IN THE COURT OF APPEAL [1999] QCA 305

SUPREME COURT OF QUEENSLAND

Brisbane

[R v Lowrie & Ross]

THE QUEEN

v

KERRY CATHERINE LOWRIE and
KERRI-LEAH MICHELLE ROSS

Appellants

McPherson JA
Davies JA
Thomas JA

Judgment delivered 6 August 1999

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

BOTH APPEALS ALLOWED. CONVICTIONS AND VERDICTS TO BE SET ASIDE AND A NEW TRIAL ORDERED IN THE CASE OF EACH APPELLANT.

CATCHWORDS: CRIMINAL LAW - Evidence - Jurisdiction, Practice and Procedure - Courses of evidence, statements and addresses - Summing up - Adjournment, stay of proceedings or Order Restraining proceedings.

DPP (Qld) v Wentworth (CA no 4118/1996; Sept 10 1996)
R v B & P [1999] 1 Qd R 296
R v Barlow (1997) 188 CLR 1
R v Callaghan [1994] 2 Qd R 300
R v Jeffrey (CA no 154/1997; 19 Dec 1997 unrep)
R v Webb, *ex p Attorney-General* [1990] 2 Qd R 275
Rowley (1948) 32 Cr App R 147
Royall v The Queen (1991) 172 CLR 378
Webb v The Queen (1994) 181 CLR 41

Counsel: Mr A Rafter for the appellant Lowrie
Mr P Callaghan for the appellant Ross
Mr D Bullock for the Crown

Solicitors: Legal Aid Queensland for the appellants
Director of Public Prosecutions (Queensland) for the respondent

Hearing Date: 13 July 1999

REASONS FOR JUDGMENT - McPHERSON JA

Judgment delivered 6 August 1999

1 These are appeals by Kerry Catherine Lowrie and Kerri-Leah Michelle Ross against their convictions on 26 February 1999 for the murder of Grace Madonna Heathcote after a joint trial in the Supreme Court at Cairns. Ms Heathcote, who was also known as Jane, was found dead in a motel room late on the night of 4 July 1995. At the trial, evidence of the forensic pathologist was to the effect that death had been caused by rupture of the heart and tearing of the liver, part of which was described as "pulped", which was consistent with the victim having been jumped or stamped on, but with unusual severity. There were some 14 or more rib fractures, as well as fractures of or beside the breast bone; the victim's Adam's apple and hyoid bone were broken, as were the nose and nasal bones, and there were extensive lacerations, bruising and abrasions on parts of the face, checks, chin, forehead, scalp, ears, neck and chest. The victim had before her death obviously been subjected to a severe beating by one or more assailants.

2 She was a prostitute, who had been summoned to the motel by a telephone call from a woman who had booked the room and made an appointment with Ms Heathcote to be given a massage there. The woman in question was the appellant Kerry Catherine Lowrie, who is also known as Skye. She was apparently a stranger to the victim, who was, however, known to her co-appellant Kerri Ross, who was also a prostitute. The latter was said to be harbouring a grudge against the victim arising at least in part from the victim's failure to pay a debt owed to Ross. It was arranged between the two appellants that Lowrie would make the appointment and lure the victim to the motel as part of a plan to obtain payment of the money owing. The plan was to supply the victim with champagne to drink, which had been laced with a drug that would put her to sleep or make her drowsy. While she was in that condition, her keys would be taken, and Ross would use them to enter the victim's home and steal her money or belongings to repay the debt.

3 There does not at the trial seem to have been much or any dispute about the plan or the proposed method of its execution. The same applies to the actions of one or both the appellants in preparing valium tablets and crushing or cooking them

into a syrup, which was poured into a bottle of champagne and taken by the appellants in a car driven by Ross to the motel that evening. From the time of their arrival at the motel, there is a divergence in the accounts, as far as they went, later given by each of the appellants to the police; and for that reason it becomes necessary to recount them separately. Neither of the appellants gave evidence at the trial and their respective versions of what happened were contained in statements given in interviews which took place out of court. In that character, they were admissible and admitted at the joint trial; but, if tendered by the prosecution as they were, they were evidence only against, or in favour of, the individual making the statements in question, and not against her co-accused, as to whom such a statement was inadmissible hearsay. It was therefore incumbent on the learned trial judge to make it clear to the jury that there were the limits on the use to which those statements could be put as evidence tending to establish the guilt of each accused.

4 Following the discovery of the crime, the appellants travelled and were traced to Mount Isa. Lowrie was subsequently interviewed by police on no fewer than five

occasions between 8 July 1995 and 6 February 1996, and after the committal proceedings she provided a written statement (ex 53) on 6 March 1996. Having explained that in the motel room she poured a glass of the drugged champagne, from which the victim drank and which made her begin to fall asleep, the appellant Lowrie said that at that stage Kerri Ross, who had been waiting outside, entered the room and said "We've come to get the money", to which the victim replied "I owe you fuck-all". Lowrie went on to say that Jane (which was the name by which she referred to the victim):

> "Jane picked up the champagne bottle that was down beside the bed, and hit me across the back of the head with it. The bottle broke, and I turned round to grab Jane, and she had the broken neck of the bottle in her hand still. She stabbed me in the left hand between my thumb and fingers with the broken bottle.
>
> I hit her in the side of the head with the inside of my fist and during this time, Kerri was swearing at her. At this time, Jane and I were at the side of the bed near the front door. Kerri was standing near the door.
>
> Kerri and Jane started to struggle with each other, and were moving around the room. They had moved around to the other side of the bed when Kerri pushed Jane away from her. Jane fell back against the wall. I picked up a single lounge chair, that was made out of wood, and had cushions for your back and seat. I hit Jane across the upper body with

this chair as she was against the wall. Jane saw the chair coming, and went to push it away, but it still struck her.

Kerri then got Jane around the throat. They were facing each other, and Kerri banged the back of Jane's head back against the wall.

I could see that Jane continued to struggle with Kerri, and I could not see any signs of bleeding from either Kerri or Jane.

I then fixed up the chair and picked up the broken glass from the champagne bottle and put this in my bag. I also put the glass that Jane had used into my bag. I then left the room, at which time Jane was lying on the floor in the doorway between the bedroom and bathroom. Kerri was sitting astride Jane and punching into Jane's head.

I went out to the car and waited for Kerri to come out. I waited there for what seemed a long time. When Kerri didn't come out, I went back into the room.

Jane was lying on the floor between the bed and the back wall with a black box in her mouth. I think it was a battery off a mobile phone. Kerri was standing up beside her. I took the black box out of Jane's mouth and she made some gasping noises.

I think that Jane was still clothed at this stage, and I can remember that her face seemed all bruised and there was a cut near the side of her mouth.

I went to pick Jane up, to put her on the bed, but I couldn't because she was too heavy for me. At this time Kerri was swearing at me, telling me

to leave Jane alone, because she was a slut, and deserved everything she got.

When I put her back down, Kerri kicked her in the head."

After this, the two appellants left the motel, following which Ross used the victim's keys to gain entry to her flat, from which she returned with a bag containing items of the victim's property. They later travelled together, in what was said to be a lighthearted mood, to Mount Isa, where they were located and interviewed by the police

There was some independent evidence of Lowrie's presence in the motel room in the form of stains of her type of blood on the carpet or floor, which might have come from the cuts to her hand and foot which, when medically examined, she was later found to have. Against Ross, there was little direct evidence of her complicity in the crime. Mr Callaghan of counsel, who appeared for her on appeal, identified some three or four items of such evidence. They were that a Mr Stancombe said Ross had told him some of the details of the plan to get the money, and afterwards that the victim was dead. Later, in one or more police interviews after the event,

Ross admitted to having driven Lowrie to the motel and subsequently returned to collect her; that Lowrie had told her that the victim had stabbed her in the hand and the foot; that Lowrie had retaliated; and that, when Lowrie left the motel room, the victim was still alive and breathing but pretending to be unconscious. Ross drove Lowrie home where, according to the evidence at the trial of Lowrie's teenage son Hendrick Wyngaarden, Ross arrived with "well soaked" bloodstains on her clothing stretching from her chest down to the middle of her stomach. Later that night he also saw some blood on his mother's clothing. Earlier, before the appellants had gone out that evening, he had seen Ross preparing some substance in a cup, which she put in the microwave; in the refrigerator he also saw a green bottle of alcohol with a gold foil at the top.

6 In addition, there was evidence from a Ms Coralee Nowlan of a conversation with Ross when they were both in prison on 12 March 1996. Ross told Nowlan that a woman had owed her money, and she had arranged for a friend to go round and get it from her; that the friend and Ross, who was wearing gloves, had gone to a motel room, where the friend was to drug the woman; that Ross had gone into the

room and "did the bashing and stuff like that, but that everything that she could blame on to her other friend because she could prove she wasn't there ...". Ross had also told Nowlan that a fight broke out, things went too far, and there was blood all over the place, which she had tried to clean up. The friend would "cop most of it" because she was "a docile dumb thing" who was now in Wolston Park, where she belonged. Two other female prisoners, identified by name, were said to have been present during this conversation; but they were not called to give evidence at the trial, nor was their absence accounted for.

7 Essentially, this constituted the evidence against the appellant Ross. Some time before the trial there was an application by the appellants for an order that they be tried separately. The application was refused by his Honour, who gave careful reasons for his decision. On appeal, both appellants submitted that separate trials should have been ordered; but the question was essentially one of discretion and there were sound reasons of principle and policy why, in circumstances like those disclosed here, the two accused should have been tried together. See *R v Collie*

(1991) 56 SASR 302, 307-311, adopted by Toohey J in *Webb v The Queen* (1994) 181 CLR 41, 88-89, adding, however, that:

> "There are, however, dangers for an accused in a joint trial by reason of the admission of evidence which would not be admitted at the trial of one accused. That risk must be obviated by express and careful directions as to the use they may make of the evidence so far as it concerns each accused."

8 The present was such a case, as his Honour (who later presided at the trial) recognised in his reasons refusing the application. In the course of the trial itself, his Honour intervened from time to time to instruct the jury that particular items of evidence were admissible against one but not the other of the two appellants. In summing up the learned trial judge gave a similar but general warning to the jury on that subject. Unfortunately, he did not in the end specifically direct them that the statements made by each of the two appellants, and in particular those contained in Lowrie's statement ex 53, were admissible only against the individual who made them and not against her co-accused. Moreover, in relation to Ross's prison confession of which Ms Nowlan testified at the trial, his Honour said:

> "Other aspects of the case against Ms Ross [are that] there was a violent assault. She at her first interview with the police knew of the detail of the assault. In that interview she said that detail came from her discussions with Ms Lowrie. Well, if you accept Ms Lowrie's statement to the limited extent of her involvement in the assault, it may be open to you to infer that the description she was giving to the police in Mount Isa might come from personal knowledge. But that would depend of course on your accepting the statement of Ms Lowrie."

9 My interpretation of that passage in the summing up is that, in saying that Ross had at her first interview disclosed some personal knowledge of the detail of the assault, his Honour may well have been suggesting that her knowledge of that detail afforded original evidence of her presence in the motel room during, and perhaps inferentially her participation in, the commission of the crime; that Ross's explanation was that the source of that detail was Lowrie; but that, if the jury accepted Lowrie's statement about the limited extent of her own participation in the assault, it would be open to them to infer that Ross might have been using personal knowledge of what had happened in the motel room when, in her first interview, she provided details of the assault. The fact remains, however, that the use, even in this limited way, of Lowrie's statement to the police necessarily involved treating it, if

accepted, as evidence of the truth of its contents, when in law it was not admissible as evidence against Ross of the truth of the facts it contained. For the Crown, Mr Bullock suggested on appeal that perhaps there had been an error in the recording or transcription of his Honour's remarks on the subject, involving the substitution of "Nowlan" for one or more of the references to Lowrie in the passage in question; but the trial judge in his report to this Court made no reference to any error of that kind, and, even if that explanation were to be accepted, the result would still have been potentially confusing to the jury without precise directions about the extent to which each of the appellant's pre-trial statements could be relied on by the jury as evidence at the trial against her co-accused.

10 A somewhat similar criticism was also levelled against a passage in the testimony of Det Insp McRae at the trial, in which he was asked in cross-examination by Mr Gundelach of counsel for Ross to repeat the contents of a telephone conversation with Ross in which she claimed that another woman had told her what had happened. In the course of that evidence, McRae related that Ross had told him that she (meaning that other woman) was " the one that bashed the

shit out of her", and that, if Ross told anyone, "she'll get me, she'll get my kids". It is clear that, whether justifiably or not, Ross was seeking to distance herself from the offence by laying the blame on someone else, who in the context of other evidence at the trial could only have been the appellant Lowrie. The evidence was not objected to by counsel for Lowrie at the trial, and it is right to say that, before McRae was cross-examined about it, his Honour directed the jury that it was evidence only in the case against Ross and not against Lowrie. Again, however, the fact remains that, although no doubt helpful to Ross, it was in the proceedings against her simply an unsworn self-serving statement made out of court, which did not fall within any of the recognised exceptions authorising its admission in evidence. See *R v Callaghan* [1994] 2 Qd R 300, 303-304. As against Lowrie, it was a hearsay and highly prejudicial statement, which at the trial ought not to have been admitted in evidence at all. Some of the evidence of Stancombe was also open to similar objection.

11 Taken alone, these complaints might well justify orders for a new trial of each appellant. But, in addition, it is a further ground of appeal by both of them that the

directions given to the jury on criminal responsibility under ss 7 and 8 of the Criminal Code were in material respects erroneous. For murder under s302(1)(a), criminal responsibility could be established by evidence properly admissible against each accused that she had killed the victim with the intention of causing her death or of doing her some grievous bodily harm. Such an intention can readily be inferred from the injuries sustained by the victim; but the difficulty for the Crown lay in proving that both of the appellants, or, if not both, then one and which of them, had killed the victim with that intent. It was for this purpose not necessary to identify the lethal blow or blows, if any, but rather that the particular accused or each of them had done an act or acts which constituted a substantial cause of the victim's death, or which substantially contributed to it. See *Royall v The Queen* (1991) 172 CLR 378, 411, 423, which was applied in *R v Jeffrey* (CA no 154/1997; 19 Dec 1997, unrep).

12 Either of the appellants against whom those matters were proved would, within s7(1)(a) of the Criminal Code, be a person "who actually does the act ... which constitutes the offence" and, as such, "deemed" by s7(1) to have taken part in

committing the offence and to be guilty of it. But the criminal responsibility of the appellants was not limited to the circumstances specified in s7(1)(a). Each of them was also criminally responsible under ss7(1)(b) or 7(1)(c) if it was proved that she assisted or aided the other in carrying out the killing knowing at the time of doing so that the other appellant was intending to kill the victim or to do her grievous bodily harm. That was the view adopted by Davies JA and by me in *R v Jeffrey* (CA no 154/1997; 19 Dec 1997 unrep). It is true that in some earlier decisions in Queensland[1] there are statements that, on one view, may be thought to imply that under s7(1)(b) or s7(1)(c) criminal responsibility is imposed on the party aiding or assisting if he or she is aware of only a possibility that death or grievous bodily harm might be intended. Having regard, however, to the approach adopted in *Barlow v The Queen* (1997) 188 CLR 1, especially at 9-10, and to what was said on the subject in *R v Jeffrey*, knowledge of no more than such a possibility is not sufficient to attract criminal responsibility under either of those two provisions. Such

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1. See *R v Solomon* [1959] Qd R 123, 128; *R v Beck* [1990] 1 Qd R 30, 37, 38; *R v Jervis* [1993] 1 Qd R 643, 647, which are discussed by Pincus JA in *R v B and P* [1999] 1 Qd R 296-309.

a conclusion is consistent with what was said by Pincus JA and Muir J in *R v B & P* [1999] 1 Qd R 296, 309, 311.

13 To establish that the appellants were criminally responsible under s7(1)(b) or s7(1)(c), it would not have been necessary under either of those provisions for the prosecution to prove which one of them inflicted the blow or blows or did the act or acts that caused or substantially contributed to the death of the victim. It would have been enough to establish that, with the requisite state of mind or knowledge, either of the appellants aided or assisted the other to do an act or acts which substantially contributed to the death of the victim. The question most commonly arises, as it did in *R v Jeffrey*, in cases in which a group of people engage in physically assaulting another person, who dies as a result of injuries inflicted by one or more of the participants, in circumstances in which it is impossible afterwards to say who inflicted the fatal blow or other force. In *Jeffrey*, on which Mr Rafter of counsel for Lowrie relied on this appeal, Davies JA said:

> "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."

What I said was:

> "The requisite state of mind which had to be established against the appellant to make him criminally responsible under 7(c)[2] was that he knew that one or more of the others was intending to kill or to do grievous bodily harm."

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2. Now s7(1)(c) of the Code.

Once such a state of mind or knowledge on the part of one of the participants is established, he (or she) becomes criminally responsible for the act or acts of any of the others (whether identifiable or not) that cause or substantially contribute to the death and consequent murder of the victim. In instructing the jury in such a case, it is, I consider, ordinarily sufficient to direct that, once a participant in such an assault becomes aware that life-threatening force is being used by one or more of the others, he or she is, by continuing to assist in the assault, liable to be found guilty if the victim's death results from injuries inflicted by any of the participants. In applying this approach to such a case, it is of course, necessary to bear in mind that it is proof of the existence of the requisite state of mind or knowledge on the part of the

participant that is decisive of responsibility for the offence that ensues. If that element is not established in the case of a particular offender, he will not be guilty of murder, although he may and probably will, subject to any relevance that s23(1)(a) or s23(1)(b) of the Code may have,[3] be guilty of manslaughter.

14 It was suggested that the effect of the decisions in *R v Wyles*, *ex p Attorney-General* [1977] Qd R 169 and *R v Webb*, *ex p Attorney-General* [1990] 2 Qd R 275, is that a person who does no more than conspire with another to carry out an offence is under s7(1)(a) criminally responsible as a person who actually committed it even if he took no part in the commission of the offence when it was later carried out. I am, with respect, disposed to prefer the conclusion that a person who does no more than agree or conspire to carry out an offence would be criminally responsible not under s7(1)(a) as the person who actually did the act which constituted the offence, but rather under s7(1)(d) as a person who counselled another to commit the offence. At common law, according to Smith and Hogan,

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3. As to which, see *R v Taiters* [1997] 1 Qd R 333, 338.

Criminal Law, 5th ed, at 121, "participation in a conspiracy to commit an offence amounts to counselling if the offence is actually committed". But, in any event, s7(1) of the Code sets out to treat all offenders within its scope equally as having committed the offence and as being guilty of it; and, provided that the jury is properly instructed on the principles governing criminal responsibility, it is not essential, or perhaps desirable, that they be told under which particular paragraph of s7(1) that responsibility arises.

15 For the purpose, however, of defending a charge against him, the accused or his counsel may need to know in what character or capacity under s7(1) he is being charged with having committed the offence. That is a difficulty which ensued in the present case when an application for such particulars was refused by the trial judge. The problem remained latent throughout the trial and became more readily apparent once the summing up was analysed on this appeal. It seems clear that neither of the appellants was being charged under s7(1)(d) as a person who counselled the murder of the victim. As to that, his Honour directed the jury that there was originally an agreement, plan or conspiracy between the two appellants to

do no more than subdue and steal from the victim in what was described as a "non-violent" manner. On that footing, which was not in dispute, neither of them was criminally responsible under s7(1)(d) for the death that ensued. If, however, with the requisite state of mind or knowledge, either of them aided or assisted the other to murder the victim, then, for the reasons already given, each was criminally responsible under ss7(1)(b) or 7(1)(c) for that murder, while the actual perpetrator (whoever she was) was guilty under s.7(1)(a).

16 For this, however, it would have been necessary for appropriate directions in accordance with *R v Jeffrey* to be given to the jury concerning the state of mind or knowledge required under s7(1)(b) and s7(1)(c). Examination of the summing up shows that, at one point, his Honour's directions came close to satisfying the requirements of those provisions. Having referred to the woman who assisted the one who actually committed the offence, his Honour went on to direct the jury "you must be satisfied beyond reasonable doubt that that woman was aware that the offence was being committed. Here, as I said, the offence is murder" But he then added:

> "You must be satisfied that one or other of the accused with that knowledge, knowledge that a violent assault was going to be committed, provided support and assistance with the intention of aiding the other to commit the offence".

The defect in this part of the summing up is that, although it rightly stressed the need under s.7(1)(b) or (c) for proof of knowledge on the part of the aider or assistant, it defined or described it simply as "knowledge that a violent assault was going to happen". In that form, the direction failed to make it clear that what was required was knowledge that death, or at least grievous bodily harm, was intended. The fact that a violent assault, even if intended, is going to happen is not necessarily capable of being equated with an intention to do grievous bodily harm or, as I have previously expressed it, to inflict life-threatening force.

17 The summing up was therefore defective in that respect. From other parts of it, it appears his Honour was also intending to give a direction in terms of s8 of the Code. Stated in broad and general terms, although perhaps not with complete accuracy, it was open to the jury under that section to find either appellant guilty of murder if satisfied that murdering her was an objectively probable result of their

carrying out together a common intention of committing a serious physical assault on her. Her death by murder cannot, objectively speaking, be said to have been a probable consequence or result of their original plan or common intention of subduing their victim by non-violent means. But, having directed the jury to that effect, his Honour went on:

> "It is only if you find that the plan changed to include an agreement between the accused women to use force, that this provision of the law could be relied upon. It may be an unspoken agreement, it might be inferred from conduct ... But you could only find that the women were guilty under this provision if you were satisfied beyond reasonable doubt that, whilst actually in the motel room, they formed an understanding or an agreement, it may be unspoken, between them that violent force would be used against Miss Heathcote to allow the plan to proceed."

18 If designed (as it appears to have been) as a direction in terms of s8, it fell short of its mark in one or more particulars. Even assuming that some such further or subsequent agreement could be inferred, it was not capable of attracting responsibility under s8 for the murder of the victim unless murdering her was an objectively probable consequence of the subsequent unspoken but inferred agreement, formed after the appellants were in the motel room together, to use

"violent force" against the victim. In that regard, his Honour gave no direction that such a consequence must, under s8, be found to be probable; nor, in accordance with *Barlow v The Queen*, that the consequence which needs to be found is that the death of the victim was brought about with the intention either of killing or causing her some grievous bodily harm. If on the other hand, the direction in question was designed to rest on any of paras. (b) or (c) or (d) of s7, then it also failed to satisfy the requirements of those provisions as they have been explained earlier in these reasons.

19 It follows that, by reason of these defects or deficiencies in the proceedings at the trial, the conviction cannot stand. On behalf of the appellant Lowrie, Mr Rafter advanced a further submission based on an earlier application for a stay of the proceedings against her. She was originally prepared to plead to a charge of having been only an accessory after the fact to the murder of the victim. However, Dowsett J, before whom the matter came in the Circuit Court at Cairns on 22 March 1996, declined to accept her plea until the principal offender had been convicted. That

accorded with the decision in *Rowley* (1948) 32 Cr App R 147, but his Honour's attention was not drawn to s569 of the Criminal Code.

20 The proceedings were thereupon stood over to a later sitting of the Court. Lowrie's plea not having been accepted, the matter came before White J on 3 March 1997, when the Crown successfully sought the return of the indictment charging Lowrie with being an accessory after the fact. On its return, a fresh indictment, on which she was later tried, was presented charging her with murder. It was followed by an application, which White J refused, for an order quashing the indictment or staying proceedings on it. From her Honour's refusal of that application an appeal was brought to this Court, which dismissed it. See *R v Lowrie* [1998] 2 Qd R 579. Special leave to appeal from that decision was refused by the High Court.

21 In *R v Lowrie*, both Davies and Pincus JJA held that this Court had no jurisdiction to entertain the appeal. Shepherdson J, who held there was jurisdiction, considered the appeal should be dismissed on the merits. The view adopted by Pincus JA was that there was no right of appeal against an order of the Supreme

Court made in an interlocutory way in relation to a trial on indictment: see *R v Lowrie* [1998] 2 Qd R 579, 589. The appellant Lowrie, having since then been convicted at her trial on the indictment for murder, now raises as a ground of appeal against that conviction that White J on 3 March 1997 was wrong in refusing to quash or stay proceedings on that indictment.

22 It was not argued by the Crown that the appellant was not entitled now to pursue this ground of appeal. The question is, however, whether there is or ever was a proper basis for quashing or staying those proceedings to which we ought to give, or to which White J ought to have given, effect. As to that, the appellant relies on the decision in *Director of Public Prosecutions (Qld) v Wentworth* (CA no 4118/1996; Sept 10 1996), in which this Court dismissed an appeal from a decision of the Supreme Court staying proceedings on an indictment. Between that case and this there is, as Mr Rafter candidly acknowledged, the critical difference that the accused in *DPP v Wentworth* had already pleaded guilty to two counts charged in an indictment and had also been called on in the matter of sentence. While the hearing of the sentence proceedings stood adjourned in order to obtain a

pre-sentence report, the Crown presented a further indictment, which not only repeated those two counts but included further charges arising out of the same incident. That indictment was the third of its kind, the first having been withdrawn when the second was presented pursuant to an arrangement under which the accused pleaded guilty to the two counts in question.

23 The difference is critical because the accused's plea of guilty in that instance had been made and accepted by the Court in that instance, whereas here the appellant was never arraigned on the charge of being an accessory after the fact, or convicted of that offence. Conviction on indictment is generally speaking the equivalent of judgment in civil proceedings: see *Cobiac v Liddy* (1969) 119 CLR 257, 270-273; and, taken by itself, neither verdict nor plea of guilty ordinarily constitutes conviction until it is accepted by the court, which is most often manifested by administering the *allocatus* preparatory to sentencing. See *R v Jerome* [1964] Qd R 595, 602-603. There is a discretion in the court to permit a

guilty plea to be withdrawn if circumstances warrant or require it;[4] but none at all to enable a mere willingness to plead guilty to be treated as the equivalent of conviction or judgment on the indictment.

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4. See *Gudgeon* (1995) 83 A Crim R 228, 246-247, where some of the authorities are cited.

24 From the standpoint of the appellant here, it is no doubt unfortunate that her willingness to plead guilty to the lesser charge was not acted on by Dowsett J; but, considered from another aspect, the wider interests of justice require that, if she is indeed guilty of this serious crime of murder, there is every reason why she should be tried, convicted, and sentenced for it. Her understandable chagrin at having, through no fault of her own, lost the opportunity of escaping with a conviction for the lesser offence in 1996 is not a sufficient reason for exercising the power to quash or stay proceedings on the indictment in a case where no discernible prejudice to the conduct of her defence can be identified.

25 However, for the other reasons given here the appeals of both appellants should be allowed. The convictions and verdicts should be set aside. There will be an order for a new trial in the case of each appellant.

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SUPREME COURT OF QUEENSLAND

CA No 77 of 1999

CA No 92 of 1999

Brisbane

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THE QUEEN

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KERRY CATHERINE LOWRIE and
KERRI-LEAH MICHELLE ROSS

Appellants

REASONS FOR JUDGMENT - DAVIES JA

Judgment delivered 6 August 1999

1 I agree with the reasons for judgment of McPherson JA and with the orders

he proposes.

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REASONS FOR JUDGMENT - THOMAS JA

Judgment delivered 6 August 1999

1 I agree with the reasons of McPherson JA subject only to the following

observations.

2 The test proposed by McPherson JA for the application of ss7(1)(b) and 7(1)(c) is a more difficult one for the prosecution than I would have chosen had the matter been free from authority. The test stated by his Honour[5] requires proof that the accused person assisted or aided another person in carrying out the killing knowing at the time of doing so that the other person was intending to kill or do grievous bodily harm to the victim. Considerable difficulty might be expected in proving to the required standard the accused's knowledge of the specific intention of the co-offender. However all three members of the court in *Jeffrey*[6] seem to have taken a common approach to the question.

3 Prior to that case less stringent tests had been suggested as to the necessary level of an accused person's awareness of what the co-offender was doing. In *Solomon*[7] it was said that it was enough if the accused person knew the

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5 In paragraphs 12 and 13.

6 CA No 154 of 1997, 19 December 1997.

7 [1959] Qd R 123, 128-129.

kind of offence which might result from the behaviour which he was aiding. At common law, the giving of aid with knowledge that another person was doing something that was "likely to involve ... the particular criminal act charged" was regarded as a sufficient basis for full criminal liability[8]. Support for a broad approach of that kind can be found in the High Court decision of *Johns v The Queen*[9] although the major part of the discussion in that judgment is premised upon the consequences of a joint enterprise, and is more germane to a situation covered by s8. The question was expressly left open by two members of the Court of Criminal Appeal in *R v Beck*[10]. Derrington J in the same case considered that a test similar to that at common law was appropriate, and that the concept of foreseeability of the ultimate event was relevant.

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8 *R v Surridge*, *Surridge & Harris* (1942) 42 SR NSW 278, 282; (1942) 59 WN (NSW) 221, 224 per Jordan CJ.

9 (1979-1980) 143 CLR 108, 130-131.

10 [1990] 1 Qd R 30, 38-39 - ("This is ... not the occasion for examining the correct limits of any principle that a person may be guilty of aiding another in committing an offence when he may know no more than the kind of offence which might result from the behaviour which he is aiding").

4 The tests which were subsequently formulated in *R v Jeffrey*[11] seem to have been strongly influenced by *Giorgianni v The Queen*[12] and to some extent by *R v Barlow*[13]. The latter case was concerned with criminal liability under s8 and I would respectfully question the validity of drawing any analogy from s8 for the purposes of application of s7. *Giorgianni* is in my view a sounder source for consideration of criminal liability of persons who were at common law regarded respectively as principals in the first degree, principals in the second degree and accessories before the fact. *Giorgianni* was concerned with legislation that compendiously covered the same subject matter as that covered by s7. However, as Gibbs CJ expressly noted, "[w]e are not concerned in the present case with the question whether knowledge of an intention to commit the type of offence is enough"[14]; and a similar

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11 CA No 154 of 1997, 19 December 1997.

12 (1985) 156 CLR 473.

13 (1997) 188 CLR 1.

14 *Giorgianni* (1985) 156 CLR 473 at p481.

reservation appears in the judgment of Wilson, Deane and Dawson JJ[15]. The ratio of *Giorgianni* is that a person may not be convicted of aiding or abetting unless he knows "the facts which went to make up the offence"[16] or unless he intentionally aids or abets "knowing all the essential facts which made what was done a crime"[17]. I confess to a difficulty arising from the tense in which the members of the High Court expressed the test, which is in similar vein to that stated by Lord Goddard CJ in *Johnson v Youden*[18] to which their Honours made reference. The problem is that such cases almost invariably are concerned with aid that is rendered *before* the offence has been completed, and that the necessary mental element is clearly concerned with the end result to which the aider is willing to contribute, that is to say to a future matter. Lord Goddard's statement which was favourably discussed by all members of the Court in *Giorgianni* ("[b]efore a person can be

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15 Ibid at pp505-506.

16 Ibid p509.

17 Ibid pp487-488.

18 [1950] 1 KB 544, 546.

convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence") is far from precise. Gibbs CJ however seems to have expressed his own view of the matter when he stated:

> "[T]he person charged must have intended to help, encourage or induce the principal offender to bring about the forbidden result"[19].

5 In this state of authority it was by no means inevitable that criminal responsibility under ss7(1)(b) or 7(1)(c) in a murder case could only be proved if it were shown that the accused person assisted or aided another offender in carrying out the killing knowing at the time of doing so that the offender was intending to kill or do grievous bodily harm to the victim. However that was the approach taken in *Jeffrey*, and a similar approach was subsequently expressed in *R v B and P*[20].

6 I therefore consider that I am bound by the test as expressed in *R v Jeffery* and that juries should be instructed in accordance with it.

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19 (1985) 156 CLR 473 at p482.

20 [1999] 1 Qd R 296, 309.

7 There is no doubt that s7(1)(a) of the Code catches at least any primary offender who is shown to have done the act that constitutes the offence. The relevance of s7(1)(a) in the present case is to cover one of the limited number of logical possibilities that are consistent with the evidence. I do not think that any question as to the limits of the full potential ambit of s7(1)(a) arises for decision in this case, and would defer to another day the question whether *R v Wyles, ex parte Attorney-General*[21] requires any qualification.

8 So far as an alternative case under s8 is concerned, I agree with McPherson JA's reasons for concluding that appropriate directions under that section were not given. Whether it is necessary or desirable to present that to the jury as an alternative route to conviction is a matter for further consideration at retrial.

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[21] [1977] Qd R 169.

9 As there must be a retrial, some observations on the nature of the case are desirable. This is not a case where there can be any serious suggestion of a killing by some other party. One or other of Ross or Lowrie, or both of them, killed the deceased by doing an act that substantially contributed to her death. The circumstances point inexorably to the fact that the person or persons who killed her did so intentionally. But the question in relation to each appellant is whether she was proved to be guilty. As already observed, the case against each appellant under s7 depends upon limiting the logical possibilities. If it is shown that Ms Ross must have either killed the victim herself or given some degree of assistance to Ms Lowrie when aware that Ms Lowrie was intending to kill or do grievous bodily harm to the victim, Ms Ross must be found guilty of murder. If the jury is satisfied that Ms Ross must have done one or other of those two things it does not matter that the jury cannot say whether she was the committer or an aider. On either basis she is guilty of murder and it does not matter whether subparagraph (a), (b) or (c) of s7(1) is involved. I agree entirely with what McPherson JA has written in

paragraph 14[22]. Similar statements might be made in relation to Ms Lowrie's case.

10 Finally I would add that in the event of a retrial it is highly desirable that the Crown should give particulars of the alternative cases that it proposes as a basis for conviction of each offender, especially if a case is intended to be brought under s8. Such particulars would facilitate the task of the court and of counsel in focussing upon the substantially different issues that arise under ss7 and 8 of the Code.

11 I agree with the orders proposed by McPherson JA.

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[22] cf *Giorgianni* at pp480, 492.