SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sullivan & Marshall* [2000] QCA 393
PARTIES:	**R** **v** **SULLIVAN, Roger John** **MARSHALL, Faren Vance** (appellants)
FILE NO/S:	CA No 115 of 2000 CA No 116 of 2000 DC No 907 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	District Court at Mount Isa
DELIVERED ON:	29 September 2000
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2000
JUDGES:	Davies and Pincus JJA, Chesterman J Separate reasons for judgment of each member of the Court; Davies JA and Chesterman J concurring as to the orders made, Pincus JA dissenting
ORDER:	**Appeals against conviction allowed; convictions set aside.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – COMPLICITY – AIDER AND ABETTOR – appellants and third person charged with assault occasioning bodily harm in company – appellants' criminal responsibility arose by way of s 7 *Criminal Code* CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – ASSAULTS – CIRCUMSTANCES OF AGGRAVATION AND AGGRAVATED ASSAULTS – ASSAULT OCCASIONING ACTUAL BODILY HARM CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – VERDICT – INCONSISTENT, AMBIGUOUS AND MEANINGLESS VERDICTS – PARTICULAR CASES – OFFENCES AGAINST THE PERSON – indictment against appellants and co-accused charged one count of assault occasioning bodily harm in company – co-accused convicted of assault occasioning bodily harm simpliciter – appellants convicted of common assault – whether such verdict open

where assault in which appellants assisted was one which occasioned bodily harm – whether "merciful verdicts" – effect of s 10A(1) and s 584(1) *Criminal Code*

Criminal Code s 7, s 8, s 10A(1), s 567(1), s 575, s 584(1)

Barlow (1997) 188 CLR 1, considered
Biddle v Dimmock CA No 136 of 1992, 21 August 1992, considered
Cramp [1999] NSWCCA 324, considered
Eades (1991) 57 A Crim R 151, considered
Giorgianni v The Queen (1984-1985) 156 CLR 473, mentioned
G CA No 324 of 1991, 24 July 1992, considered
Jervis [1993] 1 Qd R 643, discussed
Kirkman (1987) 44 SASR 591, mentioned
Leivers & Ballinger [1999] 1 Qd R 649, considered
Mackenzie v The Queen (1996) 190 CLR 348, followed
Morrow & Flynn [1991] 2 Qd R 309, considered
Triffylis CA No 358 of 1998, 11 December 1998, considered

COUNSEL: A W Moynihan for the appellants
W A Clark for the respondent

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

[1] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Pincus JA and Chesterman J. Their Honours' detailed analyses of the facts and argument before this Court make it unnecessary for me to do more than state my reasons for that conclusion in summary form.

[2] Indeed the relevant facts are not in dispute. The indictment alleged that all three, that is each of the appellants and Jackson, committed an assault occasioning bodily harm in company. As particularized by the prosecution case and as is common ground, the assault alleged against all offenders was one committed by Jackson of punching or kicking the complainant in the upper body and head, it being alleged against each of the appellants that he aided or enabled the commission of that assault by kicking the complainant in the legs. There was no evidence admissible against one offender which was not admissible against all.

[3] The jury found Jackson guilty of assault occasioning bodily harm and each of the appellants guilty of common assault. By those verdicts the jury must have found that Jackson assaulted the complainant by punching or kicking him on the head and upper body and that that assault occasioned bodily harm. Having found, on evidence admissible against all offenders, that the assault occasioned bodily harm, the jury could not rationally have found either appellant guilty only of common assault unless some statutory provision permitted a verdict of guilty of the assault constituted by the kicking on the legs notwithstanding the absence of a count alleging that offence.

[4] This is not a case in which a merciful verdict would have permitted the verdicts against the appellants. That could only occur where, on the evidence admissible against each, those verdicts were open. But the finding of bodily harm precluded that.

[5] Two statutory provisions nevertheless arguably permit the verdicts against the appellants here. They are s 10A(1) and s 584(1) of the *Criminal Code*.

[6] Section 10A(1) provides:

> "Under section 7, a person's criminal responsibility extends to any offence that, on the evidence admissible against him or her, is either the offence proved against the person who did the act or made the omission that constitutes that offence or any statutory or other alternative to that offence."

[7] I agree with Pincus JA that the meaning of that section is not immediately clear. It might be thought that, because it applies to s 7, "offence" in that section has the same meaning as that which it has in s 7 namely 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.[1] Those acts were, in this case, the acts by Jackson of punching or kicking the complainant to the upper body and head. However if that meaning is given to "offence" the section does not appear to have any sensible meaning for it is difficult to see what alternative there would be to the act or omission.

[8] The purpose of s 10A may be seen from Explanatory Notes to the Criminal Law Amendment Bill 1996 which introduced s 10A into the *Code*. It is there said that its purpose is to return the law to the way decided in *Jervis*.[2] In *Barlow*[3] which was decided before s 10A became law but after it was introduced in Parliament, *Jervis* was approved, making s 10A unnecessary. However, it can be given its intended meaning if "offence" is construed to mean, not the act or omission, but the "concatenation of elements" constituting the offence[4] which, in this case, would include the bodily harm.

[9] If that is the correct construction of the section, and I think it is, then there might be circumstances in which persons, in a similar position to the appellants here, could be found guilty only of common assault. But that would be so only if the evidence of bodily harm, found against Jackson, was admissible only against him. That is not this case and accordingly s 10A has no relevance.

[10] Nor do I think that s 584(1) is relevant to the facts of this case. It provides:

> "If, on the trial of a person charged with any indictable offence, the evidence establishes that the person is guilty of another indictable

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1 *R v Barlow* (1997) 188 CLR 1 at 9.

2 *R v Jervis* [1993] 1 QdR 643.

3 See fn 1.

4 See fn 1.

> offence of such a nature that upon an indictment charging the person with it the person might have been convicted of the offence with which the person is actually charged, the person may be convicted of the offence with which the person is so charged."

[11] Here, as already mentioned, each appellant was charged with the offence committed by Jackson. It is true that the evidence established that each was also guilty of a kicking offence. But that offence, which is one of common assault, is not an offence of such a nature that, upon an indictment charging an appellant with it he might have been convicted of the offence committed by Jackson. That would have required an indictment charging him with that offence.

[12] For those reasons, in my opinion, the appellants were each wrongly found guilty of assault and the convictions entered in consequence thereof should accordingly be set aside.

[13] **PINCUS JA:** The appellants were convicted of common assault after a trial and they appealed on the ground that the jury could not have reached the verdict which they returned, had they attended to the judge's directions.

[14] The Crown case was that the two appellants were members of a group of three men who assaulted the complainant at a nightclub. The attacks of which the complainant gave evidence were first, a punch behind the right ear, then being pushed to the floor and kicked by all three – the two appellants and their co-accused Jackson. The Crown case was that in this assault the complainant suffered bodily harm, consisting in severe bruising and swelling about the face and upper body. The judge directed the jury, and this direction is not challenged, that there was no evidence against the appellants that they assaulted the complainant in any way other than by kicking him in the lower part of the body. His Honour explained that the Crown alleged that the bodily harm, consisting in injuries to the face and upper part of the body, was caused by Jackson while the complainant was on the ground. He also said in effect that the appellants were alleged to be liable as having aided Jackson's assault, having done so by kicking the complainant "to help Jackson continue his assault".

[15] On the Crown case as explained by the learned trial judge, then, the appellants were liable under s 7(b) or 7(c) of the *Criminal Code*, as having done acts for the purpose of enabling or aiding Jackson to commit the assault which caused bodily harm or, more simply, having aided Jackson in committing that offence. Mr Moynihan, counsel for the appellant, argued that in those circumstances a verdict against the appellants of common assault, which was the one returned, could only be entered if Jackson was guilty of common assault; but in fact Jackson was convicted of assault occasioning bodily harm. Since the assault occasioning bodily harm was, if one occurred, physically done by Jackson, Mr Moynihan argued that a verdict of common assault based on s 7(b) or (c) was not open, against the appellants. He argued that if the jury attended to the judge's directions they must have appreciated this and that therefore the verdict of common assault must have been a compromise.

[16] Of course, another explanation of the jury verdict is that they were satisfied that the appellants kicked the complainant while he was on the ground, but not satisfied that this was done to aid Jackson's assault which caused bodily harm and which was

being committed at the time of that kicking. Mr Moynihan contended that if the jury approached the matter by that route they did so inconsistently with the way the matter was placed before them by the learned trial judge. That is, the judge put the case to them as being one in which the appellants were alleged to be guilty as having aided Jackson's assault, not as having themselves committed an assault as principal offenders.

[17] The indictment, of course, does not say whether the three persons charged – Jackson and the two appellants – committed the assault charged as principals, or otherwise. But the Crown explained its case to the judge as being confined to kicking in aid of Jackson's assaults. It does not appear that it was submitted to the jury that an alternative view of the matter, if they were satisfied the kicking occurred and was unlawful, was that the appellants were liable as principals, having assaulted the complainant by kicking him.

[18] In my view, it is likely that either because of a misunderstanding of the judge's directions or for some other reason, the jury failed to give a verdict in compliance with those directions. The judge's directions if accurately applied should I think have resulted in a conviction of the appellants for precisely the same offence as that of which Jackson was found guilty, or else acquittal of the appellants; however, it must be added that certain of the directions could have been understood as implying a different view.

[19] The *Code* now contains s 10A(1):

> "Under section 7, a person's criminal responsibility extends to any offence that, on the evidence admissible against him or her, is either the offence proved against the person who did the act or made the omission that constitutes that offence or any statutory or other alternative to that offence".

As Mr Moynihan pointed out, it is not immediately clear what the section means, because it is at first sight capable of being read as having the effect that A's criminal responsibility under s 7 is either the offence proved against A or any alternative to that offence. But what is meant, one might suppose, is that the first person is someone liable under s 7(1)(b), (c) or (d), whereas the second person mentioned is one liable under s 7(1)(a). Another notable aspect of the drafting is the lack of any indication of the circumstances which justify a conviction of the first person mentioned in the sentence for an offence other than that committed by the second person mentioned; this omission seems unfortunate.

[20] At the least, it must be said that because of the presence of s 10A(1), if the jury or some members of it convicted the appellants as aiders of Jackson, but thought they should properly be held guilty of a lesser offence than Jackson's, that was not necessarily erroneous in law. But the jury did not, perhaps, treat the appellants as aiders; they might have convicted them of common assault simply because the appellants kicked the complainant while he lay on the ground. Mr Clark, for the Crown, helpfully pointed out to us that although the jury must necessarily have rejected the defences raised – provocation and self-defence – they might have considered those defences only as applicable to Jackson's assault upon the complainant's face and upper body. It is however scarcely conceivable that, if the Crown successfully negated those defences in their case against the appellants, the jury would have been unsatisfied about their negation had they focused their

attention on the appellants' kicking as a separate matter, rather than on that kicking as an aid to Jackson's assault. The jury were plainly satisfied that the kicking occurred; absent the defences just mentioned, that kicking constituted an assault in itself.

[21] There appears, on the matters so far discussed, to be much to be said in favour of the view that there was no miscarriage of justice, on the ground that the jury must have been satisfied that the appellants unlawfully kicked the complainant and that was at least a common assault. If the indictment did not allege that, then the conviction is still good: s 584(1).

[22] But two other points require to be dealt with. One is that there was, on any view, only one charge of assault, instead of the multiple charges which might possibly have been brought, one for each blow or kick. The authorities show that the question how to frame an indictment "when more than one act is involved is ultimately a question of fact and degree": *Eades* (1991) 57 A Crim R 151 at 156. The subject was recently considered by this Court in *Trifyllis* (CA No 358 of 1998, 11 December 1998). There the Court distinguished authorities in which the conclusion was reached that multiple charges must be brought:

> "These cases are different in kind from the present. In the first, the accused were tried upon an indictment which contained one count of unlawful assault occasioning bodily harm. The evidence established at least seven separate incidents which could have been the subject of the indictment. Some of the incidents involved only one or the other of the two accused while others related to both of them whilst in company with each other. The particular assault the subject of the charge was not identified ...
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> *Chen* is in the same category ... The evidence with respect to the assaults differed both in quantity and quality and there were defences open to some which were not open to others": per Chesterman J at 13 and 14.

Both *G* (CA No 324 of 1991, 24 July 1992) and *Biddle v Dimmock* (CA No 136 of 1992, 21 August 1992) illustrate that a practical rather than technical approach appears to be taken to this question; particularly in the former case, it was accepted that no injustice is necessarily caused by compressing a course of illegal conduct into a single charge.

[23] Here no point was taken at trial that a single count was inappropriate, nor is any taken before us. Nevertheless a question arises as to whether a single count could cover the whole of the attack on the complainant, as he lay on the floor. A reason for thinking, as I do, that the indictment is not defective is that it would have been hardly practicable to identify and charge each of the separate blows by fist or foot. Another is that there is no reason to think that any separate defence or other consideration which would have been applicable to one blow was inapplicable to others.

[24] The other point is the possibility that there was a compromise, in the sense that, although the jury were all satisfied that the appellants unlawfully kicked the complainant, some regarded that as enough to constitute an offence in itself, whereas others arrived at that conclusion by the more complex path laid out for them by the primary judge – i.e. as aiding Jackson's assault. In *Leivers and*

Ballinger [1999] 1 Qd R 649, followed in *Cramp* [1999] NSWCCA 324, it was held in effect that if some members of the jury find an accused guilty on one basis of criminal liability and others on an alternate basis, the verdict may stand if the bases "do not involve materially different issues or consequences": see *Leivers and Ballinger* at 662/35 and *Cramp* at pars 30 and 68.

[25] Here, the fact that the jury convicted these appellants of a lesser offence than that of which Jackson was convicted support the possibility that not all were convinced that the appellants should be liable as aiders of Jackson. But even if one assumes that there was the postulated difference of view among the jury, each group must have been satisfied of the occurrence of the unlawful kicking.

[26] One arrives, then, at the conclusion that the jury must have been satisfied that the appellants assaulted the complainant, as alleged in the indictment. It might well be that, in doing so, they gave less than full effect to directions given which were designed to restrict them to considering the appellants' action in kicking the complainant as aiding Jackson's assault. It is unnecessary, in this case, to decide the true effect of s 10A. Whatever the effect of that section, there was no miscarriage of justice, substantial or otherwise.

[27] Since writing the above, I have had the advantage of reading the reasons of Davies JA, which refer to the explanatory note to cl 9 of the *Criminal Law Amendment Bill* 1996. That note is as follows –

> " *Clause 9* inserts a new section (s 10A – Interpretation of chapter) at the end of Chapter 2 – Parties to offences. The effect of this provision is to return the law about the interpretation of the party provisions to the way it was in the case of *The Queen v Jervis* [1993] 1 Qd R 643. Since *Jervis*, the Court of Appeal has held that a person charged as a party or accessory to an offence (s 7) or as a party to a common intention to prosecute an unlawful purpose (s 8) can only be convicted of the same offence as the principle (sic) offender or other party to the common intent, or nothing.
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> **Under *Jervis* the party could be convicted of any other offence proved by the evidence against that party**. In *Jervis* the jury concluded that it was not reasonably foreseeable that causing death or grievous bodily harm was intended in the plan with Wiggington and others to wound Mr Baldock to obtain his blood to drink. Jervis was convicted of manslaughter for her part in the circumstances which led to the killing while others were convicted of Murder for their part.". (emphasis added)

[28] The emphasised sentence reveals a lack of understanding of *Jervis*, which is authority for no such vague rule – one bereft of any indication of what has to be proved against the accessory, to justify a conviction of an offence other than the principal offence.

[29] *Jervis*, approved in *Barlow* (1997) 188 CLR 1, decided that under s 8, one co-offender can be convicted of murder and the other of manslaughter. That is what McHugh J in *Barlow* referred to as "the *Jervis* approach" (at 17). The main judgment (at 7) in *Barlow* interpreted *Jervis* in the same way but enunciated a wide proposition as to the meaning of s 8. The principle of *Barlow*:

> "... 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". ((1997) 188 CLR at 10)

Barlow does not say whether or to what extent this doctrine, which was entirely new, applies to s 7.

[30] The general view of s 7 which prevailed before s 10A was enacted is succinctly expressed by McPherson JA in *Jervis*:

> "Section 7 thus imposes a form of criminal responsibility that is measured by the extent of knowledge or foresight of the actions intended to be carried out. Its application depends for the most part on the subjective state of mind of the person concerned". (at 648)

His Honour goes on to contrast this with the position under s 8, which was the provision under which Jervis was held liable (655). It does not appear to me prudent to treat the mis-statement of what was decided in *Jervis*, contained in the explanatory note to what became s 10A, as determinative of the interpretation of that section.

[31] It is evident that, for example, under s 10A a principal offender may in some cases be convicted of robbery with personal violence while the aider is convicted of robbery only; the difficulty is that s 10A gives no guidance as to when this sort of result may be reached. According to the annotations to Judge Carter's Criminal Law:

> "The law as **expressed** in s 10A is in accordance with the view expressed by the majority of judgments of the High Court in *R v Barlow*". (at [s 7.27]) (emphasis added)

That is plainly not so; the section does not express the *Barlow* rule. While it is possible that the doctrine of *Barlow* as set out above was intended to be introduced into s 7 by the words of s 10A, that seems to me unlikely. The interpretation of s 10A need not be determined here, but I express the tentative view that there can be, if the aider is proved to have intended the commission of a lesser offence than that committed by the principal offender, a conviction of that lesser offence, under s 10A.

[32] The appellants' appeals should in my opinion be dismissed.

[33] **CHESTERMAN J:** An indictment alleged that

> ". . . on the 9th day of May 1999 at Mt Isa in the State of Queensland Mark David Jackson, Faren Vance Marshall and Roger John Sullivan unlawfully assaulted Justin Francis Strong and did him bodily harm.

> And Mark David Jackson, Faren Vance Marshall and Roger John Sullivan were in company with each other."

After a short trial Jackson was convicted of assault occasioning bodily harm and fined an amount so modest it evoked an immediate expression of gratitude. The appellants were each convicted of common assault. No conviction was recorded against either of them and they were discharged absolutely. The trial judge apparently took the view that the jury's verdict in respect of them was wrong and they should have been acquitted. The basis for that view has been advanced in support of the appeals against conviction. The submission is that the appellants could be convicted only of the offence of which Jackson was found guilty. The lesser verdicts returned against the appellants indicates, so it is said, an inconsistency indicating the convictions are unsafe and are unsatisfactory and, probably, the product of compromise.

[34] It is to be noted that the indictment alleges one offence, an assault causing bodily harm to Strong committed jointly by the appellants and Jackson. The indictment thus conformed to the requirement of s 567(1) of the *Criminal Code*. It could have, but did not, also allege another assault or assaults by the appellants, or either of them, against Strong at the same time and place it alleged that the three accused together assaulted Strong.

The prosecution was thus limited to the presentation of a case against the appellants that they were guilty of an assault in which both they and Jackson participated. The appellants could not, on that indictment, have been convicted of any separate assault they might have committed. See *R v Morrow & Flynn* [1991] 2 Qd R 309.

[35] The prosecution case was that Jackson was the primary aggressor and that the appellants assisted and/or encouraged him in the assault against Strong. The appellants were said to be criminally responsible by reason of s 7(1) (b) (c) or (d) of the *Criminal Code*.

[36] The incident occurred very early in the morning of 9 May 1999 at a nightclub in Mt Isa. The complainant, Strong, and his fiancee had arrived at the club shortly after 3am having spent the earlier part of the evening dining and drinking at a restaurant and another club. The appellants and Jackson had arrived at the club some time before. It is a safe inference from the evidence that the four men were to some degree intoxicated. The club, at the time, was dark, noisy and crowded. The complainant's fiancee was bumped heavily, apparently by the appellant Marshall, and fell to the ground. The complainant thought she had been deliberately pushed. He remonstrated with Marshall to obtain an apology but was unsuccessful. A little later, just before leaving the nightclub, the complainant went to the toilet while his fiancee waited near the door. On his return the complainant encountered the appellant Marshall who was with the appellant Sullivan and their co-accused, Jackson. He approached Marshall and again asked for an apology. There was an altercation of some sort during which the complainant was hit from behind and pushed to the ground. He was then set upon by the appellants and Jackson. The complainant himself testified that he was kicked around the head and upper body as well as the legs. A barmaid who knew the three accused gave the most coherent account of the incident. She described the appellants as kicking the complainant

around the legs while Jackson punched him around the upper part of his body and head.

[37] The complainant suffered injuries which satisfied the description of bodily harm in the *Criminal Code*. His injuries were all to the head and upper body. No bodily harm was done to his legs or lower trunk.

[38] The appellants gave evidence. Both denied kicking the complainant.

[39] The trial judge instructed the jury as to the availability of a number of defences; provocation, self defence and the prevention of repetition of insults. His Honour warned the jury that, because of the confrontation which the complainant had initiated with the accused, it should have regard only to the events which followed the complainant being knocked to the ground when considering whether the accused were guilty of the assault charged. The verdicts returned must signify that the jury was satisfied beyond reasonable doubt that both the appellants kicked the complainant and that none of the defences mentioned justified their actions.

[40] It follows from what was said earlier that the appellants, and Jackson, were charged with criminal responsibility for the one criminal act. In form the indictment was apposite to the situation where one of the accused was charged as the principal offender and the others with criminal liability pursuant to s 7, or to the situation where the assault occurred in accordance with a common intention pursuant to s 8. In fact the prosecution relied upon s 7 only: it being alleged that the appellants assisted Jackson in his assault on the complainant.

[41] It will be recalled that Jackson was convicted of assault occasioning bodily harm. Although s 575 of the *Criminal Code* might, in theory, have allowed the jury to convict the appellants (and Jackson) of an assault upon the complainant without the circumstances of aggravation that they were in company, or that the assault occasioned bodily harm, it is argued on behalf of the appellants that in reality they could only be convicted of the same offence as Jackson. It is said that the only case against them was that they kicked the complainant in aid of Jackson's assault. If they were convicted it can only have been on that basis, that they were aiding Jackson, and, if they were, they were assisting in an assault which occasioned bodily harm. The jury having acquitted them of such an offence it is submitted there was no basis on which they could be convicted of common assault.

[42] As a matter of logic the submission cannot be criticised. The appellants could not be convicted of common assault arising out of their kicking the complainant around the legs unconnected to Jackson's assault: *Morrow & Flynn.* They could only be convicted if they were parties to Jackson's assault, but that assault was one which occasioned bodily harm. It is true that persons who are guilty by virtue of the operation of s 7(1)(b) or (c) or (d) may be convicted of a lesser offence than that committed by the principal offender.

> "Section 7 . . . imposes a form of criminal responsibility that is measured by the extent of knowledge or foresight of the actions intended to be carried out. Its application depends for the most part on the subjective state of mind of the person concerned."

Per McPherson ACJ in *R v Jervis* [1993] 1 Qd R 643 at 648 approved in *R v Barlow* (1996-1997) 188 CLR 1 at 11.

The point is of no significance in the present case because the appellants were present when Jackson punched and/or kicked the complainant and their assistance was given with respect to the very blows which constituted assault occasioning bodily harm. It cannot be said that the appellants gave their assistance to an assault but not an assault occasioning bodily harm. That circumstance of aggravation is what was described in *Barlow* as "a prescribed result". The offence is constituted by an assault which has that result. If the jury found (as it appears to have done) that the appellants assisted Jackson's assault then it was an assault which caused the prescribed result. In assisting the assault by Jackson the appellants were guilty of assault occasioning bodily harm and no other. See *Giorgianni v The Queen* (1984-1985) 156 CLR 473 at 502 citing Blackstone's commentaries

> "It is likewise a rule, that he who in any way commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act . . .".

[43] The point that the convictions for common assault may not be questioned because of the operation of s 584(1), notwithstanding that the indictment charged the appellants with assaulting Strong together with Jackson, was not argued. For that reason I would hesitate to conclude that the section validates convictions that might otherwise be thought unsafe.

[44] The sub-section provides:

> "If, on the trial of a person charged with any indictable offence, the evidence establishes that the person is guilty of another indictable offence of such a nature that upon an indictment charging the person with it the person might have been convicted of the offence with which the person is actually charged, the person may be convicted of the offence with which the person is so charged."

The appellants were charged that both of them, together with Jackson, assaulted Strong. The evidence, which the jury must have accepted, established that each of the appellants kicked Strong. Section 584(1) will only operate if, had the appellants been charged with assaulting Strong, either jointly or individually, they could have been convicted of assault occasioning bodily harm in company with Jackson. This was the offence with which the appellants were "actually charged". By s 2 an offence in the *Code* is an act which renders the person doing the act liable to punishment. The word "offence"

> "is used . . . to denote the elements of conduct . . . 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."

Barlow at 9.

[45] So understood it does not seem to me with respect that on an indictment charging the appellants with a joint assault, or two separate assaults, on Strong they could have been convicted of assault occasioning bodily harm in company with Jackson.

[46] I was, initially, attracted by the respondent's submission that the verdicts against the appellants might be explicable on the basis that the jury wished to distinguish between the respective culpability of Jackson and that of the appellants. The argument was that it is a jury's prerogative to return a "merciful" verdict. Such a verdict may not accord "with strictly logical considerations (or) . . . with the strict principles of the law", but, nevertheless the court is enjoined to be cautious about setting it aside. See *Mackenzie v The Queen* (1996) 190 CLR 348 at 367 citing with approval *R v Kirkman* (1987) 44 SASR 591 at 593.

[47] There are, however, limitations on the prerogative. It is pointed out in *Mackenzie* at 366-7 that in cases where a jury returns verdicts which are legally inconsistent "it must be inferred that the jury misunderstood the judge's directions on the law . . . the impugned verdict . . . must be set aside . . ." Moreover there must be "a proper way by which the appellant court may reconcile the verdicts". There will not be such a means if there is not "some evidence to support the verdict said to be inconsistent".

[48] It is not possible to reconcile the verdicts returned against the appellants with that returned against Jackson. The inconsistency is a legal one. If the appellants were guilty it was as parties to his offence. There is no evidence to support their convictions apart from that which was led to show they aided Jackson. Given the finding against Jackson it was not open for the jury to find that the appellants aided him but did not commit the same offence. If they aided Jackson they were guilty of assault occasioning bodily harm. If they did not aid Jackson they could not be convicted on the indicted charge.

[49] Accordingly the convictions must be quashed. The question of a re-trial should be left to the discretion of the Director of Prosecutions.