck the fatal blow, he would nevertheless be guilty of murder if, in combination with the principal offender, he attacked Timms by delivering heavy blows intending to cause his death or to do grievous bodily harm to him. Although, as I have said, the relevant question under s.7(c) is not whether the aider himself had the intention of causing death or grievous bodily harm but whether he knew that to be the intention of the principal offender whose acts he was aiding, as his Honour went on to add the requirement of knowledge, the misdirection in this passage must have favoured the appellants.

In directing the jury on the application of s.8 his Honour did not direct them as to how they were to conclude that a murder had been committed where they were unable to say who had delivered the fatal blow. As the only direction on this question appears to be that set out above, they may well have thought that, in order to be satisfied of guilt of murder under s.8 also, they needed to be satisfied that all attackers had the intention of causing Timms' death or of doing grievous bodily harm to him. The strong possibility that they may have thought that shows that the failure otherwise to direct on this question could only have favoured each of the appellants. But I do not think it can be said, as it can in respect of Pascoe's trial, that the jury must have concluded, here as well as under s.7(c), that all intended Timms' death or grievous bodily harm.

Perhaps because they were more frank in their admissions than Pascoe, the evidence against each of Donald and Jeffrey as to their own intentions, their awareness of the intentions of the others and consequently the common intention, established an even stronger case of murder against each of them under each of ss.7(c) and 8 than against Pascoe.

However it was not inevitable on the evidence against each that, on the first occasion at Eenie Creek Road, he knew of the intention of the principal offender to do grievous bodily harm to Timms.

The facts relating to the second occasion however present a different picture. Each of Donald and Jeffrey must have been aware that their earlier assaults had inflicted serious injuries on Timms. Donald had expressed concern that they may have killed him and Jeffrey was concerned about inflicting future injury, he said, because of the injuries which Timms already had. Each also knew before they returned on the second occasion that the intention, of the others in the case of Donald, of all in the case of Jeffrey, was to render Timms into such a state of unconsciousness that he would not remember who his attackers were. Donald said that he told one of his companions that they could do Timms permanent damage and he said that he then knew that there was a danger that Timms would be killed. Notwithstanding the absence of a similar admission against Jeffrey I think it must have been inferred against both of them that they then knew of the intention of others to do grievous bodily harm to Timms. With that knowledge Donald drove them back to the scene of the first attack and Jeffrey joined in a further assault on Timms.

In my view, in those circumstances, each was guilty of murder under s.7(c) if it was inevitable that blows inflicted on this occasion substantially or significantly contributed to Timms' death. On Jeffrey's admissions it was on this occasion that Pascoe jumped up and down on Timms' chest. Given that the collapse of his rib cage was a substantial cause of Timms' death it is likely that this contributed substantially to his death. But even on the admissions of each of further assaults committed on this occasion on Timms, especially further kicking by Pascoe with his steel capped boots, I think that a reasonable jury must have been satisfied that assaults on this occasion substantially contributed to Timms' death.

Therefore I do not think that there has been a substantial miscarriage because of the misdirection in the joint trial.

Whether a verdict of murder under s.8 would have been inevitable against each of Donald and Jeffrey, had the jury been properly directed on that section, depends on an objective question: whether a probable consequence of the prosecution of the common purpose must have been that the principal offender or offenders would have the intention of doing Timms grievous bodily harm. The evidence relevant to that question is in much the same form before this Court as it was before the jury. The question therefore does not involve evaluation of evidence, as it would if there were any questions of credibility and, although it does involve competing inferences of fact, in my view only one inference is reasonably open.

In drawing inferences from the facts proved and in assessing that question of probability this Court is in as good a position as the jury would have been if it had been properly directed. There can have been no substantial miscarriage if this Court is satisfied beyond reasonable doubt that it was a probable consequence of the prosecution of the common unlawful purpose, in the case of each of Donald and Jeffrey, that the principal offender or offenders would have the intention of causing Timms grievous bodily harm. In such case a reasonable jury, properly instructed, must have been so satisfied. I have no doubt that such an intention was a probable consequence of the prosecution of that purpose upon the evidence to which I have referred - the admissions of each as to what they did and what they heard others say and observed others do and the medical evidence.

For both of these reasons the appeals of Donald and Jeffrey must fail in my opinion.

It was submitted by the respondent that, in consequence of the misdirection with respect to s.8, the appellants were not deprived of the opportunity of a verdict of manslaughter but wrongly had the advantage of the possibility of acquittal.[13] However there was never any realistic possibility in either case of an acquittal. It was almost inevitable that each appellant would be convicted either of murder or manslaughter. The principle relied on therefore has no application in these appeals.

I would therefore dismiss all appeals.

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[13] Relying on Ross v. The King (1922) 30 C.L.R. 246, Mraz v. The Queen (1955) 93 C.L.R. 493, Apted v. The Queen [1981] Tas.R. 140, R. v. Evans and Lewis [1969] V.R. 858 and R. v. Iannazzone [1983] 1 V.R. 649.