# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Crothers & Ors* [2010] QCA 334 |
| PARTIES: | **R**<br>**v**<br>**MICHAEL CROTHERS**<br>**DAVID ROBERT HEATHCOTE**<br>**YVONNE JEAN HEATHCOTE**<br>**COLIN ROBERT ROGERS**<br>(appellants) |
| FILE NO/S: | CA No 262 of 2009<br>CA No 265 of 2009<br>CA No 274 of 2009<br>CA No 277 of 2009<br>SC No 337 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 30 November 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 22 and 23 July 2010 |
| JUDGES: | Margaret McMurdo P, Chesterman JA and Douglas J<br>Judgment of the Court |
| ORDERS: | **1. In respect of each appellant, the appeal against conviction is dismissed.**<br>**2. In respect of the appellant Crothers, the application to adduce further evidence is refused.**<br>**3. In respect of the appellant Rogers, the application to adduce further evidence is refused. The application for leave to appeal against sentence is refused.**<br>**4. In respect of the appellant Yvonne Heathcote, the application for leave to appeal against sentence is refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where appellants were jointly tried and convicted of the murder of John Hoghes – where there was evidence that appellant Yvonne Heathcote was the instigator of a plan to seriously injure Matthew Hoghes, the victim's son – where appellants David |

Heathcote, Crothers and Rogers drove to the residence of Matthew Hoghes – where John Hoghes arrived to defend his son – where Crothers shot and killed John Hoghes – where appellant David Heathcote then seriously assaulted Matthew Hoghes – where appellants David Heathcote, Crothers and Rogers committed aggravated burglaries at the residences of Matthew Hoghes and Michelle Hoghes, the victim's wife – where appellants Yvonne Heathcote, David Heathcote and Rogers were convicted on the basis that they had formed a common intention to seriously injure Matthew Hoghes and the murder of John Hoghes was a probable consequence of that alleged purpose – whether there was sufficient evidence to support the murder convictions – whether the verdicts were unreasonable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – REVIEW OF EVIDENCE – where there was evidence of a telephone conversation between appellant Yvonne Heathcote and little John Hoghes in which she told him that appellant David Heathcote and Nathan Wells were coming to assault Matthew Hoghes – where it was intended Matthew Hoghes would be assaulted with a metal club – where victim bystander was killed with a gun – whether the jury had to be satisfied of the telephone conversation beyond reasonable doubt – whether judge misdirected the jury in describing the conversation as direct evidence of appellant Yvonne Heathcote's implication in the plan to seriously injure Matthew Hoghes – whether trial judge adequately instructed jury on the application of s 8 to the facts – whether trial judge erred in not directing the jury to decide the details of any common intention – whether trial judge erred in directing the jury that they need not be satisfied that it was objectively likely the deceased would be murdered with a gun

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where a jury member brought a map into the jury room – where similar maps were already exhibited – where appellants Rogers, Yvonne Heathcote and David Heathcote made applications for separate trials on the basis that appellant Crothers' self-representation would prejudice the jury – where evidence that appellant Crothers had been in prison was put before the jury – where two witnesses did not give evidence foreshadowed in prosecution's opening – where trial judge instructed the jury on all these issues – whether trial judge erred in declining to declare a mistrial – whether trial judge erred in refusing the applications for separate trials

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where appellant Crothers argued he had shot Frank John Hoghes in self-defence – where trial judge summed up in respect of s 271(2) and s 272(1) *Criminal Code* – whether trial judge misdirected the jury on self-defence – whether the jury's verdict was unsafe in concluding that the prosecution had negated self-defence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where appellant Crothers terminated the services of his in-house lawyer from Legal Aid Queensland (LAQ) and his new barrister prior to the trial – where Crothers repeatedly declined opportunities to be legally represented by LAQ at trial because he wanted to be represented by Douglas Law – where appellant Rogers dismissed his lawyers on the twelfth day of the trial – where Rogers did not request an adjournment to obtain different representation – where Crothers experienced great difficulty in dealing with the evidentiary material and in conducting his defence – where trial judge ensured all defendants had a fair trial – where Crothers and Rogers seek to adduce further evidence – whether Crothers' and Rogers' lack of legal representation amounted to a miscarriage of justice – whether applications to adduce further evidence should be allowed

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – RECORDS OF INTERVIEW – OTHER MATTERS – where appellant Rogers' formal record of interview with police was put into evidence – where interview was incriminating but supported the contention that appellant Crothers had acted in self-defence – where Rogers instructed his lawyers not to challenge the evidence's admissibility – whether trial judge should have conducted a *voir dire* on the admissibility of the interview after Rogers dismissed his lawyers

*Criminal Code* 1899 (Qld), s 7(1)(b), s 7(1)(c), s 8, s 268, s 271, s 271(2), s 272, s 272(1), s 302(1)(a), s 567, s 568, s 668E(1)
*Evidence Act* 1977 (Qld), s 15(2)

*Ahern v The Queen* (1988) 165 CLR 87; [1988] HCA 39, cited
*Brennan v The King* (1936) 55 CLR 253; [1936] HCA 24, cited
*Darkan v R* (2006) 227 CLR 373; [2006] HCA 34, cited
*Dietrich v The Queen* (1992) 177 CLR 292; [1992] HCA 57, applied
*Domican (No 3)* (1990) 46 A Crim R 428, cited

*Fingleton v The Queen* (2005) 227 CLR 166; [2005] HCA 34, cited
*Folbigg v The Queen* [2007] NSWCCA 371, cited
*Gallagher v The Queen* (1986) 160 CLR 392; [1986] HCA 26, cited
*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited
*Mickelberg v The Queen* (1989) 167 CLR 259; [1989] HCA 35, cited
*R v Barlow* (1997) 188 CLR 1; [1997] HCA 19, applied
*R v Beck* [1990] 1 Qd R 30; (1990) 43 A Crim R 135, applied
*R v Condren; ex parte Attorney-General* [1991] 1 Qd R 574; (1991) A Crim R 79, cited
*R v Daley; ex parte A-G (Qld)* [2005] QCA 162, cited
*R v Dean* [2009] QCA 309, distinguished
*R v East* (2008) 190 A Crim R 225; [2008] QCA 144, distinguished
*R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377, cited
*R v K* (2003) 59 NSWLR 431; [2003] NSWCCA 406, considered
*R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229, cited
*R v Main; ex parte A-G (Qld)* (1999) 105 A Crim R 412; [1999] QCA 148, cited
*R v Ritchie* [1998] QCA 188, cited
*R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37, considered
*R v Small* (1994) 33 NSWLR 575; (1994) 72 A Crim R 462, distinguished
*R v Walbank* [1996] 1 Qd R 78; [1995] QCA 149, distinguished
*R v Wilmot* (2006) 165 A Crim R 14; [2006] QCA 91, applied
*R v Young (No 2)* [1969] Qd R 566, cited
*Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56, applied
*Stuart v The Queen* (1974) 134 CLR 426; [1974] HCA 54, cited
*The Queen v Keenan* (2009) 236 CLR 397; [2009] HCA 1, followed
*Tripodi v The Queen* (1961) 104 CLR 1; [1961] HCA 22, cited

COUNSEL:

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**THE CONVICTIONS**

[1] The appellants were tried jointly for the murder of John Hoghes at Tara on 3 May 2007. After a 28 day trial they were all convicted of the murder on 7 October 2009.

[2] The indictment contained other counts against each appellant.

[3] Crothers was found guilty of:

(i) entering the dwelling of Matthew Hoghes (the deceased's son) with intent to commit an indictable offence, at night, during which he used actual violence, while armed with an offensive weapon and a dangerous weapon, and in company;

(ii) unlawfully depriving,
(a) Matthew Hoghes;
(b) John Luke Hoghes;
(c) Michelle Wood;

of their personal liberty;

(iii) entering the dwelling of Michelle Wood with intent to commit an indictable offence at night, during which he threatened to use actual violence while armed with a dangerous weapon and in company;

(iv) unlawfully using Michelle Wood's motor vehicle to facilitate the commission of an indictable offence.

[4] David Heathcote was found guilty of entering the dwelling of Michelle Wood with intent to commit an indictable offence at night during which he threatened to use actual violence, while armed with a dangerous weapon, in company.

[5] When arraigned, on the first day of the trial, he had pleaded guilty to:

(i) entering the dwelling of Matthew Hoghes with intent to commit an indictable offence, at night, using actual violence while armed with an offensive weapon, and a dangerous weapon, while in company;

(ii) unlawfully depriving:
(a) Matthew Hoghes;
(b) John Luke Hoghes;
(c) Michelle Wood;

of their personal liberty.

(iii) unlawfully using Michelle Wood's motor vehicle to facilitate the commission of an indictable offence.

[6] Yvonne Heathcote was found guilty of entering the dwelling of Matthew Hoghes with intent to commit an indictable offence, at night, during which she used actual violence, while armed with a dangerous and an offensive weapon, in company.

[7] Rogers was found guilty of entering the dwelling of Michelle Wood with intent to commit an indictable offence at night during which he threatened to use actual violence, while armed with a dangerous weapon, and in company.

[8] When arraigned he had also pleaded guilty to:

(i) entering the dwelling of Matthew Hoghes with intent to commit an indictable offence at night, during which he used actual violence, while armed with a dangerous weapon and an offensive weapon, and in company;

(ii) unlawfully depriving:
(a) Matthew Hoghes;
(b) John Luke Hoghes;
(c) Michelle Wood;

of their personal liberty;

(iii) unlawfully using Michelle Wood's motor vehicle to facilitate the commission of an indictable offence.

[9] Each appellant was sentenced to life imprisonment for the murder.

[10] Crothers was sentenced to:

(i) nine years' imprisonment, with a declaration that he had committed a serious violent offence, on each burglary;

(ii) three years' imprisonment on each count of unlawful deprivation of liberty;

(iii) three years' imprisonment for the unlawful use of the motor vehicle.

[11] David Heathcote was sentenced to:

(i) eight years' imprisonment for the burglary of Matthew Hoghes' home, with a declaration that he had committed a serious violent offence;

(ii) two and a half years' imprisonment on each count of unlawful deprivation of liberty;

(iii) seven years' imprisonment, without a declaration, for the burglary of Michelle Wood's home,

(iv) two and a half years for the unlawful use of the motor vehicle.

[12] The appellant Yvonne Heathcote was sentenced to five years' imprisonment for the burglary of Matthew Hoghes' dwelling.

[13] Rogers was sentenced to:

(i) eight years' imprisonment for the burglary of Matthew Hoghes' dwelling with a declaration that he had committed a serious violent offence;

(ii) two and a half years' imprisonment on each count of deprivation of liberty;

(iii) nine years' imprisonment for the burglary of Michelle Wood's dwelling, with a declaration that he had committed a serious violent offence;

(iv) two and a half years' imprisonment for the unlawful use of the motor vehicle.

[14] In the case of each appellant the sentences were to be served concurrently. The time each had served in pre-trial custody was declared to have been time served under the sentences.

[15] All of the appellants have appealed against their convictions for murder. Yvonne Heathcote appeals as well against her conviction for aggravated burglary.

**OUTLINE OF THE OFFENCES**

[16] The terrible events of 3 May 2007 at Tara which led to the death of John Hoghes and the commission of the other offences had their origin in an adolescent dispute between Matthew Hoghes and Sarah Heathcote. The former was the son of the murdered man. The latter was the daughter of the appellant Yvonne Heathcote, and the sister of the appellant David Heathcote who was, obviously, Yvonne Heathcote's son. The appellant Crothers was a friend and neighbour of Yvonne Heathcote. He lived in the same street in Gatton. Rogers lived in Crothers' house.

[17] The deceased, John Hoghes, lived about 20 kilometres outside Tara, at 22 Males Drive. His sons Matthew and John (who was called "little John" to distinguish him from his father) lived on a nearby property, 16 Males Drive. The two houses were about a kilometre apart.

[18] Matthew Hoghes at the time was 17. Little John was 16, as was Sarah Heathcote. David Heathcote was 21.

[19] Not long before 3 May 2007 Sarah Heathcote and Matthew Hoghes had lived together at 16 Males Drive. Their relationship had become tempestuous. She was pregnant. He thought that the father may have been Nathan Wells, a young man who, as at 3 May 2007, was boarding with Yvonne Heathcote's family in Gatton. Nathan regarded Yvonne Heathcote as his step-mother and David Heathcote as a brother. By the time of trial he was Sarah's partner.

[20] Matthew Hoghes and Sarah Heathcote had argued in the days prior to 3 May 2007. The upshot was that she left the house and returned home to her mother. During the course of the day, 3 May 2007, there were a number of acrimonious telephone calls between Matthew Hoghes, Sarah Heathcote and Yvonne Heathcote.

[21] During the course of the telephone conversations Matthew Hoghes and Sarah Heathcote "had a big fight" as a result of which he said that he would put all her possessions and items of personal property which she had left behind at 16 Males Drive on the side of the road for collection. The house property was some distance back from the road. The arrangement was to leave the possessions outside the property, at the end of the driveway.

[22] In one or other of the calls Matthew Hoghes abused both Sarah Heathcote and her mother, whom he called "a fat slut". In another conversation Yvonne Heathcote told little John Hoghes, that "they" were coming to collect the possessions and that David (Heathcote) and Nathan (Wells) were "going to beat (Matthew's) head in." Little John told his father of the threat.

[23] Yvonne Heathcote reacted badly to Matthew Hoghes' insult. There was some evidence that the two had been on bad terms for some time, the origin of the ill-will apparently being Mrs Heathcote's insinuation that Nathan Wells was the father of Sarah's child. Following Matthew's affront Yvonne Heathcote "threw the phone" at

David Heathcote and Nathan Wells and told them what Matthew Hoghes had called her. Shortly afterward David Heathcote spoke to Matthew Hoghes on the telephone though there is no evidence of what was said. A little later Yvonne Heathcote told her daughter that Michelle Wood, who was the dead man's partner, and de facto step-mother to Matthew Hoghes, had "been ringing … and abusing her."

[24] Towards evening Yvonne Heathcote, David Heathcote, and another son Bradley, Nathan Wells and Sarah Heathcote left Gatton to drive to Tara to collect her possessions. Nathan Wells took a golf club with him in the car. They also took with them a small aluminium baseball bat, which may have been in the car when they all got in.

[25] Yvonne Heathcote made a number of telephone calls to Crothers during the afternoon. Crothers knew the deceased, and had quarrelled with him in the past. As a result of a call made in the mid afternoon he returned home from Ipswich, where he had gone on an errand, his utility was unloaded, and Crothers drove with Rogers to Tara. Before leaving Rogers gave Crothers a double-barrelled 12-gauge shotgun which Crothers put into the utility. It was Crothers' gun but Rogers knew where it was kept. Rogers took some cartridges which he kept in his pocket during the journey. Crothers and Rogers were both aged in their late forties.

[26] Yvonne Heathcote and her party stopped at Jondaryan to break their journey and enjoy a drink at the hotel. They arrived at about 6.15 pm. There they met Crothers and Rogers who arrived at about 6.30 pm. There was some evidence which suggests that Yvonne Heathcote's party was waiting for Crothers.

[27] At Jondaryan David and Sarah Heathcote argued about her relationship with Matthew Hoghes. She told her brother that she wanted to re-establish it. He opposed the suggestion because of the denigrating language and attitude Matthew Hoghes had exhibited towards Yvonne Heathcote. He left the family group and joined Crothers and Rogers, driving off with them in the utility. After David Heathcote had left the group his sister and mother argued heatedly. Sarah Heathcote was reluctant to proceed to Tara and hid for a while from her family. Eventually she was found and the group drove off about half an hour after Crothers.

[28] In the meantime, that group had gone to 16 Males Drive. They drove into the property, slowing to look at, but not stopping at, Sarah's belongings which had been left as Matthew Hoghes had indicated outside the property boundary. The time was just before 9.00 pm.

[29] The house was occupied by Matthew and little John Hoghes. They saw the utility approach. Little John Hoghes rang his father's home. Michelle Wood answered the phone. She spoke to the deceased who left home at once and drove to his sons' house, about two minutes' drive away.

[30] Meanwhile the utility had stopped outside the sons' house. Crothers got out and took the shotgun with him and Rogers handed him two cartridges which he loaded, though Rogers may have stayed in the vehicle. Matthew Hoghes and his brother jumped out of a back window of the house when they saw Crothers with the shotgun. They hid near a water tank at the side of the house. David Heathcote went into the house. The boys heard him express disappointment when he found it empty.

[31] The deceased drove up and stopped his car about 15 metres from the utility. As he arrived Crothers was standing next to it holding the shotgun. David Heathcote came

out of the house and stood on or near the front stairs. The deceased who was a large man, about six feet one inch in height, and a little over 108 kilograms in bulk, carried an iron bar about half a metre in length. He approached Crothers who told him to get back into his car and go away. The deceased refused and moved towards Crothers who shot him in the chest with one shot when the two men were a little under two meters apart. The deceased died shortly after.

[32] None of the three appellants who were present at the homicide attempted to assist the deceased. They did not call police or ambulance services.

[33] Matthew and little John Hoghes had gone into the house immediately after the shooting in order to telephone police. They ran past David Heathcote who was still at the front stairs. The call was made at 9.01 pm. David Heathcote and Crothers followed them in. Crothers pointed the shotgun at little John's head. David Heathcote smashed the telephone with an iron bar. Rogers entered the house with a set of handcuffs which he applied to the two brothers, restraining them together. David Heathcote then "started bashing" Matthew Hoghes with the bar. The evidence is not clear whether it was the same bar the deceased had held. Evidence admissible only against Rogers suggests it was an aluminium baseball bat.

[34] Throughout the attack Crothers and Rogers stood and watched. Crothers kept the gun aimed at the brothers.

[35] After striking Matthew Hoghes some 18 or 19 times with the bar about the legs, arms and shoulder, and punching him hard once to the face, David Heathcote used the weapon to damage or destroy items of property in the house. Crothers then told the two brothers to go outside, pick up their father's body and put it into the boot of his car. Matthew Hoghes fell when leaving the house because of the injuries to his legs. David Heathcote struck him again after he fell.

[36] Matthew and little John Hoghes struggled to lift the body into the boot because they were handcuffed together and because of Matthew's injuries. Crothers told David Heathcote and Rogers to help. David Heathcote, at Crothers' direction, reversed the car adjacent to the deceased. The deceased's body was got into the boot.

[37] Crothers told Rogers to find a shovel. He did so and gave it to the brothers who were told to cover over their father's blood with dirt. Matthew Hoghes was unable to perform the task because of his injuries. Little John did it. Crothers then told Rogers to get into the utility, which he did. Crothers told the brothers to get into their father's car. He still held the gun. They got in to the back seat and Crothers sat in the front passenger seat, still with the gun.

[38] David Heathcote drove to the deceased's house at 22 Males Drive where Michelle Wood was at home with her three small children. Rogers followed behind in the utility. When they arrived Crothers told the brothers to stay in the car. They were still handcuffed together. He and perhaps David Heathcote went to the door. Crothers returned to the car. He, or David Heathcote, told Matthew and little John to go into the house. Rogers remained with the utility. The brothers went into the house and sat on a lounge. Michelle Wood also sat on the lounge. David Heathcote left and drove off in the deceased's car which he abandoned not far away. The body was still in the boot.

[39] For about 10 minutes Crothers menaced Michelle Wood and Matthew and little John Hoghes with the shotgun. He said he was going to kill them because they

were witnesses. Rogers then entered the house with an electronic device for listening to police radio broadcasts.

[40] All together Rogers and Crothers were in Michelle Wood's house for about three hours. During that time Crothers said to her: "I'm very sorry. … I've killed your husband." He remarked of Matthew Hoghes that there was no point in shooting him as he "will be dead by morning." He told Matthew Hoghes "Don't forget (Sarah's name)."

[41] During the burglary Ms Wood's telephone rang. The time was 10.52 pm. The caller was Yvonne Heathcote who said to Ms Wood "Surprise, surprise, Michelle". She asked to speak to Crothers.

[42] Crothers directed Michelle Wood to make coffee for him and Rogers. He demanded she produce maps so they could plan their escape from Tara. He also directed her to clean their fingerprints from surfaces he had touched.

[43] According to Matthew Hoghes' testimony, Rogers said that he thought the police had gone and urged the others to go. He unlocked his handcuffs from Matthew and little John Hoghes but tied their legs together with rope which he fetched from the utility. The three appellants left. Rogers untied Matthew and little John Hoghes before leaving.

[44] In the meantime Yvonne Heathcote and her party, less David Heathcote, had left Jondaryan and arrived in Tara. Sarah Heathcote insisted upon being let off. It may be inferred that from what had been said she apprehended that her former partner was about to be assaulted and she did not want to be party to the assault or witness to the violence. She went to the home of Heidi Hoghes, the deceased's sister. She arrived at 9.27 pm. There she remained, hiding from her mother who came to the house later that night to collect her.

[45] Yvonne Heathcote, Bradley Heathcote and Nathan Wells drove on to 16 Males Drive where they collected Sarah's possessions which had been left, as arranged, at the front. While they were there some police officers arrived, looking for 16 Males Drive in response to the 000 call little John Hoghes had made when his father was shot.

[46] After abandoning the deceased's car David Heathcote spent the night walking across bush and farmland. He encountered a geologist working a nightshift at an oilwell and prevailed upon him to drive him back to Tara. Before the trip he used the geologist's telephone to make a call. At Tara David Heathcote went to the house of a woman known to him and his mother, Suzanne Richards. He told Ms Richards in the morning that he "ran through the paddocks" and that he had "give(n) (Matty) a touch up". Following telephone contact between Ms Richards and Yvonne Heathcote, Ms Richards drove David Heathcote to the weir at Chinchilla. He waited for his mother who came for him at about 8.00 am.

[47] Yvonne Heathcote spent the night driving between Tara and Toowoomba looking for David Heathcote. On one occasion she encountered Crothers and Rogers in their utility at a service station in Dalby. She asked where David was but they said they did not know. She had got as far as Toowoomba on her way home when she received a telephone call, presumably from David or Ms Richards that he was still in Tara. Yvonne Heathcote then telephoned home where she spoke to Heidi

Dammasch (who was Crothers' niece). The two women arranged for Ms Dammasch to drive to an agreed location in Bradley Heathcote's car. He and Nathan Wells would then drive home in that car. Ms Dammasch would accompany Yvonne Heathcote back to Tara to resume the search for David Heathcote. The arrangement was carried out.

[48] Yvonne Heathcote drove to Chinchilla where she met David Heathcote at the weir. They then drove home via Kingaroy, a long detour designed to avoid police who by this time were aware of the homicide and were searching for those responsible. Yvonne Heathcote had David hide under a blanket in the back of the car. They were intercepted by police near their home.

[49] Some time after their meeting with Yvonne Heathcote at Dalby, Crothers and Rogers drove to the township of Coominya where Crothers had friends. They later separated. Rogers was arrested that morning on the outskirts of Ipswich. Crothers went to Redcliffe where he hid in a caravan park until his arrest on 7 May.

**YVONNE HEATHCOTE – APPEAL NO 262/09**

[50] The prosecution case against this appellant on both counts, murder and the aggravated burglary at 16 Males Drive, was put on the basis of s 8 of the *Criminal Code*. Particulars were given:

**Count 1**

**David Heathcote, Yvonne Heathcote, and Colin Rogers**

> actively participated in a common unlawful purpose to seriously injure Matthew Hoghes and it was a probable consequence of that common unlawful purpose that John Hoghes would die from injuries inflicted with an intention to cause him death or grievous bodily harm.

**Count 2**

**Michael Crothers, David Heathcote, Yvonne Heathcote and Colin Rogers**

> actively participated in a common unlawful purpose to seriously injure Matthew Hoghes and it was a probable consequence of that common unlawful purpose that the home of Matthew Hoghes would be entered, at night, in company, whilst armed, with actual violence being used and with the intention that Matthew Hoghes would be assaulted.

[51] Section 8 of the Code provides:

> "When 2 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."

[52] The appellant was given leave to substitute for the grounds of appeal originally set out in the notice of appeal the following:

> 1. The verdict was unreasonable and cannot be supported by the evidence;

2. The trial judge erred in finding there was sufficient evidence upon which a jury, properly instructed, could convict;

3. Instructions to the jury on the application of s 8 of the Code were inadequate;

4. The instruction to the jury on the ground of self-defence was wrong;

5. The trial miscarried because of an accumulation of irregularities:

   (a) a juror had engaged in making independent investigations;
   (b) the conduct of the appellants Crothers and Rogers, who appeared for themselves at the trial, prejudiced the appellant's fair trial;
   (c) the reception of inadmissible evidence that Crothers had been imprisoned prejudiced the appellant's fair trial;
   (d) the Crown opening referred to matters which were not, in the end, the subject of evidence, resulting in prejudice that could not be cured by direction.

[53] Whether Crothers' act of killing the deceased was authorised by s 271 and/or s 272 of the Code, "the self-defence" provision, the question raised by ground 4, is common to all of the appellants and will be dealt with in the consideration of Crothers' appeal. If Crothers' conduct in shooting the deceased came within the ambit of one of those sections then he was not guilty of murder, or manslaughter, and none of the other appellants could be guilty as parties to the offence under s 8.

**Grounds of Appeal 1 and 2: The verdict was unreasonable having regard to the evidence and the evidence was insufficient to support the murder conviction**

[54] Grounds 1 and 2, that the verdict was unreasonable having regard to the evidence, and that the evidence was insufficient to support the appellant's murder conviction, while conceptually different, depend upon the same analysis of fact and can be dealt with together. The grounds have three elements:

(i) the evidence did not establish that Yvonne Heathcote had formed a common intention with others to prosecute the unlawful purpose of seriously injuring Matthew Hoghes; and

(ii) murder was not an offence of such a nature that its commission was a probable consequence of the purpose, if proved; and

(iii) burglary by persons in company, at night armed with an offensive and/or dangerous weapon, and the use of actual violence, was not an offence of such a nature that its commission was a probable consequence of the purpose, if proved.

[55] Before considering the arguments it is necessary to set out some facts additional to those which were set out earlier. Those facts are:

(a) The frequency of telephone contact between Yvonne Heathcote and Crothers on the afternoon of 3 May 2007 into the morning of 4 May 2007 was very great indeed. She called him at 1.06 pm, 4.16 pm, 5.50 pm, 6.30 pm, 7.04 pm, 7.47 pm, 8.12 pm, 10.34 pm (and attempted to call him at 10.41 pm, 10.42 pm, 10.46 pm, 11.02 pm, 11.08 pm, 11.09 pm, 11.13 pm and 11.16 pm), 11.22 pm, 11.52 pm, 11.56 pm, 1.00 am, 6.16 am, 6.17 am and 6.35 am;

(b) Interspersed among the telephone calls between Yvonne Heathcote and the occupants of 16 Males Drive she also called the deceased, and spoke to him in angry and abusive terms;

(c) When at Jondaryan, apparently waiting for Crothers and Rogers to arrive, the party went into a Caltex roadhouse for food. The older woman in the group, who must have been Yvonne Heathcote, was heard to ask a younger man of David Heathcote's description whether he wanted something. He replied that he was not hungry but should have a meal in case "he was put in the lock-up";

(d) At Jondaryan Sarah Heathcote used a public pay telephone to ring the Hoghes' household at 16 Males Drive. Yvonne Heathcote also made two calls to the house, at 7.07 pm and 7.28 pm;

(e) When driving through Tara on their way to collect her possessions Sarah Heathcote insisted upon being let off. She refused to go on. Yvonne Heathcote told police that her daughter did not want to go with them because "there's going to be arguments". The plain inference, as mentioned in the outline, is that she knew full well the argument was to involve violence;

(f) When collecting Sarah's possessions at the entrance to 16 Males Drive, Yvonne Heathcote and the two young men with her were spoken to by police who were searching for the property in response to the 000 call made at 9.00 pm. They were unsure which was the correct house because of a lack of lighting and house identification. Constable Booker asked Yvonne Heathcote if the property they were at was 16 Males Drive. She said she did not know. She clearly did. She had gone to that address to collect her daughter's possessions. She had lived in Tara and been to the deceased's property for family functions. (The lie was not relied upon as an implied admission of guilt. It was, however, relevant to the reliability of Yvonne Heathcote's account given to police in her interview). Constable Booker told the group to move off as soon as they had packed the possessions because there had been a "firearm incident" in the vicinity;

(g) During the course of the evening when she was driving between Chinchilla and Tara looking for David Heathcote

she rang Crothers and asked if he knew where David was. When she had ascertained David's whereabouts she again rang Crothers to say that she had found him;

(h) When David Heathcote joined his mother at about 8.00 am at the Chinchilla weir he told her that he had "given Matty a flogging";

(i) When interviewed by police Yvonne Heathcote gave an account of leaving her home to drive to Tara.

[56] The first issue which the evidence must have been sufficient to establish is that Yvonne Heathcote had formed the common intention with others to seriously injure Matthew Hoghes, undeniably an unlawful purpose.

[57] There was a great deal of evidence that there was such a common intention involving at the least Yvonne Heathcote, David Heathcote and Crothers. There is no other sensible view of the evidence that:

(a) Yvonne Heathcote was called "a fat slut" by Matthew Hoghes and was deeply offended by the insult;

(b) David Heathcote was offended by the insult to his mother;

(c) Yvonne Heathcote made a specific threat to little John Hoghes that David Heathcote and Nathan Wells were coming to Tara and would "beat (Matthew's) head in";

(d) Shortly afterwards Yvonne Heathcote with her son David and Nathan Wells (and Sarah) left in the family car to drive to Tara taking with them a metal bat and golf club. The jury could well have concluded that Yvonne Heathcote knew of the weapons' presence. Some evidence puts her sitting as a passenger adjacent to where the golf club was put for the journey. There is other evidence that puts her elsewhere but it cannot be thought that in the space of a journey of some hours of the five people in a family sedan no one mentioned the incongruous presence of a golf club;

(e) There was an extraordinary degree of telephone contact between Yvonne Heathcote and Crothers. At least three of the calls, those of 7.04 pm, 7.47 pm and 8.12 pm, were made at a time when David Heathcote was in Crothers' presence. Yvonne Heathcote knew that he had gone with Crothers and Rogers in the utility;

(f) Sarah Heathcote refused to accompany her mother to 16 Males Drive. She insisted upon being left at Tara because "there's going to be arguments" involving Matthew Hoghes for whom she still entertained feelings of tenderness, feelings which had led to a heated argument with her brother David who remained resentful at Matthew Hoghes' slurs against his family;

(g) At Jondaryan David Heathcote surmised to his mother that he might end the evening "in (the) lock-up";

(h) On arrival at 16 Males Drive, David Heathcote, Crothers and Rogers did not collect Sarah Heathcote's belongings but drove into the property. David Heathcote went straight into the house. Not deterred by the fatal shooting of John Hoghes he returned to the house with Crothers and Rogers. They overcame any resistance from Matthew and little John Hoghes by menacing them with a loaded shotgun. They were restrained with handcuffs and Matthew Hoghes was beaten repeatedly with a metal bar by David Heathcote;

(i) When leaving Michelle Wood's house Crothers said to Matthew Hoghes "don't forget (Sarah's name)";

(j) Yvonne Heathcote did not telephone Crothers between 8.12 pm and 10.34 pm. Shortly after 9.30 pm she was at 16 Males Drive and had been told by Constable Booker that there had been "a firearm incident". Between 10.41 pm on 3 May and 6.35 am on 4 May she rang or attempted to ring Crothers 15 times. In some of those calls she asked if he knew where David Heathcote was. She let him know when he had been found;

(k) She returned home, not directly along the Warrego Highway, but *via* Kingaroy, a very long detour.

[58] It was submitted on behalf of Yvonne Heathcote that the common understanding or intention established by the evidence was to collect Sarah Heathcote's property from 16 Males Drive. The presence of weapons in the car, if known to the appellant, was said to be consistent with their use for protection in the event that Matthew Hoghes threatened violence. It was also submitted that the telephonic communication between Yvonne Heathcote and Crothers is consistent with requests to Crothers for assistance in collecting Sarah's possessions.

[59] There is certainly evidence that the object of those who drove to Tara was to collect the possessions, and the golf club was taken for self-defence. It is not evidence the jury was bound to accept. It had some obvious difficulties. Crothers, David Heathcote and Rogers made no attempt to collect Sarah's possessions. They drove straight into the property and, having killed John Hoghes, set about assaulting his son. The party assembled for the stated purpose was incongruously large for it. Moreover it divided and went separately to the property. Only one group acted as though its object were to collect the possessions. There is, as well, the point that those possessions had been left remote from the house in order to avoid any contact or conflict with those who came for them.

[60] The jury was not compelled to accept the evidence relied upon by the appellant. There were very substantial grounds for rejecting it. That evidence does not mean that it was not open for the jury to find the common unlawful purpose from the other evidence.

[61] It is obvious that David Heathcote intended to assault Matthew Hoghes, and that he shared the intention with Crothers and Rogers. Together they drove to his property, went into his house; overcame any possible resistance by Crothers pointing a loaded shotgun at him; and by Rogers restraining him with handcuffs while David

Heathcote assaulted him repeatedly with a metal bar. The strength of their intention was such that the homicide of Matthew Hoghes' father, who came to defend his son, did not deter them from carrying it out.

[62] The particular question is whether the evidence established that Yvonne Heathcote had the same intention, in common with the others. The evidence strongly suggests that she did share the intention, and was its instigator. She made the threat to Matthew Hoghes and travelled to Tara with the two young men whom she nominated as being the avengers of her honour. They took with them weapons suitable for the punishment she had described.

[63] The plan, or common intention, seems to have changed at or just before the sojourn at Jondaryan. Nathan Wells was replaced as one of those to be involved in the assault by Crothers, and probably Rogers.

[64] The frequency of telephone contact between Yvonne Heathcote and Crothers is clear evidence that she was keeping in touch with his activities. She knew that Crothers was at Michelle Wood's house when she rang there just before 11.00 pm. Her frantic efforts to locate David Heathcote after she knew there had been a shooting (whether or not she knew that John Hoghes was dead) between 10.30 pm on 3 May and 8.00 am on 4 May, and the frequent calls to Crothers to assist in the search, was evidence indicating that the three of them were involved in a joint enterprise, the purpose of which can be identified by the threat to Matthew Hoghes and the journey to his house by three armed men.

[65] Counsel for Yvonne Heathcote argued that the common intention had not been proved because:

- The injuries sustained by Matthew Hoghes did not amount to serious harm;
- The assault was carried out by means of a weapon not shown to have been taken to the property by David Heathcote;
- Crothers' presence with his utility might be explained by Yvonne Heathcote's belief that a washing machine was among the possessions to be collected.

[66] The fact that Matthew Hoghes' injuries were not serious (and they seem not to have been) does not mean that there was not a common intention to injure him seriously. The intention may not have been fully carried into execution for a number of reasons. One is that David Heathcote's blood lust had been partially sated by John Hoghes' violent death. Or he may have understood what trouble Crothers was in and moderated his attack to avoid a long gaol term for himself. A third reason is that he overestimated the force of his blows and, while intending to harm Matthew Hoghes seriously, failed in the attempt.

[67] The account of the assault given by Matthew Hoghes and little John Hoghes is of a sustained and vicious attack by a weapon apt to cause severe injury. A substantial number of blows was delivered. There is evidence that Matthew Hoghes appeared to have been quite seriously hurt. Michelle Wood gave evidence that when at her house Crothers remarked about Matthew Hoghes who was lying on the lounge that he had "a broken chest, broken jaw, broken ribs … broken leg." He said to Matthew Hoghes "You won't last till morning" indicating he thought he had been beaten to

death. David Heathcote may have had the same impression. Michelle Wood noted that Matthew Hoghes was lapsing in and out of consciousness and "didn't look very healthy." He was later taken to hospital.

[68] There was cogent evidence of an intention to inflict serious harm. A lesser result does not diminish the force of the evidence.

[69] The existence of the common intention is not disproved by lack of direct evidence that David Heathcote had with him a weapon in the utility which he took into the house. There was evidence of the presence of two weapons in the car in which he drove from Gatton to Jondaryan. When he began assaulting Matthew Hoghes he had a weapon of a generally similar description to one of those. There was no evidence that David Heathcote did not have the metal club with him when he got out of the utility. Matthew and little John Hoghes did not pay attention to David Heathcote. They were preoccupied with Crothers and his shotgun.

[70] The suggestion that Crothers and his utility might have been present because a washing machine was to be picked up cannot stand with the evidence that the utility was driven straight into the property, past Sarah Heathcote's possessions.

[71] The first issue, as described, is made out. The evidence was capable of establishing that Yvonne Heathcote, David Heathcote and Crothers had formed the common intention to prosecute the unlawful purpose of seriously injuring Matthew Hoghes. The next inquiry is whether the offences charged against Yvonne Heathcote, murder and aggravated burglary, are offences of such a nature as to be a probable consequence of the prosecution of the common unlawful purpose. Understandably the submissions focused on count 1, the murder, and nothing was said about count 2. However Yvonne Heathcote appeals also against her conviction on that offence, which must therefore be dealt with.

[72] The common intention, which the evidence supported, was that David Heathcote, Crothers and Rogers would go to where Matthew Hoghes lived, at night, in order to assault him with a weapon. The implementation of the intention required violence against Matthew Hoghes.

[73] The three assailants arrived at Matthew Hoghes' house at 9.00 pm to carry out their common intention. It was probable that he would be at home, which would have to be entered if the intention was to be carried into execution.

[74] The aggravated burglary, entering the dwelling of Matthew Hoghes intending to commit an indictable offence, at night, using actual violence in company while armed with an offensive and/or dangerous weapon was a probable consequence of carrying out the common intention. Indeed it was an inevitable consequence.

[75] The real challenge was to the murder conviction. The argument, though put elaborately and at length, was essentially that murder, intentional killing, was not a probable consequence of a common intention to inflict serious harm upon Matthew Hoghes. Particular reliance was placed upon the absence of any evidence that Yvonne Heathcote knew that Crothers had taken a shotgun with them to 16 Males Drive, that she was not present when the offence was committed and that it was not Matthew Hoghes who was killed.

[76] The operation of s 8 was explained by Brennan CJ, Dawson and Toohey JJ in *R v Barlow*.[1] Their Honours said:

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1 (1997) 188 CLR 1 at 10.

> "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 … which the principal offender has done … . 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 … of the principal offender as (1) renders the principal offender liable to punishment but (2) only to the extent that that conduct … was a probable consequence of prosecuting a common unlawful purpose. The secondary party is deemed to have done an act … but only to the extent that the act was done … 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 … define an offence of a particular 'nature'."

[77] Section 8 was again considered by the High Court in *R v Keenan*.[2] Factually the case has some similarities to the present. Keenan and three others were party to a plan to do serious harm to one Coffey. Coffey was shot in the spine and became a paraplegic. Keenan did not fire the shots and there was no evidence that the use of a gun was a part of the plan. He was convicted of doing Coffey grievous bodily harm with intent.

[78] Hayne J said:[3]

> "… the condition for the engagement of s 8 in this case can be rendered as follows. First, what was the common purpose? Secondly, was the shooting that happened an *offence of such a nature* that its commission was a *probable consequence* of the prosecution of the purpose? Both questions must be addressed. And s 8 is not to be read as requiring that the offence that was in fact committed (the shooting) was a probable consequence of the prosecution of the unlawful purpose. To do so would give no work to the expression 'of such a nature'.
>
> …
>
> The question is not whether the act of shooting that did occur was a probable consequence, it is whether the act of shooting was an offence of such a nature that its commission was a probable consequence. This latter question directs particular attention to what was the common intention." (footnote omitted) (emphasis in original)

[79] His Honour rejected the proposition that, in the circumstances of that case, Keenan could only be convicted if the common intention had involved the use of a gun and that s 8 would not operate where the common intention proved was to attack Coffey with a club. Hayne J said:[4]

> "But to identify the common intention in this way would focus only upon the means that were to be used to effect the unlawful purpose.

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2 (2009) 236 CLR 397.

3 (2009) 236 CLR 397, 423.

4 (2009) 236 CLR 397, 424.

> Identifying the weapon … to be used is at best an incomplete description of the purpose that the prosecution alleged the parties had in this case. That purpose was alleged to be the purpose of inflicting some serious physical harm on the victim.
>
> It is important to recognise that the second question presented by s 8 … can be answered in the affirmative even if the possibility that the conduct actually committed would occur was not shown to have been adverted to by any participant in the common intention. …
>
> In considering that objective question it will always be necessary to pay very close attention to what is identified as having been the common intention to prosecute an unlawful purpose. But it is necessary to bear steadily in mind that formation of the common intention … may not have been accompanied by any consideration … of what was to be done, how it was to be done, and who was to do what to bring about the intended purpose. In such cases there will be no direct evidence that the parties to the common intention adverted to the possibility that an offence of the nature of the offence that was committed would be committed; there will be no evidence that the parties to the common intention were aware that commission of the crime that was committed was a probable consequence." (footnotes omitted)

[80] Kiefel J (with whom Hayne, Heydon and Crennan JJ agreed) said:[5]

> "In answering the questions, as to the nature of the offence committed and what was the common purpose, it is necessary to bear in mind how s 8 operates. The ultimate question which the section poses – whether the offence is of such a nature as to be a probable consequence of the common purpose – is directed to the connection between the offence and the common purpose. It is that connection which is the basis for criminal responsibility. The section's test for connection does not suggest as necessary an approach which imports the act involved in the offence into the finding of common purpose.
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> The operation of an identical provision was described by Dixon and Evatt JJ in *Brennan v The King* in these terms:
>
> > 'The expression 'offence … of such a nature that its commission was a probable consequence of the prosecution of such purpose' fixes on the purpose which there is a common intention to prosecute. It then takes the nature of the offence actually committed. It makes guilty complicity in that offence depend upon the connection between the prosecution of the purpose and the nature of the offence.'
>
> The inferences available as to what the common purpose may have been in a given case will depend upon the evidence, viewed as a whole. Section 8 does not require the connection, between the offence actually committed and the common purpose to be prosecuted, to be established at the point when the common purpose is determined as a fact." (footnotes omitted)

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5 (2009) 236 CLR 397, 431.

[81] Her Honour also said:[6]

> "Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible. In some cases the means intended to be used may permit an inference as to the level of harm intended. An offence involving such harm may be a probable consequence of such purpose whatever means came to be used. It may be otherwise where the intended means suggest no serious harm was intended and the offence committed well exceeds such a purpose."

[82] Her Honour then said:[7]

> "There can be no difficulty, in a case such as the present, in describing the unlawful purpose as the infliction of serious physical harm. In such a case it is not correct to approach the determination of the common purpose by reference to the means and thereby determine the connection to which the objective test in s 8 is directed. Further, the test to be applied under s 8 is as to the probable consequences of the common plan, not what the parties might have foreseen. Even if the respondent had not anticipated that a gun might be used, he may nevertheless be held criminally responsible where it was used and caused the very level of harm that had been intended. In a case involving an objective of this kind the means actually used may not assume importance in the determination of probable consequence."

[83] It is a question for the jury to determine what the particular unlawful common purpose was in a given case: *Keenan*[8] citing *Brennan v The King*.[9] Equally it is a question for the jury whether the offence in question was of such a nature that its commission was a probable consequence of the prosecution of the common unlawful purpose: *Keenan*[10] citing *Stuart v The Queen*.[11]

[84] The question which the court must answer with respect to ground 1 is whether the verdict, guilty of murder, was unreasonable in the sense that it was not open to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt of Yvonne Heathcote's complicity in the murder, or expressing the question alternatively, should the Court of Appeal entertain a reasonable doubt which the jury should have entertained: *M v The Queen*.[12] The question for ground 2 is whether the evidence was capable of supporting the conviction.

[85] For both grounds the question comes down to whether the evidence was sufficient to support the conclusion that the fatal shooting of John Hoghes by Crothers was an offence of such a nature as to be a probable consequence of the prosecution of the common unlawful purpose to inflict serious harm upon Matthew Hoghes. To convict Crothers of murder the jury must have been satisfied that he shot the

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6 (2009) 236 CLR 397, 433.
7 (2009) 236 CLR 397, 434.
8 (2009) 236 CLR 397, 430 per Kiefel J.
9 (1936) 55 CLR 253, 261, 266.
10 (2009) 236 CLR 397, 424 per Hayne J.
11 (1974) 134 CLR 426, 442-3.
12 (1994) 181 CLR 487.

deceased intending to kill him or cause him grievous bodily harm. Can it be said, on the whole of the evidence, that killing the deceased with the intention of causing him at least grievous bodily harm was an act of such a nature as to be a probable consequence of carrying out the unlawful purpose? Does the evidence show a sufficient connection between the unlawful purpose and the killing with that intention?

[86] Although it must be acknowledged that the case against Yvonne Heathcote was not as strong as that against her son, or Rogers, and that the trial judge entertained misgivings about it, the evidence was sufficient for the jury to conclude that the murder of John Hoghes was a probable consequence of prosecuting the unlawful purpose.

[87] The jury was entitled to infer (indeed it appears the only sensible inference) that Yvonne Heathcote was the instigator of the plan and recruited her son, Crothers and Rogers to carry it out. The unlawful purpose was a gross overreaction to an adolescent insult delivered in the course of an emotionally charged break-up of an immature relationship. To that context Yvonne Heathcote brought two mature men, as well as her son, to inflict serious harm upon a 17 year old youth. The plan, the unlawful purpose, was not to be some youthful skirmish involving fists and abuse but the infliction of serious harm by two older and one younger man, the use of metal clubs, golf clubs and/or aluminium bats.

[88] In addition it was known to Yvonne Heathcote that John Hoghes lived near his sons and was likely to protect them from attack. It was to be expected that the deceased had been advised that David Heathcote and others were coming for the express purpose of harming Matthew Hoghes. Whatever Yvonne Heathcote had said to Matthew Hoghes and/or little John Hoghes in the telephone calls made them thoroughly alarmed. Immediately the utility drove onto the property little John telephoned John Hoghes who came at once with an iron bar to defend his children.

[89] It was open to the jury to find that a probable consequence of carrying out the unlawful purpose in circumstances where the victim had been given advance notice of the plan, and that his father lived nearby, is that the latter would come to defend his son and thereby interrupt the execution of the common unlawful purpose. It was, as well, open to the jury to find that if the unlawful purpose was to be carried out any attempt by John Hoghes to disrupt it had to be overcome by disabling him. In the circumstances, killing John Hoghes with the intention of causing him grievous bodily harm in order to allow the purpose to proceed and prevent his disruption of it could well be regarded as an offence of such a nature as to be a probable consequence of the unlawful purpose.

[90] The evidence might not have compelled that conclusion but it was sufficient to allow it. There was a clear connection between the purpose, and its execution, and the homicide. The circumstances in which the unlawful purpose was to be prosecuted made the intentional infliction of grievous bodily harm to a probable rescuer likely. Murder was therefore an offence of such a nature as to be a probable consequence of prosecuting the purpose. The exposition in *Barlow* at 10 is satisfied.

[91] It is not necessary, of course, for accessorial liability that a party to the offence under either s 7 or s 8 of the Code be present when the offence is committed. Nor, as *Keenan* explains, need the particular act which constitutes the offence, in this

case shooting, be a probable consequence of prosecuting the common unlawful intention. It is enough if the shooting was an offence of such a nature as to be a probable consequence. For the reasons just explained it was open to the jury on the facts of this case to come to that conclusion.

[92] Grounds 1 and 2 are not made out.

**Ground of Appeal 3: The trial judge's directions concerning the application of section 8**

[93] Ground 3 is that the trial judge's directions to the jury concerning the application of s 8 were inadequate. There are two specific complaints. The first is that the jury was not instructed that they could not convict unless satisfied beyond reasonable doubt that in a telephone conversation between Yvonne Heathcote and little John Hoghes she told him to inform Matthew that David Heathcote and Nathan Wells were coming and would "beat his head in". The second is that the trial judge failed adequately to relate the terms of s 8 to the facts as they concerned the appellant.

**(a) The trial judge's directions concerning the telephone conversation between Yvonne Heathcote and little John Hoghes**

[94] The appellant's argument on the first complaint is that the case against her was entirely circumstantial, and that the conversation was "an indispensable intermediate step" in the process of reasoning to the inference of guilt so that, according to *Shepherd v The Queen*,[13] that fact, relied upon as a circumstance pointing to guilt, had to be proved beyond reasonable doubt.

[95] There is a subsidiary complaint that the trial judge wrongly described the evidence of the conversation. Having referred to it her Honour said:

> "You must consider very carefully whether you accept this evidence. It is the only direct evidence implicating Yvonne Heathcote in a plan to seriously injure Matthew."

The appellant categorises the case against her as entirely circumstantial so that the judge's designation of the conversation as direct evidence was erroneous.

[96] *Shepherd* decided that in a circumstantial case the facts, being the circumstances from which the inference of guilt is to be drawn, must be proved beyond reasonable doubt but the evidence which tends to prove the existence of those facts (circumstances) do not themselves have to be proved beyond reasonable doubt. It is only those intermediate facts which are necessary for the ultimate inference of guilt that must be proved to that standard.

[97] The prosecution case against Yvonne Heathcote, that she in common with others intended to do serious harm to Matthew Hoghes, was circumstantial. The conclusion that there was such an intention which she had in common with others was said to follow from a number of pieces of evidence concerning what she said, where she went, her choice of companions, what they took with them, and her contact with her co-accused. None of those pieces of evidence was an indispensable intermediate fact leading to the conclusion, or inference, that she shared the common intention. The conversation was not necessary to the inference, which

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13 (1990) 170 CLR 573.

could have been drawn from other evidence. Nevertheless the evidence of the conversation was correctly described as direct. The fact that it occurred was not itself a question of inference. One of the parties to the conversation who heard what the appellant said gave evidence of her words. They were, or were capable of being, an admission that she, in common with David Heathcote, intended to hurt Matthew Hoghes.

[98] The conversation was important direct evidence. There was no misdirection with respect to it.

**(b) The trial judge's instructions concerning the application of section 8 to the facts**

[99] The second complaint making up ground 3 is that the jury was not given any instruction as to the application of s 8 to the facts of the case: *Fingleton v The Queen*.[14]

[100] The complaint is without substance. The trial judge approached her instructions to the jury with respect to s 8 by explaining the section and its operation in general terms and then separately discussing its application to the cases against Yvonne Heathcote, David Heathcote and Rogers. Her Honour read the section, gave a paraphrase of it, and explained how the prosecution sought to use the section, by reference to the particulars furnished.

[101] Her Honour said:

> "The prosecution relies on section 8 as an alternative way of establishing that Rogers and David Heathcote are guilty of the murder of Hoghes, and it relies on this section to establish that Yvonne Heathcote is guilty of murder. If you go to the particulars … . The prosecution alleges that the common unlawful purpose was to serious[ly] injure Matthew. It alleges that David … Heathcote, Yvonne … Heathcote and … Rogers had that purpose, and it alleges that it was a probable consequence of that common unlawful purpose that Hoghes would die from injuries inflicted with an intention to cause death or grievous bodily harm. In other words, that the murder of Hoghes was the kind of offence likely to be committed as the result of carrying out the plan to seriously injure Matthew.
>
> Taking each of these three defendants in turn, you have to consider whether the prosecution has satisfied you beyond reasonable doubt on evidence admissible against the particular defendant whose case you are considering: (a) that there was common intention to seriously injure Matthew; (b) that the murder of Hoghes was committed in carrying out that purpose and; (c) that the offence was of such a nature that its commission was a probable consequence of carrying out that purpose."

[102] The learned judge then turned to the separate requisites of the section and explained "common intention" and "probable" in terms which are not the subject of criticism. That part of the summing-up concluded:

> "Before you could bring in a verdict of murder based on section 8, you would have to be satisfied beyond reasonable doubt that it was

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[14] (2005) 227 CLR 166, 196-7.

> objectively likely that in carrying out the plan to seriously injure Matthew, John … Hoghes would be killed by an act or acts done with intent to kill or cause grievous bodily harm. You would not need to be satisfied that it was objectively likely that he would be murdered by the use of a gun.
>
> If you are left with a reasonable doubt whether murder was the kind of offence likely to result from carrying out that plan, you cannot find any of these three defendants guilty of murder based on section 8. …"

[103] The summing-up then turned immediately to "the section 8 case against Yvonne Heathcote" and the jury was asked to consider "Was there a plan to which she was a party?" There followed a summary of the evidence relevant to that point, and the arguments of counsel, prosecution and defence, with respect to it. Her Honour finished this part of her summing-up by saying:

> "… before you may find Yvonne guilty of murder, you must be satisfied beyond reasonable doubt that she was a party to a plan, that the plan was to seriously injure Matthew rather than to simply collect Sarah's gear, and that it was a probable consequence of the prosecution of that plan that John … Hoghes would be murdered. The objective likelihood of the murder of Hoghes depends largely on what the plan was. Again, a matter for you."

[104] The appellant's submissions do not identify what additional instruction the trial judge should have given. It is not obvious that anything more could sensibly have been said. The section was read to the jury and its operation explained. The jury were well aware of the circumstances of John Hoghes' homicide. They were reminded of the evidence which implicated Yvonne Heathcote in what the Crown alleged was a common unlawful purpose and told they could convict of murder only if satisfied beyond reasonable doubt that murder was an offence of such a nature as to be a probable consequence of carrying out the common unlawful purpose. To say so much was to instruct the jury as to the real issue in the case, the facts relevant to it and how the law applied to the facts.

[105] This complaint, too, is without substance and ground 3 is not made out. There was no complaint made about the summing-up with respect to count 2, the burglary.

**Ground of Appeal 4: The trial judge's instructions on self-defence**

[106] For the reasons given in Crothers' appeal, ground 4 in this appeal, that the jury was inadequately instructed on self-defence, has not been made out. Yvonne Heathcote's appeal should therefore be dismissed.

**Ground of Appeal 5: The trial miscarried because of an accumulation of irregularities**

[107] Ground 5 contains four separate complaints which separately or in combination are said to have caused the trial to miscarry.

**(a) Independent jury investigations**

[108] The first complaint, that the jury had made independent investigations, arose from the fact that a juror took a roadmap into the jury room the better to understand evidence of the appellants' movements and the roads on which they travelled.

[109] At the commencement of the trial, the judge directed the jury in these terms:

> "… The only evidence you may consider in coming to your verdicts is that presented in Court during the trial. The only law you may apply is the law I shall explain to you. It is not for you to make your own inquiries about the facts or the law. You must not take into account anything you have ascertained about the facts or the law outside the courtroom.
>
> I am giving you this direction for good reason. It would be inherently unfair for you to act on information not before the Court and which both sides don't know you are acting on. It would be inherently unfair for both sides not to have the opportunity to test its accuracy and its application to the case. We all know that information in the public arena is not always accurate. I can give an example, of someone with a similar name."

[110] On the 16th day of the trial, the jury asked the judge for a larger map of the Tara, Kingaroy and Gatton area. After discussing the request with counsel, Rogers and Crothers, the judge told the jury that a map would be provided, though it would take some time.[15]

[111] On the 19th day of the trial, the prosecution produced the maps requested by the jury and provided multiple copies. Exhibit 157 depicted the Kingaroy, Chinchilla, Tara and Gatton area. Exhibit 158 provided more detailed topography of these areas.[16]

[112] Later that day, the bailiff brought to the judge's attention that a juror had an RACQ map of south-east Queensland in the jury room and had highlighted a number of towns relevant to the case. The judge had the jury return to the court. The juror responsible explained that he had brought the map into the jury room two days earlier, but only took it out of his bag that day "to get the mileage of some of the areas to give an overall view of the mileage".[17] The judge gave the following direction:

> "… Ladies and gentlemen, you will recall that at the commencement of this trial I directed you that the only law you might consider was that which I would explain to you and the only facts which you might consider were the facts you heard in the courtroom and that you were not to make your own inquiries about the law or the facts because to do so would be inherently unfair to the parties."[18]

[113] The judge enquired whether the jurors had made any other inquiries. The jurors collectively answered, "no". The jury then retired whilst the judge heard legal argument about the unusual turn of events. Counsel for Yvonne Heathcote and David Heathcote applied for a mistrial, largely on the basis that if the jury did not obey the judge's directions given at the commencement of the trial, then the jury could not be expected to follow the complex legal directions which would be given at the end of the trial. Crothers joined in this application.

[114] The judge found as a matter of fact that the map brought into the jury room did not in any real sense add to the information already before the jury. The maps, exs 157

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15 Appeal Book 921-922.
16 Appeal Book 1124 and 1125.
17 Appeal Book 1150.
18 Appeal Book 1150-1151.

and 158, largely showed the area contained in the unexhibited map. The judge distinguished a number of cases where jury misconduct or irregularity resulted in mistrials, including *R v Skaf*;[19] *Domican (No 3)*[20] and *Folbigg*.[21] Her Honour considered that the correct approach in determining this application accorded with that taken in *R v Forbes*:[22] a juror's failure to follow a judicial direction on one occasion did not mean that the juror was generally prepared to act contrary to judicial direction. The judge was ultimately unpersuaded that the juror's taking the map into the jury room meant there was a substantial risk that the jury would ignore other judicial directions. Accordingly, the judge refused to declare a mistrial.

[115] Counsel in this appeal contend that this ruling was an error of law. They emphasised the cases of *Skaf* and *R v K*.[23] But the investigations made by the jury in this case, as her Honour found, were in a different and less concerning category to an inspection of the crime scene (*Skaf*) or an internet search (*R v K*). First, in those cases the jury investigations may well have resulted in material not before the jury in evidence being considered by the jury in reaching a verdict. The second but related distinction is that, in the present case, similar maps to the RACQ map were already exhibited before the jury. Like the primary judge, we are satisfied the irregularity of taking the RACQ map into the jury room did not affect the jury verdict: see *R v K* and *Skaf*.[24] There has been no resulting fundamental irregularity or miscarriage of justice. This complaint is without substance.

**(b) The trial judge's refusal to order separate trials**

[116] The second complaint is that Crothers and Rogers who appeared for themselves at the trial misbehaved and, as a result, prejudiced Yvonne Heathcote's trial. In addition to the comments which immediately follow, the observations made later in these reasons in respect of Crothers' ground of appeal 2 and Rogers' grounds of appeal (a) and (b) and their applications to adduce further evidence are apposite.

[117] No appellant applied for a separate trial prior to the commencement of the trial before the jury on 31 August 2009, although there was ample opportunity to do so, especially during the two days of pre-trial legal argument in Toowoomba on 17 and 18 August 2009. The presentation of an indictment joining the various charges brought against all four appellants was authorised under s 567 and s 568 *Criminal Code*. The prosecution case based on s 7 and s 8 *Criminal Code* relied on evidence of the close interconnectedness of the four appellants in the offending. This case was therefore an entirely appropriate one in which to proceed against all four appellants in a joint trial. No doubt that is why there was no early application for separate trials.

[118] The first application for a separate trial was made on the fourth day of trial by Rogers' counsel on the basis that Crothers' self-representation was likely to prejudice the jury against Rogers in light of Crothers' intellectual and educational deficits. Counsel for Yvonne Heathcote joined in the application. The judge summarily dismissed the application concluding that there was no present need to order separate trials, but noting that she would consider future applications on their

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19 [2004] NSWCCA 37.
20 (1990) 46 A Crim R 428.
21 [2007] NSWCCA 371 at [11]-[19].
22 [2005] NSWCCA 377.
23 [2003] NSWCCA 486.
24 At [274].

merits. The judge was plainly right to refuse that application as no reason warranting a separate trial at that time had arisen.

[119] Counsel for Rogers, David Heathcote and Yvonne Heathcote made a further application for a separate trial on the seventh day. Again, this application was based on the considerable delay caused by Crothers' self-representation and counsel hypothesised that the jury might become angry and frustrated at the length of the trial. Counsel submitted that, were the trial to proceed only in respect of the defendants other than Crothers, it would be efficiently conducted and significantly shortened.

[120] The judge again concluded that a separate trial or a declaration of a mistrial was not warranted at that time. The judge considered that, whilst conscious of the potential for the jury to feel frustrated, they were responsible community members who would, true to their oaths and affirmations, try the case fairly. When the jury returned to the court room, the judge gave the following direction:

> "I'm conscious, ladies and gentlemen, that it must be sometimes frustrating, if not irritating, for you to be sent out of the courtroom and being asked to wait. However, as I said to you at the commencement of this trial, yours is a very important task, one central to the administration of justice. I know that you're all responsible members of the community and that you will all be true to the oath or affirmation which you took at the beginning to try this case fairly, and in doing that I'm afraid sometimes you have to be patient. I'll do what I can to keep things moving, but as you will have appreciated by now, when someone does not have legal representation things can take longer than they otherwise might. We'll keep moving as fast as we reasonably can, and I ask for your patience."

[121] The judge's decision not to grant a mistrial was clearly within a proper exercise of discretion and, in our view, was the only proper course open. The judge wisely reminded the jury of their obligations and counselled patience. There is no reason to think that the jury did not heed the judge's thoughtful direction.

[122] On the 12th day of the trial, Rogers dismissed his lawyers. Counsel for David Heathcote and Yvonne Heathcote made fresh applications for separate trials on the following basis. The jury by this time had become aware that Crothers had a criminal history. Before Rogers dismissed his counsel, the jury would have noticed that his counsel and counsel for David Heathcote had been running their "respective cases in tandem … by arrangement". Rogers, in conducting his own case, could now damage David Heathcote's case and counsel's planned tactics.

[123] Counsel for Yvonne Heathcote submitted that, had he known that two defendants would be self-represented during this trial, he would have made an application for a separate trial at the commencement of proceedings. Like counsel for David Heathcote, he had made forensic decisions with counsel for Rogers as to the conduct of the trial and his vision as to how the trial should be conducted was now uncertain because of Rogers' self-representation.

[124] Neither Crothers nor Rogers joined in the application.

[125] The trial judge expressed her confidence in the capabilities of counsel for David Heathcote and Yvonne Heathcote to rise to the challenge and to continue to ably

defend their clients. Whether a separate trial should be granted involved a consideration of the interests of justice. The continuation of the joint trial against all four defendants would not be unfair to any of them. The trial was in its 12th day and many witnesses had already given evidence. For a number of witnesses, the experience of giving evidence had been distressing as they relived traumatic events. This was an appropriate case to proceed against all defendants together. The judge refused the application.

[126] The judge's decision to refuse this application was clearly within a sound exercise of discretion. Indeed, it was the only rational conclusion in the circumstances.

[127] The appellant has not demonstrated that the judge's refusal of separate trials was an error or has resulted in a miscarriage of justice.

**(c) Evidence of Crothers' criminal history was put before the jury**

[128] The third complaint is that inadmissible evidence that Crothers had a criminal history and had been imprisoned was put before the jury. This is said to have prejudiced the case against Yvonne Heathcote.

[129] The evidence in chief of little John Hoghes on the fifth day of trial included the following:

> "PROSECUTOR: You've said [Crothers] was deciding what to do. Did he say anything else?-- He wasn't sure whether - he said, 'There is one bullet left.' He said he should use it on himself. He said he's going back to gaol, it is all our fault, saying to Matthew it is his fault that he is going back to gaol."

[130] At the completion of little John Hoghes' examination in chief, the jury left the courtroom. The prosecutor stated that the witness's two references to Crothers having been in jail were not in the witness's statement and this was the first time he had given such evidence.

[131] Counsel for Rogers, David Heathcote and Yvonne Heathcote applied to discharge the jury. The judge refused their applications as she considered the inadmissible evidence could be dealt with by a direction to the jury not to draw any adverse inference against Crothers or, by association, against any of the appellants. The judge warned the jury in the following terms:

> "… you will recall that John Hoghes said that at one stage Mr Crothers was deciding what to do with them. He said that Michelle, Michelle Wood, was saying, 'Don't shoot me, don't shoot me, don't kill me.', and that Mr Crothers said, 'I won't kill you, you've got kids.' He then moved on to say that Mr Crothers said 'There is one bullet left.', 'He said he should use it on himself, he said he's going back to gaol, it's all our fault, saying to Matthew it's his fault that he's going back to gaol.' Now, you mustn't draw any adverse inference against Mr Crothers, or indeed against any of the defendants, from that reference to going back to gaol. Completely disregard it. All right? Because it would be pure speculation as to what he was talking about and to speculate would be unfairly prejudicial to him, so disregard that piece of evidence."

[132] In the absence of competing evidence, we have no reason to conclude that the jury did not follow these judicial directions. The judge emphasised to the jury throughout the trial that they must reach their verdicts only on the evidence in the case. She directed them to put aside any questions of prejudice. About three weeks later when directing the jury, the judge summarised little John Hoghes' evidence and, of course, omitted any reference to the inadmissible portion of it. The judge did not err in refusing the application for a mistrial. We are not persuaded that this inadmissible evidence, in light of the judge's directions, could have affected the determination of the jury verdict. It has not caused a miscarriage of justice.

**(d) Two witnesses did not come up to proof**

[133] The last complaint is that two witnesses did not come up to proof and the prosecutor's opening address which described the evidence they were expected to say prejudiced the jury against the appellant.

[134] The prosecutor in his opening address on the first day of the 28 day trial stated that Sarah Heathcote would give the following evidence:

> "… her older brother [David Heathcote] was going on about finishing Matt [Hodges] off. Sarah Heathcote noticed that her older brother, David, had a metal pole with him as he got into the car. …
>
> At about that same time, 4 p.m., Little John [Hodges] gets another phone call from Yvonne Heathcote. In that phone call he was told that they would be there soon to pick Sarah's stuff - pick up Sarah's stuff and that they were coming down to kill Matthew and take Sarah's stuff."

[135] The prosecutor also opened evidence that at Jondaryan Sarah Heathcote heard her mother on the telephone saying, "You are fucked when we get out there" and that Sarah protested with her brother, David Heathcote:

> "that he can't kill Matt as he is the father of her unborn child. David Heathcote continues ranting about how he is going to kill Matt, and if his sister does not shut up he will do to her like he is going to do to him. He tells her if she does not believe him, 'I will show you when Mick gets here'. It is then, according to Sarah Heathcote, that Michael Crothers and Colin Rogers arrive."

[136] Neither Sarah nor little John Hoghes ultimately gave the evidence opened by the prosecutor set out in the preceding two paragraphs.

[137] On the eighth day of the trial (after both Sarah and little John Hoghes had given evidence), Crothers and counsel for Rogers, David Heathcote and Yvonne Heathcote applied for a mistrial on the basis that the prosecutor opened damning evidence from Sarah and little John Hoghes which these witnesses did not subsequently give. The judge refused that application, noting that:

> "… The opening was, in all respects, a proper one. So far witnesses who have been called have not come up to proof in relevant respects. This may well mean that the Crown does not succeed on the section 8 case. However, it must steadily be borne in mind that what the jury must reach their verdicts upon is the evidence which has been given in the case. They will be directed, as juries always are, in the clearest

> of terms that what was said by the prosecutor in his opening, what may be said by any of the other barristers or Mr Crothers if they choose to make openings and go into evidence, what is said in closing addresses and what is said in the summing-up, none of those matters are evidence."

[138] The judge, in her closing directions to the jury, instructed them as to what was and was not evidence in the case and summarised the evidence given by Sarah Heathcote and little John Hoghes. The judge told the jury that counsel's addresses were not evidence. There is no reasonable possibility that the jury reached their verdicts on the basis of what was opened by the prosecutor on the first day of this 28 day trial, rather than on the evidence they heard at trial. This is especially so in light of the judge's summing-up immediately before the jury retired to consider their verdict. This ground of appeal is not made out.

### (e) Conclusion on Ground of Appeal 5

[139] There is no substance in any of the complaints, either individually or collectively. Two of the complaints are trivial. The two, grounds 5(b) and (c), which were of a potential significance were dealt with by appropriate directions.

[140] Ground 5 has not been made out.

## DAVID HEATHCOTE – APPEAL NO 265/09

[141] The prosecution case particularised against David Heathcote was put on two bases. The first was that he aided and/or encouraged Crothers to shoot John Hoghes by his deliberate presence at the time of the shooting knowing that Crothers intended to cause the death of, or grievous bodily harm to, John Hoghes, thereby being a party to the offence pursuant to s 7(1)(b) and/or (c) of the Code.

[142] The second basis relied upon was s 8 of the Code and was the same case as that advanced against his mother. The allegation was that David Heathcote, Yvonne Heathcote and Rogers actively participated in a common unlawful purpose to seriously injure Matthew Hoghes and it was a probable consequence of that common unlawful purpose that John Hoghes would die from injuries inflicted with an intention to cause death or grievous bodily harm.

[143] Section 7(1) of the *Criminal Code* provides:

> "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 …
>
> …
>
> (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;
>
> … ".

[144] David Heathcote's grounds of appeal were:

1. The verdict was against the evidence and the weight of the evidence;

3. In all the circumstances the verdict was unsafe and unsatisfactory;

4. The trial judge was in error in directing the jury to ignore, in considering s 8 of the Code, that the alleged murder involved the use of a gun.

Ground 2, that the jury should have been discharged and that David Heathcote should have been tried separately from the others, was abandoned as a discrete ground of appeal.

**Grounds of Appeal 1 and 3: The verdict was unreasonable having regard to the evidence and the evidence was insufficient to support the murder conviction**

[145] As with the appeal by Yvonne Heathcote it is convenient to discuss grounds 1 and 3 together. The first point taken in support of the grounds concerned the "self-defence" provisions available to Crothers, s 271 and/or s 272 of the Code, the evidence with respect to them and the directions about their application. As the argument is common to Crothers' appeal, and applies most directly to him, it is convenient to deal with it in that appeal.

[146] The second point is that the evidence was insufficient to prove that David Heathcote was a party to the homicide by virtue of s 7(1)(b) and/or (c) of the Code.

[147] Liability on this basis was said by the prosecution to be that David Heathcote intentionally aided the commission of the murder by his "voluntary and deliberate presence at the time of the (death)." The prosecution case was that David Heathcote intentionally encouraged Crothers to shoot John Hoghes by his presence, which was not that of a mere observer.

[148] The relevant principles were described by Macrossan CJ in *R v Beck*.[25] The Chief Justice said:[26]

> "Intentional encouragement may come from expressions, gestures 'or actions intended to signify approval'. Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding. It seems that all will depend on a scrutiny of the behaviour of the alleged aider and the principal offender and on the existence which might appear of a bond or connection between the two actors and their actions. The fortuitous and passive presence of a mere spectator can be an irrelevance so far as an active offender is concerned. But, on the other hand, a calculated presence … can project positive encouragement and support to a principal offender. The distinction between a neutral and a guilty presence of a person at the scene of a crime will be for the jury to assess. Proof of guilt of the crime of aiding will not ordinarily be established by mere presence if no telltale acts are performed by the alleged aider but the intention behind and the effect of the presence of the additional person at the

25 [1990] 1 Qd R 30.
26 [1990] 1 Qd R 30, 37-8.

> scene may be established by other evidence from which it is possible to say that a case of intentional encouragement or support of the principal offender is made out.
>
> …
>
> It is not possible to be an aider through an act which unwittingly provides some assistance to the offender in the commission of the offence and it is not possible to be an aider, whatever the intention, unless support for the commission of the offence is actually provided. In some cases … where positive intervening acts in support of the commission of the offence by the principal offender may not have occurred it has been natural to speak of encouragement and this will often be an appropriate word to convey, in the absence of direct physical involvement, the relevant active element in the aiding which has taken place."

[149] The immediate difficulty for the prosecution case is that there was no evidence that David Heathcote did anything but witness the shooting. Both Matthew and little John Hoghes left the house *via* the window as soon as they saw Crothers and his shotgun. Thereafter their entire attention was given to the confrontation between him and their father. They heard David Heathcote go into the house before the shooting and they saw him standing near the front door on or about the top stair when the shot was fired but they did not observe him more closely. There is no evidence that by word or gesture David Heathcote encouraged Crothers to shoot the deceased. There is no evidence he supported Crothers in any way to commit the homicide.

[150] There is, moreover, no evidence that prior to their arrival at 16 Males Drive David Heathcote knew that Crothers had come armed with the shotgun. The act of assistance given to Crothers with respect to the shooting must therefore be limited to David Heathcote's activities after their arrival and before the shooting.

[151] The Crown submissions rely upon the appellant being:

> "... an active participant in what happened after the shooting which evidenced that his presence was for the purpose of aiding Crothers … . His voluntary and deliberate presence was intended to assist Crothers. He thereby provided encouragement … for the commission of the offence."

[152] David Heathcote's presence at the scene of the homicide is explicable on grounds other than that he was providing aid, assistance or encouragement to Crothers to commit the homicide. On the Crown case he was there to prosecute the unlawful purpose of "beating Matthew Hoghes' head in". His activities after the shooting were equivocal. He certainly assisted Crothers and Rogers to dispose of John Hoghes' body and he acted in concert with them in assaulting Matthew Hoghes and invading Michelle Wood's house. That conduct is relevant to the case against him pursuant to s 8 of the Code. It does not unequivocally point to a case of assistance pursuant to s 7.

[153] A conviction of murder on the basis of s 7 of the Code would therefore be unreasonable.

[154] The third point was that there was insufficient evidence against David Heathcote to support the conviction pursuant to s 8.

[155] The only additional fact to mention admissible against and relevant to this appellant which has not been mentioned in the earlier recital of facts is that when David Heathcote was striking Matthew Hoghes he said "Do you want to call my mum a slut? You think you can take me on."

[156] The evidence of the threat made by Yvonne Heathcote against Matthew Hoghes was, on proof of a common intention between the accused, or some of them, to assault the young man, admissible against the other accused: *Ahern v The Queen*;[27] *Tripodi v The Queen*.[28] The prosecutor however limited the use of that evidence to the case against Yvonne Heathcote only. It is therefore to be ignored when considering the available evidence against David Heathcote.

[157] The arguments advanced in support of this appeal were that:

(1) The nature and existence of a common purpose relies entirely on an inference from events following the death of John Hoghes, particularly the appellant's assault on Matthew Hoghes.

(2) Those subsequent events were affected by the death and are not a reliable guide to what David Heathcote (and the others) may have intended before it, especially since it was not shown David Heathcote brought a weapon to 16 Males Drive.

(3) The extent of the injuries inflicted on Matthew Hoghes do not support an inference that there was an intention, whether unique to David Heathcote or common to others, that Matthew Hoghes be seriously injured.

(4) The evidence does not exclude the possibility that Crothers drove into the property intending to make sure that all of Sarah's property had been left out for collection; or that the appellant acted alone in assaulting Matthew Hoghes.

(5) The death of John Hoghes from an act intended to cause him death or grievous bodily harm could not have been a probable consequence of the alleged common unlawful purpose.

[158] The premise with which the appellant's argument commences is wrong. The evidence that supports an inference that David Heathcote, in common with his mother and/or Rogers, intended to seriously injure Matthew Hoghes is not limited to events which followed the shooting. The submission overlooks the following:

(a) Yvonne Heathcote reacted angrily to Matthew Hoghes' calling her a "fat slut". She told David Heathcote of the insult in a manner which expressed her anger.

(b) Shortly afterwards David Heathcote accompanied his mother, brother and sister, and Nathan Wells, in the family motor car intending to go to Tara. They took with them the weapons mentioned earlier. For the same reasons that give rise to the inference that Yvonne Heathcote knew of the

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27 (1988) 165 CLR 87.

28 (1961) 104 CLR 1.

presence of the weapons in the car the jury could infer that David Heathcote knew of them.

(c) David Heathcote spoke to his mother at the Caltex roadhouse at Jondaryan about ending the evening "in (the) lock-up".

(d) David Heathcote was himself offended by Matthew Hoghes' insult to his mother. He argued with his sister at Jondaryan and opposed her re-entering the relationship with Matthew Hoghes because of what he had said about his mother. He told Matthew Hoghes that the reason for the beating was that he had called Yvonne Heathcote a "fat slut".

(e) The utility did not stop at the entrance to the property at 16 Males Drive to collect Sarah's possessions. It drove straight into the property. The suggestion that it did not stop because Crothers "intended to make sure all of Sarah's property had been put out" is fanciful. The first step in such an inquiry would be to look at what had been put out, but they did not do that. Moreover in Sarah's absence there was no way of knowing what should have been put out to compare with what had been put out.

(f) At Jondaryan David Heathcote left the company of those who did in fact go to the property to collect Sarah's possessions and joined Crothers and Rogers who went to the property but did not collect them.

[159] As the appellant's submissions recognise there is evidence of events subsequent to the shooting from which an inference of a common unlawful intention, to seriously injure Matthew Hoghes, can be drawn.

[160] The most compelling fact is that all three men, David Heathcote, Crothers and Rogers, did take part in an assault on Matthew Hoghes. David Heathcote did not act unilaterally. The facts have already been rehearsed. The three men acted in concert, having driven together to the property, and having ignored Sarah's goods. Crothers and Rogers were parties to the assault. The fact that Rogers took a set of handcuffs with him to the house is strong evidence that he knew of a plan which involved restraining a victim.

[161] The immediate antecedent to the assault was the homicide of John Hoghes. Despite that horrific event no compassion was shown to the dying man and no attempt made to summon assistance for him. Instead the three men went straight into the house and began the assault. This indicates the existence of a strong determination to carry out a pre-existing common intention. They were not deterred, even by a violent death.

[162] The evidence was more than sufficient to justify an inference, beyond reasonable doubt, that they had gone to the property to injure Matthew Hoghes seriously.

[163] The argument that the evidence did not support an inference that the intention was to injure Matthew Hoghes seriously has been considered in the discussion of the appeal by Yvonne Heathcote. For the reasons given in that appeal this submission should be rejected.

[164] To the extent that the appellant's point that the shooting changed the "dynamic", so that it is not safe to infer from what happened afterward what was intended before, has substance, it works against the appellant. What is remarkable about the events is the complete lack of concern for the deceased. The beating of Matthew Hoghes was administered while his father lay dying outside the house. The shooting death of John Hoghes cannot realistically be regarded as a cause of the assault upon his son. The obvious conclusion is that the assault was the reason for the presence of the three men at the house and that their intention to administer a severe beating to Matthew Hoghes was not affected by John Hoghes' attempt to prevent it and the violent means by which his attempt ended.

[165] The events which followed the beating of Matthew Hoghes strengthens the inference that David Heathcote, Crothers and Rogers were acting together, in accordance with a pre-existing common intention, and that the assault on Matthew Hoghes was not some frolic of David Heathcote's own in which Crothers and Rogers spontaneously joined. Having conducted the beating in the circumstances described, the three men then turned their attention to the disposal of the deceased's body and the concealment of evidence that he had been shot. David Heathcote did not withdraw from the others. He did not react to the shooting by calling for help. He remained with Crothers and Rogers and joined in removing witnesses from, and concealing evidence of, the homicide.

[166] David Heathcote's attempts to make contact with his mother and their joint attempt to evade police after they met at the Chinchilla weir is also some indication of a common intention between mother and son with respect to the events at 16 Males Drive. The evidence earlier rehearsed of events preceding and immediately following the arrival of the three men at the property shows what the intention was.

[167] The final point, that a killing in circumstances which made it murder was not a probable consequence of the prosecution of the common unlawful intention should also be rejected for the reasons given in dealing with the same point in Yvonne Heathcote's appeal. Indeed the case for concluding that death following an act intended to cause grievous bodily harm was an offence of such a nature as to be a probable consequence of the common intention is stronger in the case of this appellant.

[168] The reactions of David Heathcote, Crothers and Rogers to the shooting death which is said to be an improbable consequence of prosecuting their common intention is some indication of whether or not it had that character. In concluding that the shooting death was a probable consequence, or at least was an offence of such a nature as to be a probable consequence, the jury would have been assisted by the lack of remonstration from David Heathcote about the shooting as well as by the fact that he destroyed the telephone rather than calling an ambulance and joined with Crothers and Rogers in attempting to remove all trace of what had happened. The three men did not act as though the death was unconnected with their common purpose of assaulting Matthew Hoghes which took them to his house in the first place.

[169] The test of probability is an objective one. It does not depend upon what an accused subjectively foresaw or anticipated. Nevertheless, the fact that an accused did not at once disassociate himself from the criminal enterprise, and reacted matter of factly to a consequence of executing an intention in common with others so as to suggest that the consequence was not unexpected is relevant to a determination of whether it was probable.

[170] There is a further consideration which is David Heathcote's flight, having abandoned the deceased's car with the body still in the boot. He left the car, trekked cross country before getting a lift to Tara where he hid with a friend until he contacted his mother and made arrangements to meet her and be driven home.

[171] The trial judge gave appropriate directions as to when flight may be regarded as an implied admission of guilt. The jury could regard his conduct as an admission that he had been complicit in the unlawful killing of John Hoghes.

[172] It is true, as the appellant emphasises, that there was evidence adverse to the finding of common intention involving David Heathcote. The jury could have accepted evidence that David Heathcote travelled with his mother, and then with Crothers and Rogers, for the innocent purpose of collecting his sister's belongings and that he was ignorant of the presence of weapons in his mother's car, the shotgun in the utility, or of a common intention to assault Matthew Hoghes. The existence of that evidence does not mean the jury could not accept the other evidence which did support the inference of the common intention the Crown alleged.

[173] The question for an appellate court is whether the evidence was sufficient to allow the jury safely to infer the existence of the intention alleged and the requisite degree of connection between the prosecution of that purpose and the offence, the murder, charged.

[174] The evidence rehearsed in this appeal, and that of Yvonne Heathcote, shows that it was.

**Ground of Appeal 4: The trial judge's summing up on section 8**

[175] Ground 4, that the trial judge erred in directing the jury to ignore the fact that the murder alleged involved the use of a gun, is in fact a collection of separate complaints about the summing-up with respect to s 8.

[176] The trial judge's directions followed the course described in the previous appeal. Her Honour explained the operation of the section and then dealt separately with its application to the cases of the three accused, Yvonne Heathcote, David Heathcote and Rogers.

[177] In the passage complained of her Honour said:

> "Before you could bring in a verdict of murder based on section 8, you would have to be satisfied beyond reasonable doubt that it was objectively likely that in carrying out the plan to seriously injure Matthew, John … Hoghes would be killed by an act or acts done with intent to kill or cause grievous bodily harm. You would not need to be satisfied that it was objectively likely that he would be murdered by the use of a gun."

[178] The appellant's first complaint is that because the deceased was not the subject of the alleged common intention, which was to be prosecuted in circumstances where it was unlikely there would be a significant number of bystanders who might be hurt in the prosecution of the unlawful purpose, the trial judge ought to have instructed the jury:

> "… about the need to consider probabilities in light of the particular circumstance that the alleged victim of the offence … was someone other than the person … the subject of the common purpose."

[179] It is true that no such instruction was given. No complaint was made by counsel at the trial about what is now said to have been an omission. No redirection on the point was sought.

[180] The complaint must, however, now be dealt with. The answer to it is that had the trial judge directed the jury about the particular circumstances of the case which led to the death of John Hoghes, rather than of his son who was the subject of the common purpose, the additional summing-up would have served to inform the jury of facts which pointed to murder as being a probable consequence of the prosecution of the common unlawful purpose.

[181] The circumstances were identified in Yvonne Heathcote's appeal. They were, in brief, that Matthew Hoghes had been warned of the impending attack upon him. Calls were made from Jondaryan by Yvonne Heathcote and Sarah Heathcote to 16 Males Drive as late as 7.00 pm. John Hoghes lived nearby and was a large man and therefore one who might seek to stand between his sons, one of whom was only 16, and would-be assailants. If the common unlawful purpose was to be carried out in the event that John Hoghes came to his sons' defence he would have to be rendered powerless by such force as was necessary to achieve that end.

[182] These circumstances would serve to establish the connection between the alleged common unlawful purpose and the offence charged, murder. Their omission from the summing-up can only have been of benefit to the appellant.

[183] The second complaint is that the trial judge failed to instruct the jury that they must be satisfied about the existence of the common intention before considering the question whether murder was an offence of such a nature as to be a probable consequence of its prosecution. It is said that the trial judge "should have provided the jury with more assistance (in) the task of determining whether the evidence disclosed a common intention on the part of the appellant and, if so, what that common intention was." The submission was amplified in oral argument. It was said that the summing-up failed to make it clear that the jury had to make a finding with respect to whatever common unlawful purpose it found to exist, and then decide whether murder was an offence of such a nature as to be a probable consequence of the prosecution of that purpose. No assistance, it was said, was given to the jury to make a finding with regard to the nature of the common intention and then determine whether the particular common unlawful purpose they found to have existed made murder an offence of a kind as to be a probable consequence. The jury, the submission continued, had to be directed that it had to answer the question what the particular plan consisted of, who was a party to it and when it was made.

[184] The submission should not be accepted for two reasons. The first is the observation made by Hayne J in *Keenan* (at 424):

> "But it is necessary to bear steadily in mind that formation of the common intention … may not have been accompanied by any consideration … of what was to be done, how it was to be done, and who was to do what to bring about the intended purpose. In such cases there will be no direct evidence that the parties to the common intention adverted to the possibility that an offence of the nature of the offence that was committed would be committed; there will be no evidence that the parties to the common intention were aware that commission of the crime that was committed was a probable consequence."

[185] The second reason is that the case was put squarely to the jury on the basis that unless it was satisfied that David Heathcote in common with Yvonne Heathcote and/or Rogers intended to injure Matthew Hoghes seriously they should acquit the appellant of murder. The only common unlawful intention which the Crown asked the jury to consider was that of seriously injuring Matthew Hoghes. If that were not proved to the jury's requisite satisfaction then s 8 had no operation and David Heathcote could not have been convicted of murder. It was not necessary, and it would have been distracting, to direct the jury that they should consider some different, or more detailed, common intention.

[186] The trial judge said:

> "Taking each of these three defendants in turn, you have to consider whether the prosecution has satisfied you beyond reasonable doubt on evidence admissible against the particular defendant whose case you are considering: (a) that there was common intention to seriously injure Matthew; (b) that the murder of Hoghes was committed in carrying out that purpose and; (c) that the offence was of such a nature that its commission was a probable consequence of carrying out that purpose.
>
> The law speaks of a common intention to prosecute an unlawful purpose. So you would have to be satisfied that the particular defendant, and at least one other person, had the same intention, namely to seriously injure Matthew.
>
> Whether something was a probable consequence depends largely on what the common intention was."

[187] Having given some further general directions on s 8 and addressed the jury particularly with reference to the case against Yvonne Heathcote pursuant to that section the trial judge turned to the Crown case against David Heathcote. She said:

> "You have to consider whether you are satisfied beyond reasonable doubt that David Heathcote was a party to a plan to seriously injure Matthew"

and then briefly summarised the cases, prosecution and defence, against David Heathcote.

[188] After about a day's deliberation the jury sought a redirection with respect to the s 8 case against David Heathcote. The trial judge repeated what she had said earlier and asked that if at the conclusion of the direction "there (was) any particular aspect that is troubling you … tell me and I will endeavour to answer it." In the course of the further summing-up her Honour said:

> "Now, the crux of the section 8 case is that there was a plan, that the particular defendant you are considering was a party to that plan, and that the offence which was committed, and in this case we are considering murder, was a likely consequence of carrying out that plan. So, you must consider whether David was party to a plan and, if he was, what the plan was. There is a critical distinction between him having his own agenda to go and beat up Matthew on the one hand, and on the other his being party to a plan to which others were party, to go and beat him up. It is only if you are satisfied there was a plan, that he was a party to it, and that is what the plan was, that you then go on to consider whether it was a likely consequence that murder would be committed."

[189] Her Honour then turned to summarise the points made by the appellant's counsel on his behalf. This part of the direction concluded:

> "Mr Bailey put it to you that David Heathcote was not a party to a plan to seriously injure Matthew. So, before you could find him guilty of murder on this basis, one of the matters of which you would have to be satisfied beyond reasonable doubt is that he was a party to a plan and the plan was to seriously injure Matthew."

[190] The next day the jury again then asked for redirections with respect to s 8. In particular it asked:

> "… how critical is it to a finding of guilt of an offence by section 8 that there be a common intention to prosecute an unlawful purpose?"

The trial judge gave further directions and the jury indicated that she had answered the question. Nevertheless the trial judge went on:

> "I will give you a little more information … . It is essential. In this case you would have to be satisfied that there was a common intention to seriously injure Matthew.
>
> I will remind you of the three things I said you would have to be satisfied of beyond reasonable doubt on evidence admissible against the particular defendant whose case you are considering. A, that there was a common intention to seriously injure Matthew; B, that the murder of Hoghes was committed in carrying out that purpose; C, that the offence was of such a nature that its commission was a probable consequence of carrying out that purpose.
>
> Can I illustrate this by reference to the case against David Heathcote? … one possibility … that you have to consider, is whether David Heathcote had his own agenda to beat up Matthew. So, unless you are satisfied beyond reasonable doubt that at least one of the other defendants who is alleged to have shared that intention to seriously injure Matthew did, in fact, share it, you couldn't find David Heathcote guilty of murder on the basis of section 8 … ."

[191] It is therefore abundantly clear that the jury did not have to turn its mind to whether some alternative common unlawful intention was established by the evidence, and if so, what it was. The case proceeded on the express basis that unless the Crown proved the particular intention particularised the appellant should be acquitted.

[192] It was not necessary that the jury be instructed to consider the details of the plan, or common intention. It was not necessary for them to determine who was to strike Matthew with what weapon and what were the intended separate roles of any of the accused who shared the intention. The reason was that given by Hayne J. Moreover a common intention expressed in very similar terms to that particularised in this case was found sufficient in *Keenan*. No doubt the jury would have inferred that the common intention, at least as between David Heathcote and his mother, extended to a metal implement used as a club, that being the thing taken with them from Gatton and used in the assault.

[193] The third complaint is that the trial judge erred in directing the jury that they need not "be satisfied that it was objectively likely that (the deceased) would be murdered by the use of a gun" because "Where the actual victim is someone other than the intended victim of the common purpose, the issues that go to objective probability

are much extended." The point sought to be made is that where the victim is a bystander or rescuer, and the issue is whether his death is a consequence of the execution of the unlawful purpose so as to come within the ambit of s 8, the offence in question will not be of the requisite nature unless committed by the means intended to be used in carrying out the unlawful purpose, in this case, a metal club.

[194] The submission is contrary to the decision and reasoning in *Keenan*. It is a not a relevant distinction that the victim in *Keenan* was the object of the common unlawful intention and John Hoghes was not. The question in both cases was whether the offence charged, here the murder, was sufficiently connected with the prosecution of the common purpose so that a jury could be satisfied that it was an offence of such a nature as to be a probable consequence of carrying out the purpose. It was not essential to that determination that homicide by shooting as opposed to some other means be a probable consequence. Hayne J insisted that:

> "… s 8 is not to be read as requiring that the offence that was in fact committed (the shooting) was a probable consequence of the prosecution of the unlawful purpose. To do so would give no work to the expression 'of such a nature'."

[195] Ground 4 has not been made out.

**The trial miscarried because of an accumulation of irregularities**

[196] As we mentioned David Heathcote abandoned ground 2 of his appeal, that he should have been tried separately from Crothers and the other appellants. He did not argue the matters which Yvonne Heathcote advanced in support of ground 5 of her appeal.

[197] But he contended that, in determining the question of the reasonableness of the jury's verdict under s 668E(1) *Criminal Code*, this Court should consider the prejudice caused to him by the following matters: Crothers' self-representation raised in the application for a separate trial by Rogers' counsel on the fourth day of trial;[29] little John Hoghes' evidence that Crothers had told him that Crothers did not want to go back to jail and the resulting application for a mistrial; a juror had an RACQ map of south-east Queensland in the jury room, on which a number of towns which featured in the trial had been highlighted and which was not an exhibit; and Crothers' and Rogers' self representation efforts.

[198] For the reasons given with respect to Yvonne Heathcote's appeal ground 5, Rogers' appeal grounds (a) and (b), Crothers' appeal ground 2, and Rogers' and Crothers' applications to adduce further evidence, the points are without substance and do not establish, or assist to establish, that his conviction of murder was unreasonable.

[199] As we explain in dealing with Crothers' appeal, there is no substance in the criticisms of the trial judge's direction with respect to self-defence. Nor was the evidence such that the jury must have entertained a reasonable doubt in relation to the application of s 271 and/or s 272 of the Code.

[200] David Heathcote has not made out any of the grounds of appeal. His appeal should therefore be dismissed.

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29 Appeal Book 260 ff.

**MICHAEL CROTHERS – APPEAL NO 274/09**

[201] Crothers has appealed only against his conviction for murder.

[202] The prosecution case against him was straight forward. The particulars allege that he was guilty by reason of s 7(1)(a) of the Code on the basis that he:

> "… shot Frank John Hoghes causing his death intending to cause the death or some grievous bodily harm to John Frank Hoghes."

[203] Crothers sought and was given leave to amend his notice of appeal so that the grounds now read:

> "(1) The verdict is unreasonable and cannot be supported having regard to the weight of the evidence;
>
> (2) There was a miscarriage of justice as a result of the appellant's inability to competently represent himself;
>
> (3) There was a miscarriage of justice as a result of a misdirection to the jury in relation to s 271(1) of the *Queensland Criminal Code*; *Self Defence* and the trial judge's summing up;
>
> (4) There was a miscarriage of justice as a result of an accumulation of circumstances particularised as:
>
> (a) The jury having engaged in its own independent investigation;
>
> (b) The jury was informed that the appellant had previously been imprisoned;
>
> (c) The prosecution does not appear to have complied with its disclosure obligations pursuant to s 590AH(2)(c)(iii) of the *Queensland Criminal Code*;
>
> (d) An out of court police photo board description of the appellant as 'No. 12 is the animal with the gun' was led before the jury; and
>
> (e) The constant exchanges before the jury between the appellant and the judge, legal argument, objections, adjournments and other matters would have resulted in a prejudice against the appellant."

[204] The focus of Crothers' defence was whether the prosecution had negated self-defence. That was highly relevant to the cases of each of the other appellants also because, if Crothers was not guilty of murder, they could not have been found guilty as parties to that offence. His argument on the appeal was that the jury's verdict was unreasonable or unsafe. His other grounds of appeal, and the grounds argued by other appellants, included that there had been misdirections about the self-defence provisions of the Code and a miscarriage of justice because of a variety of circumstances, including his inability to represent himself competently and other matters to do with the conduct of the trial with which we shall deal later. We shall deal first with the arguments about self-defence.

**Grounds of Appeal 1 and 3: Self-defence**

[205] The relevant law for the purposes of the self-defence sections of the Code was expressed by the President in *R v Wilmot*:[30]

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[30] [2006] QCA 91; (2006) 165 A Crim R 14, 16-17 at [3]-[5] omitting the footnotes. See also Jerrard JA, 24-26 at [32]-[41].

"[3] The *Criminal Code* 1899 (Qld) relevantly provides:

'**271 Self-defence against unprovoked assault**

(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

**272 Self-defence against provoked assault**

(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

(2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first began the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.'

[4] In *Gray* McPherson JA agreed with the approach of Gibbs J in *Reg v Muratovic* (approved in *Marwey v The Queen)*: s 271(2) requires that if the jury consider the nature of the assault on the defendant was such as to cause reasonable apprehension of death or grievous bodily harm and the defendant believed, on reasonable grounds, that they could not otherwise defend themselves from death or grievous bodily harm, or if the jury are left in doubt on those matters, the defendant must be acquitted; s 271(2) does not require the defendant's act causing death or grievous bodily harm to be objectively necessary.

[5] In *Vidler* this Court considered:

> 'The effect of *Gray* is that the critical point for the jury to consider is whether the defender's actual state of belief, based on reasonable grounds, was that the defender could not preserve himself otherwise than by doing what he did. If that is made clear to the jury, *Gray* considers that further directions on the question whether the force was necessary for defence are otiose, and worse still, positively erroneous if they are seen as creating a further requirement of objective necessity.'
>
> Whilst recognizing that *Allwood* and *Julian* demonstrate that other views may be reasonably open, until the matter is reconsidered the ratio in *Gray* is binding on this Court so that s 271(2) requires that the defender's belief set out above must be on reasonable grounds but does not require that force used by the defender be reasonably necessary."

[206] The principal task for the prosecution, therefore, was to exclude the conclusion that Crothers had been assaulted with such violence by the deceased as to cause him to have a reasonable apprehension of death or grievous bodily harm in response to that assault. Her Honour summed up in similar terms on this issue in respect of both s 271(2) and s 272(1) of the Code.

[207] It seems clear on these facts, with Mr Hoghes confronted as soon as he exited his car by a number of men, one armed with a shotgun, apparently intent on attacking his sons in the house where they lived near him, that s 272(1) was likely to be more relevant to the jury's deliberations than s 271. Her Honour did not sum up on s 272(2) which can only have benefited the appellants. Her summing up attracted some criticism to which we shall return.

### (a) The evidence relevant to self-defence

[208] The details of the evidence of Matthew Hoghes and little John Hoghes of the events leading up to the shooting of their father need to be considered in more detail than we have set out so far as it is this evidence that the prosecution relied on in particular to negate self-defence. The appellants submitted that it was unsafe to exclude self-defence on the basis of that evidence, largely because of the evidence of the younger John Hoghes from which it could be concluded that his father advanced quickly on Crothers after he came out of his car.

[209] Matthew Hoghes' evidence was interrupted several times because of distress from which he was suffering when he gave it. It included the following passage partly recapitulating some earlier evidence:[31]

> "Your dad is coming up the driveway. You see Michael Crothers get out of the passenger side of the car. He's holding a shotgun. When he gets out of the passenger side of the car holding a shotgun, how is he holding the shotgun?--
>
> Like this.
>
> Okay, for the Court record, you are indicating the shotgun was held across his body around chest to stomach height?-- Yeah.

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[31] Appeal Book 138, line 41 to Appeal Book 139, line 1.

> Okay. Which way was the shotgun pointing?-- Towards the road.
>
> Towards the?-- Road.
>
> Towards the road?-- Which would have been making him facing down towards the road and Dad pulled up, like, just behind him a bit. Hopped out and then, yeah, Mick was saying, 'Get back in the car.' Then Dad's like, 'You want to talk to me or something?' Then bang."

[210] He went on to describe how his father was carrying a metal bar half a metre long when he stepped out of his car. The distance between his father's vehicle and Crothers' was 10 to 20 metres. He said his father could have been holding the bar above his shoulder or down beside him. He went on to say that he thought his father may have had the bar resting over his right shoulder, holding it by one end. His evidence continued:[32]

> "Now, when your dad first got out of the car, did he say anything?-- I think Dad got out of the car and said, 'I want to speak to you.'
>
> What tone of voice did he use?-- Just his speaking voice.
>
> Okay. At that time where was Michael Crothers?—Standing out the passenger side of the door of the ute.
>
> You told us he had a shotgun in his hands. How was he holding the shotgun at that time when your dad got out of the car?-- Like, into his shoulder and out a bit.
>
> When you talk about "into his shoulder", you are holding the rifle across your body at about chest height?-- Yeah.
>
> You have - which part of the gun is into the right-hand shoulder?-- It would be the stock.
>
> You have the left hand on-----?-- On the rest of it.
>
> -----on the barrel?-- Yes.
>
> Well, the rest of the gun?-- Yeah.
>
> In which direction was the gun pointed at that time?-- Towards my dad."

[211] He said his father moved about halfway towards Crothers. Crothers may have taken at least one step forward and told his father to get back into the car. His father said he did not have to and words to the effect that it was his property and "these are my boys". Crothers said nothing back to his father and shot him when he was about two metres away and the bar was still on his shoulder. In cross-examination he said that his father may have lifted the bar a little bit when he and Crothers were close but said that he could not really remember.[33] Otherwise the cross-examination did not result in a material change in his evidence on this topic although he was referred to some previous statements made by him at the committal hearing suggesting that he had said previously that his father had raised the bar as he approached Crothers. Nor could he, in the earlier versions put to him, recall the content of the conversation between his father and Crothers.

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32 Appeal Book 154, line 44 to Appeal Book 155, line 11.

33 Appeal Book 223, lines 50-52.

[212] Little John Hoghes' evidence was generally similar but suggested a more aggressive role by his father. He said his father was holding the bar extended towards the ground when he first got out of his car. Crothers had told his father to get back in the car, holding the shotgun with his right hand on the trigger and his left hand on the barrel pointing it at his father's chest. Then, as his father stepped towards Crothers, the deceased said "Don't point that shit at me." He said his father was leaping towards Crothers pretty quickly, lifting up the bar to about the level of his head and up and behind it. He was shot when about a metre and a half to two metres away from Crothers. At that time he had the bar raised vertically behind his head and moved it forward as if he was going to hit Crothers with "a bit of a tap".[34] He denied the suggestion that Crothers told his father to "drop the weapon" three times.

[213] The submission for Crothers was that other evidence, including Crothers' own statements to police and evidence from Michelle Wood, confirmed that he did not have an intention to kill until the deceased arrived at the scene and, on his version, threatened him. The argument was that that evidence negated the view that Crothers, Rogers and David Heathcote were the sole aggressors. The evidence included reported statements by Crothers to Matthew Hoghes that all he was going to do was handcuff and bash him, humiliate him and teach him a lesson. His evidence to the arresting police officer was also that he had told the deceased, among other things, to "drop the steel bar and we'll talk. He lifted it up and he said 'you're fucked'. And I just lost it." He had also told the police that the boys, meaning the Hoghes boys, had come out of the bushes at that time, one waving a claw hammer and the other a piece of wood. That was inconsistent with their evidence. He told a number of other people that he was involved in the death of the deceased but that he did it in self-defence.

**(b) The trial judge's directions on self-defence**

[214] Her Honour's summing up on the facts related to these issues was unexceptional and even-handed. She reminded the jury that the onus lay on the prosecution to exclude self-defence beyond a reasonable doubt, summarised the evidence of Crothers' interview with police and versions he gave to others in which he claimed he acted in self-defence as well as the versions given by Matthew and John Hoghes. She also pointed out that Crothers' statements to others referred to the father having a knife as well as a gun, something not referred to by Matthew and John Hoghes, although a police officer found a metal pole and a knife in Crothers' utility.

[215] The main passage of her Honour's summing up on this issue was as follows:

> "The criminal law doesn't only punish, it protects as well. It doesn't punish someone for reasonably defending himself, as I will explain it to you. The prosecution may exclude self-defence by satisfying you beyond reasonable doubt either that Crothers was not acting in self-defence or that his conduct went beyond what the law permits by way of self-defence.
>
> Generally, the level of violence which may be justified as self-defence depends very much on the level of danger created by the attacker and the reasonableness of the defendant's response. If the violence of the attacker is such that the defendant reasonably fears

[34] Appeal Book 296, line 16.

for his own life or safety, then the level of violence justifiable as self-defence will be greater than it would otherwise be.

The law defines circumstances in which a person who is assaulted by another may use force in self-defence. In this context a threat of violence can be an assault if it is accompanied by some bodily act or gesture and an actual or apparent ability to implement the threat immediately. It has to be a threat of imminent danger. Past threats cannot be a foundation for self-defence, although they may be relevant to the evaluation of a present threat.

You may be satisfied that Crothers provoked an assault by Mr Hoghes by presenting the gun at his sons' home as Hoghes approached. I note that the Prosecutor has not suggested that at that point Crothers intended to kill Hoghes or to do him grievous bodily harm. Indeed, there is no evidence on which you could find he had the intent at that point. If Hoghes advanced towards Crothers raising a metal bar, or if he advanced towards Crothers with a metal bar and a knife, his conduct could constitute a threat of this type. In other words, Hoghes' conduct could, itself, amount to an assault.

If the Crown has not excluded the possibility of that scenario beyond reasonable doubt then there are four matters you have to consider. *Did Crothers fear for his own life or that he would suffer grievous bodily harm? If he did, was that fear a reasonable one in all the circumstances? Did Crothers believe it was necessary to shoot Hoghes to preserve himself from death or grievous bodily harm? If he did, were there reasonable grounds for that belief?*

It is if, and only if, the prosecution satisfies you beyond reasonable doubt that at least one of these questions must be answered "no", that it can succeed in excluding self-defence.

*The first question relates to Crothers' actual state of mind. He told police that the bar 'fucking terrified' him. Robert Jarvis overheard him tell Karen Ryan that he was scared by it. It is a matter for you, but you could be left thinking there is a reasonable possibility that he was in fear for his life, or at least fear of grievous bodily harm.*

*If you think there is at least a reasonable possibility that he was in such fear, then move on to the next question, the reasonableness of the fear.*

*This involves an objective assessment. To exclude self-defence, the prosecution has to persuade you beyond reasonable doubt that an ordinary, reasonable person in Crothers' position would not have held such a fear. Again, it is a matter for you.*

*If you think there is at least a reasonable possibility that the fear was reasonable in this sense, then have you to consider whether the prosecution has satisfied you, one, that Crothers did not believe it was necessary to shoot Hoghes to preserve himself from death or grievous bodily harm and, two, that even if he did hold that belief, there were no reasonable grounds for doing so.*

*Again, the first question goes to Crothers' actual state of mind and the second involves an objective assessment.*

> Remember, in the stress of the moment a person defending himself cannot be expected to make accurate or sophisticated judgments about how far it may be necessary to go. You may think Crothers' response was intuitive, not grossly out of proportion to the danger that confronted him, and that he may have done what he did because he believed on reasonable grounds it was necessary to save himself.
>
> In considering these questions take account of the physical stature of Hoghes, 6 foot 1, 108 kgs.
>
> …
>
> You can take account of the nature of the relationship between the Hoghes and Heathcote families, Crothers' prior association with each family, that Crothers had heard of threats by John Frank Hoghes to Yvonne, and what Crothers knew of John Frank Hoghes' reputation for violence.
>
> The law also deals with the situation of a person who is unlawfully assaulted and who has not provoked the assault. *If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm and the person using force by way of defence believes on reasonable grounds he cannot otherwise preserve himself from death or grievous bodily harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though it may cause death or grievous bodily harm.* So, if Hoghes started the incident and his assault on Crothers was unprovoked, then Crothers is not criminally responsible for using any such force as was necessary for self-preservation, even though it might cause death or grievous bodily harm.
>
> The same four matters have to be considered in this scenario also, and again the prosecution can succeed in excluding self-defence only if it satisfies you beyond reasonable doubt that at least one of the questions must be answered 'no'. (Emphasis added.)"

[216] The first passage emphasised in this extract from her Honour's summing up sets out the four questions or issues the jury needed to consider both in respect of the defences available under s 271(2) and s 272(1) of the Code. She dealt with them first in respect of s 272(1) and then referred back to them when summing up in respect of s 271(2).

### (c) Criticism of the trial judge's directions on self-defence

[217] There was some criticism by the appellants of the following passage of the summing up extracted from the second passage emphasised above:[35]

> "If you think there is at least a reasonable possibility that he was in such fear, then move on to the next question, the reasonableness of the fear.
>
> This involves an objective assessment. To exclude self-defence, the prosecution has to persuade you beyond reasonable doubt that an *ordinary*, reasonable person in Crothers' position would not have held such a fear. Again, it is a matter for you." (Emphasis added.)

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35 Appeal Book 1473, lines 15-30.

[218] The criticism was that the use of the word "ordinary" merged the subjective and objective standards of reasonableness relevant to the defence of self-defence in respect of s 271 and s 272. Mr Keim SC, acting for David Heathcote, argued that the first question under either section is whether there is a subjective belief and then the second question is whether that belief is held on reasonable grounds. The question as to whether the belief is held on reasonable grounds, he submitted, was different from the question whether someone else would have or could have held that belief. That is, he submitted, another person in the same circumstances may have reacted completely differently. He submitted her Honour should have identified those parts of the evidence which may have constituted reasonable grounds for the belief and not have raised the issue whether an ordinary person would have had that belief.

[219] Her Honour's four questions for the jury dealt with the issues in precisely the terms submitted, however, and immediately after the passage to which we have referred she also put the test to the jury in those terms when she said they should:

> "… consider whether the prosecution has satisfied you, one, that Crothers did not believe it was necessary to shoot Hoghes to preserve himself from death or grievous bodily harm and, two, that even if he did hold that belief, there were no reasonable grounds for doing so.
>
> Again, the first question goes to Crothers' actual state of mind and the second involves an objective assessment."

[220] In our view the isolated use of the word "ordinary" in the context of the general directions given by her Honour was not a material misdirection. Nor was there any request for a redirection by defence or prosecution counsel.

[221] Another criticism of her Honour's summing up on s 271(2) focussed on the words in the third passage emphasised in the larger extract from her summing up and was that her Honour had not said that the test for self-defence was subjective and had in fact suggested it was objective.

[222] The respondent's submission was that the earlier passage dealing with s 272(1), self-defence against provoked assault, that has been emphasised made it clear that the subjective and objective tests needed to be addressed in the four questions her Honour had articulated for the jury and that the passage complained of was referenced back to those questions so that the direction did not give rise to an error. In our view that submission is correct. The language her Honour used also reflected the language of s 271(2) and s 272(1) in their references to the person's belief and the questions she had posed for the jury earlier made it clear that there was a subjective element to the test in respect of the person's belief.

[223] There was also some criticism of the summing up by Mr Keim on the basis that the reference to the possibility that the assault may have been unprovoked for the purposes of the direction under s 271 may have prejudiced the jury because the meaning of the word "provoked" was not explained by reference to the definition of "provocation" in s 268(1).[36] His reliance on the decision in *R v Dean*[37] in that context does not seem to us to be relevant as that decision dealt with a case where

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[36] See *R v Dean* [2009] QCA 309.

[37] [2009] QCA 309.

there was no direction under s 272 and the concern was that "in the absence of guidance to the jury about the meaning of 'provoked' there was a miscarriage of justice because of a risk that the jury applied some common understanding of the term 'provoked' which might have been wider than or otherwise differed from the legal meaning of 'provocation' in s 268."[38]

[224] Here her Honour's factual direction about provocation was that the jury may be satisfied that Crothers provoked an assault by Mr Hoghes by presenting the gun at his sons' home as Mr Hoghes approached. That evidence was uncontroversial and seems to us to be an accurate basis on which to put the prosecution case that any assault by Mr Hoghes was provoked for the purposes of summing up to the jury on s 272(1). No redirection was requested. We do not believe that the failure to sum up to the jury by reference to the precise meaning of provocation under s 268 had the potential to prejudice the jury in their consideration of the elements of self-defence in this case.

**(d) The jury's verdict was unsafe in concluding self-defence was negated by the prosecution**

[225] Apart from those arguments about the form of the summing up, the main issue on this aspect of the appeal was whether the jury's verdict was unsafe in concluding that self-defence had been negated by the prosecution. The appellants' arguments were that the evidence to which we have referred should lead to the conclusion that the prosecution could not exclude beyond reasonable doubt Crothers' perception that he was about to be seriously injured by the deceased and, therefore, that he reasonably believed that he had no choice but to fire the shotgun. The submissions were that the jury's rejection of self-defence on his part was unreasonable and could not be supported having regard to the weight of the evidence.

[226] The respondent's submissions drew attention to the fact that Crothers had emerged from his vehicle armed with a loaded weapon before a call was made to the deceased and in circumstances where Matthew and little John Hoghes posed no threat to his group's safety. Mr Fuller submitted that the appellants were in control of the situation throughout in circumstances where their actions evidenced an intention to assault Matthew Hoghes.

[227] The respondent also submitted that it was clear that the deceased's intention was to protect his children, that he had armed himself with a bar but was shot at point blank range in the chest. Crothers' actions after the death showed that he made a number of calculated decisions, thinking clearly about what he was doing. Mr Fuller argued that Crothers had provoked the assault by attending at the property that night in the company of two other men and arming himself with a weapon with, at the very least, the intention to menace the two brothers with the weapon on arrival.

[228] His submission was that the prosecution evidence excluded the possibility that Crothers had been assaulted by the deceased with such violence as to cause reasonable apprehension of death or grievous bodily harm in response to his provocation. Crothers was in the company of two other men who had accompanied him for the purpose of assaulting Matthew Hoghes and, Mr Fuller submitted, knew that he could rely upon them to assist if necessary. The consequence was that he

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38 *R v Dean* [2009] QCA 309 at [30].

had a number of reasonable options open to him to avoid a further confrontation with the deceased.

[229] When one thinks about this evidence with the benefit of hindsight a number of options appear possible. There was a car into which Crothers could have retreated. He could have fired a warning shot. He could have moved away from the deceased and have sought help from those accompanying him. It was made clear to the jury, however, that it is not always possible to weigh up these alternatives coolly in the heat of the moment.

[230] The main issue the jury needed to consider was Crothers' subjective intention, whether the prosecution evidence was sufficient to permit the jury to conclude that he did not subjectively believe, on reasonable grounds, that it was necessary for his preservation from death or grievous bodily harm to use force in self-defence (s 272(1)). The alternative expression of that issue under s 271(2), is whether the prosecution had established that he did not believe, on reasonable grounds, that he could not otherwise preserve himself from death or grievous bodily harm. On that issue of subjective intention the jury was entitled to take into account the other possible courses of conduct available to him, his behaviour in helping to plan the proposed assault on Matthew Hoghes, his bringing of the loaded shotgun to the scene and his confronting Mr Hoghes with the weapon when he arrived at the scene and before Mr Hoghes exited from his car, in assessing whether he had such a belief.

[231] It was also open to the jury to conclude on the evidence that there were means reasonably open to Crothers to preserve himself from death or grievous bodily harm other than by shooting the deceased, to adapt the language of s 271(2). If it were relevant to consider the language of s 272(1),[39] it was open to the jury to conclude that the force he used was not reasonably necessary for his preservation from death or grievous bodily harm.

[232] His conduct very arguably betrayed an aggressive intention not produced in reaction to the threatened assault by Mr Hoghes. It seems to us to have been a question for the jury whether the prosecution had established that he did not have the belief necessary to establish self-defence and that the evidence was sufficient to enable them to reach the verdict of guilty. In our view, therefore, it was open to the jury to reach the conclusion that the prosecution had discharged the onus on it of disproving self-defence. Accordingly this ground of appeal fails.

[233] As we mentioned, this conclusion means that ground 4 of Yvonne Heathcote's notice of appeal and part of ground 1 of David Heathcote's appeal, each dealing with self-defence, were not made out.

**Grounds of Appeal 2 and 4: There was a miscarriage of justice because the appellant could not represent himself competently and the trial miscarried because of an accumulation of irregularities**

[234] What we have written disposes of grounds 1 and 3 of Crothers' amended notice of appeal. That leaves for consideration ground 2, that there was a miscarriage of justice because he could not represent himself competently and ground 4, that the trial miscarried because of the accumulation of the identified circumstances.

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39 Cf *R v Wilmott* [2006] QCA 91; (2006) 165 A Crim R 14, 17 at [5].

[235] Crothers also applied to adduce evidence not given at his trial to support those contentions.

**(a) The trial miscarried because of an accumulation of irregularities**

[236] We have dealt with in the previous appeals complaints about the circumstances which, cumulatively, were said to have amounted to a miscarriage of justice. There is no reason to repeat them. For the reasons given earlier the individual complaints do not, separately or taken together, constitute any basis for thinking that there had been a miscarriage of justice. We would point out that Crothers abandoned particular 4(c), the allegation that the prosecution failed to disclose relevant material.

**(b) Miscarriage of justice caused by Crothers' lack of legal representation at trial**

[237] That leaves for consideration Crothers' contention that there was a miscarriage of justice because of his inability to represent himself competently and the manner in which he conducted his defence. His counsel now contends that these matters would have resulted in jury prejudice against Crothers amounting to a miscarriage of justice. These contentions relate to Crothers' grounds of appeal 2 and 4(e). Relevant to these grounds is his application to adduce further evidence.

**(i) Crothers' application to adduce further evidence**

[238] An appellant in a criminal appeal who wishes to rely on new or further evidence has a challenging task, even where it is fresh in the sense discussed in *Gallagher v The Queen*.[40] An appellate court, in determining whether to accept fresh evidence, considers whether there is a significant possibility (or that it is likely) that, in light of all the admissible evidence including the evidence at trial, a jury acting reasonably would have acquitted the appellant. The courts also recognise that there is a residual discretion in exceptional cases to receive on appeal new or further evidence which is not fresh evidence if to refuse to do so would lead to a miscarriage of justice: *Mickelberg v The Queen*;[41] *R v Condren; ex parte Attorney-General*;[42] *R v Young (No 2)*;[43] *R v Daley; ex parte Attorney-General Queensland*;[44] *R v Main*[45] and *R v Katsidis; ex parte Attorney-General Queensland*.[46] In determining that issue in the present case, it is necessary to consider the nature of the evidence, its relationship to the evidence at trial, and the grounds of appeal to which the further evidence is said to be relevant.

[239] Crothers has filed an affidavit in which he describes his troubled and dysfunctional upbringing. He did not attend school regularly and was educated at what were then called "opportunity schools". He left school at age 12. He describes himself as illiterate with a reading age equivalent to a child in grade 3. He grew up in institutions and has received compensation for sexual and physical abuse suffered whilst in youth detention centres in the 1970s.

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40 (1986) 160 CLR 392, 395; [1986] HCA 26.
41 (1989) 167 CLR 259, 273, 292, 301-302; [1989] HCA 35.
42 [1991] 1 Qd R 574, 579; (1991) A Crim R 79.
43 [1969] Qd R 566.
44 [2005] QCA 162.
45 (1995) 105 A Crim R 412, McMurdo P at [16]-[17]; Pincus JA at [22]-[24]; [1999] QCA 148.
46 [2005] QCA 229, at [2]-[4], [11]-[19], and [36].

[240] Crothers has also deposed to his perception as to how he came to be self-represented during his trial for murder and other serious offences. After his arrest on the present charges, he was given a grant of legal aid to defend the charges. He was allocated an in-house lawyer at Legal Aid Queensland ("LAQ"). By early 2009, his relationship with the in-house lawyer had broken down for the following reasons. The lawyer had only limited contact with him in prison between May 2007 and April 2009. The lawyer would not obtain material which Crothers wanted to enable him to prepare for his trial, namely, video footage from a Dalby service station; and Queensland Police Service activity logs and telephone records which Crothers believed would disprove the prosecution witnesses' versions of events. The lawyer refused to apply for further legal aid for Crothers to make a Supreme Court bail application, despite the magistrate's criticism of the Queensland Police Service's tardiness in finalising the brief of evidence for Crothers' committal proceedings. Crothers understood the in-house lawyer was pressuring him to plead guilty to murder. He was happy with the barrister who conducted his committal proceedings but he did not think the in-house lawyer had instructed the barrister adequately. Crothers told LAQ he wanted his grant of legal aid transferred to Douglas Law.

[241] The barrister who appeared for Crothers at committal was unavailable for his trial. The in-house lawyer and a different barrister in private practice visited Crothers in prison. They explained that Crothers' grant of legal aid was on the basis that he would be represented by the in-house lawyer instructing the new barrister. Crothers lost confidence in his in-house lawyer over the ensuing weeks. For these reasons, he terminated the services of both lawyers at the end of July 2009.

[242] A pre-trial hearing took place at Toowoomba on 17 and 18 August 2009. Shortly beforehand, LAQ provided Crothers with a brief of evidence and several boxes of material. He received another box of legal material and further new material from the prosecutor on the morning the trial was to commence. In all he had about 5,000 pages of material and 64 cassette tapes of electronically recorded interviews and other conversations. He was not supplied with any electronic equipment to listen to the cassette tapes in prison. He received assistance from Douglas Law in challenging LAQ's decision not to transfer his grant of legal aid to them, but the challenge was unsuccessful. He then unsuccessfully applied to the Supreme Court for an order directing LAQ to review their decision.

[243] The trial commenced before the jury on 31 August 2009. Crothers did not understand the legal arguments and did not know how to cross-examine witnesses. He was unable to adequately manage the many trial documents. He unsuccessfully asked for an adjournment to get proper legal representation. He continued to receive material such as new witness statements and daily transcripts during the trial. As he was in custody and because of his illiteracy, it was difficult for him to deal with this material.

[244] Crothers produced a copy of an affidavit from a LAQ officer. This affidavit was relied on by LAQ in opposing Crothers' application for directions in the Supreme Court. The LAQ officer obtained LAQ's in-house practice file for Crothers' case which showed the following. After receiving the police brief of evidence, the in-house lawyer in charge of Crothers' case formed the professional opinion that the service station video footage which Crothers wanted LAQ to obtain was not relevant. It concerned events after the shooting of the deceased and matters which were not in dispute. The in-house lawyer did not express any view to Crothers or Crothers' wife as to Crothers' guilt. He did not tell Crothers to plead guilty. On

30 July 2009, the LAQ officer refused Crothers' request to transfer his grant of legal aid to Douglas Law. LAQ policy is to not re-assign a grant of legal aid in criminal matters from an in-house practitioner to a private practitioner if the re-assignment will incur additional costs, absent exceptional circumstances. The LAQ officer noted that the re-assignment of Crothers's case to Douglas Law would incur additional costs. Crothers wanted Douglas Law to represent him and had lost faith in the in-house lawyer assigned to him. But these matters did not give rise to any issues which would prevent LAQ's in-house practice representing Crothers and did not amount to exceptional circumstances warranting the transfer of his grant of legal aid to Douglas Law.

[245] Crothers has also filed affidavit material exhibiting a report from forensic psychologist Prof Ian R Coyle. Professor Coyle described Crothers as functionally illiterate and exhibiting "significant anti-social personality traits, at the very least". He had no formal education and a low tolerance to frustration. He would have been incapable of understanding the myriad issues involved in conducting his own defence at this trial. He would have been unable to understand the directions given to juries of the kind set out in the District and Supreme Court of Queensland Bench Book dealing with s 302(1)(a) *Criminal Code*.

[246] It is significant that none of the new evidence on which Crothers seeks to rely demonstrates or suggests that he was of unsound mind when the offences occurred or that he was not fit to plead to the charges brought against him.

[247] In response to Crothers' material, the respondent has filed an affidavit from the in-house lawyer at LAQ who had conduct of Crothers' case as solicitor from 14 May 2007 until Crothers terminated the retainer. The in-house lawyer engaged an experienced criminal barrister in private practice to appear at Crothers' committal. Crothers was committed for trial on 21 August 2008. That barrister was unavailable to be trial counsel. The in-house lawyer instructed another experienced criminal law barrister to conduct Crothers' trial. The in-house lawyer had a conference with Crothers in prison on 20 March 2009 and made a further appointment for 23 March 2009. As Crothers was hospitalised, the 23 March visit was cancelled. The in-house lawyer booked further legal visits for 1, 2 and 3 April 2009.

[248] On 29 March 2009, the in-house lawyer received a letter from Crothers advising that he did not want the in-house lawyer to represent him. On 1 April 2009, the in-house lawyer attended the prison with Crothers' new barrister. Crothers gave signed, dated and witnessed instructions retaining them both as his legal representatives and confirming that he wished to run self-defence at his trial. On 2, 3 and 7 April, the in-house lawyer attended on Crothers at the prison, read out witness statements to him and obtained his instructions about those statements. On 8 April 2009, the in-house lawyer received advice that Crothers wanted to change his legal representation under his grant of legal aid. LAQ refused that application on 9 April 2009. The in-house lawyer attended on Crothers to inform him of that, but Crothers refused to meet with him. LAQ sent the depositions to Crothers on 8 July 2009 and returned the photographs and other exhibits to the Toowoomba office of the Director of Public Prosecutions.

**(ii) Crothers' contentions**

[249] At the appeal hearing, counsel for Crothers frankly conceded that LAQ offered Crothers competent legal representation and Crothers refused it, electing instead to

appear for himself.[47] But he contended that, once Crothers was self-represented, the adjournment of the trial from 18 August to 31 August gave insufficient time to allow Crothers to properly prepare his complex and lengthy case, particularly with his many difficulties. This was compounded at trial by the disadvantage Crothers experienced in representing himself.

[250] As well as relying on matters raised in the previous grounds of appeal already discussed, he gave further examples of that disadvantage. The witness Thelma Baker saw Matthew Hoghes and little John Hoghes after the deceased had been killed. Matthew made a triple 0 call from Ms Baker's premises in her presence. Instead of cross-examining her about the call, Crothers attempted to cross-examine a witness from Telstra who produced telephone records about the content of the call. The trial judge properly stopped that cross-examination. Nor was Crothers effective in cross-examining Ms Baker about her statement that Matthew Hoghes ran out of the bushes to her house, a statement which was inconsistent with Matthew being seriously injured in the assault on him after his father's shooting. These matters were relevant to the credibility of Matthew and little John Hoghes and to the s 8 case.

[251] Crothers, his counsel submitted, conducted his case in a rambling and incoherent manner, both in his cross-examination of crucial witnesses and in his 15 minute address to the jury after a trial of many weeks. There were periods during the trial when Crothers seemed to be withdrawn and did not actively participate in his trial. It would have been obvious to the jury that an extraordinarily large number of applications for them to leave the court room for legal argument resulted from Crothers' incompetent conduct of his trial. This would inevitably have caused the jury to be prejudiced against him.

[252] By way of example, Crothers' counsel points to the following matters. Crothers tried to cross-examine Matthews Hoghes about the number of triple 0 calls that he made around the time of the killing. After objection from the prosecutor, the judge asked Crothers to "point out to the witness where you are suggesting those calls were made from". Crothers responded: "No, drop it. You know I can't do this, your Honour, I've got a grade 3 education. I'm telling you you got to stop this case, you can't go on."

[253] The trial transcript records that the judge responded by sending the jury out of the court room. In the absence of the jury at this point, Crothers asked for a mistrial. He was angry that the prosecution had given him a CD of a taped interview between police and Bradley Heathcote, but he had no means of playing the CD in his prison cell. He expressed his frustration by breaking the disk in court. The judge made arrangements for a replacement disk to be provided and played in the court room outside regular court hours in Crothers' presence. She also explained to Crothers the correct way to question Matthew Hoghes about the triple 0 phone calls. The following exchange occurred:

> "DEFENDANT CROTHERS: If I had the brains to do that don't you think I would have done that?
>
> HER HONOUR: Well, you can still do it if you want to.
>
> DEFENDANT CROTHERS: No, this is a mistrial and you know it. I want it on record that once again I cannot read, I cannot write, I'm

[47] Appeal Transcript, 22 July 2010, 1- 93.

> being denied the right, even if I sit here with a disk you're giving me files, piles of information today and you're expecting me to act on it. No, it can't be done."

[254] Another example relied on by Crothers' counsel concerned the witness Jane Eugenia Lagosha, who once had a relationship with Crothers. She gave evidence for the prosecution at Crothers' request. She identified Crothers' mobile phone number and her own mobile phone number. The judge invited Crothers to cross-examine her and the following exchange occurred:

> "DEFENDANT CROTHERS: The Crown tells me I can't ask you anything that benefits me.
>
> [PROSECUTOR]: I object to that.
>
> HER HONOUR: Mr Crothers, that is-----
>
> DEFENDANT CROTHERS: That is the truth.
>
> HER HONOUR: -----an inappropriate remark and properly objectionable. You are to ask questions, you are not to make comments.
>
> DEFENDANT CROTHERS: Oh, that's right. I have no further questions."

[255] Crothers' counsel contends that whilst the appellants who were legally represented at trial made sensible evidentiary admissions on uncontroversial matters, Crothers told the judge that he would make no admissions[48] (although at times he seemed to confuse the terms "submissions" and "admissions"[49]).

[256] The jury would also have noted, submitted his counsel, that whilst Crothers' co-defendants pleaded guilty to some of the charges brought against them, Crothers pleaded not guilty to all counts.

[257] Crothers' counsel gives the following example of the jury being inconvenienced by Crothers' incompetence. The prosecution on day 13 of the trial indicated that it would be calling Detective-Sergeant Aaron Walker through whom Crothers' record of interview with police was to be tendered. The judge asked Crothers whether there were matters that needed to be addressed in the absence of the jury. Crothers responded: "I want it as it is." At 4.06 pm, the judge sent the jury out of the court room. Her Honour heard submissions as to which part of Crothers' record of interview should be excluded. The jury did not return to the court room until about 10.16 am the next day.

[258] Crothers' counsel emphasises that Crothers' cross-examination of principal prosecution witnesses was not extensive. For example, his cross-examination of Matthew Hoghes, Michelle Wood and the main investigating police officer, Kevin Goan, each took no more than five minutes. He did not cross-examine little John Hoghes or Thelma Baker at all. He was unable to effectively cross-examine Detective Goan, the senior investigating officer in the trial. The transcript suggests that Crothers wanted to but did not effectively investigate the timing of the three triple 0 calls.

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48 Appeal Book 39-40, 151-153.

49 Appeal Book 147, 153.

[259] Counsel for Crothers emphasises that objection could have been taken to the tendering of some exhibits during the prosecution case, for example, ex 45, the transcript of little John Hoghes' triple 0 phone call.[50] And, as has been noted, Crothers did not make sensible, uncontroversial admissions to avoid the tendering of the photo board containing his photograph endorsed with Michelle Wood's notation "No. 12 is the animal with the gun".

[260] On the 21st day of the trial during the cross-examination of Adam Gelfe, a Telstra officer, Crothers said that he wanted the triple 0 tapes played to the witness. The judge asked the jury to leave the court room so that the matter could be discussed. The following exchange occurred:

> "DEFENDANT CROTHERS: Oh you've got to be kidding.
>
> HER HONOUR: It's all right, Mr Crothers, we're going to sort it out.
>
> DEFENDANT CROTHERS: Here we go hiding it again."

[261] After the matter was discussed in the absence of the jury, the witness and the jury returned. The judge asked Crothers whether he had any questions of Mr Glefe, to which Crothers responded, "You won't let me defend myself. I am not going to bother."

[262] Crothers' counsel contends that the judge's failure to adjourn the trial to allow him to obtain legal representation, and his self-representation at trial, have resulted in a miscarriage of justice. This is even clearer in light of the further evidence sought to be lead in this appeal.

### (iii) Relevant aspects of the conduct of Crothers' trial

[263] To fully and fairly deal with this ground of appeal and Crothers' application to adduce further evidence, it is necessary to set out more details relating to the conduct of the pre-trial hearing and the trial before the jury.

[264] The endorsement sheet attached to the indictment indicates the following. On 21 April 2009, the in-house lawyer from LAQ and the barrister he had instructed were given leave to withdraw as lawyers on the record for Crothers. The following day, Mr Di Carlo of counsel appeared for him. The trial was adjourned to the Toowoomba sittings of the Supreme Court commencing on 17 August 2009.

[265] On 12 May 2009, Crothers was represented by Douglas Law. On 26 May 2009, Mr Di Carlo, instructed by Douglas Law, appeared for him. On 22 July 2009, the matter was mentioned before the trial judge at Brisbane and Crothers was represented by Mr B Stephens of counsel. The judge granted Mr Stephens and Douglas Law the opportunity to make representations to LAQ to have Crothers' legal aid grant transferred to them. They were to advise the judge's associate of the outcome of that application within 48 hours. The trial was adjourned to commence in Toowoomba on 17 August 2009.

[266] On 5 August 2009, the matter was again mentioned in Brisbane before the trial judge. Mr Stephens was given leave to withdraw and Crothers was self-represented.

[267] On 17 and 18 August 2009 in the Toowoomba Supreme Court, the judge dealt with a number of preliminary matters before adjourning the trial to commence with a jury at 10 am on Monday, 31 August 2009 in Brisbane. Crothers remained self-

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[50] Appeal Book 303.

represented at that hearing and throughout the 28 day trial and the subsequent sentencing proceedings. He is now represented by experienced criminal law counsel in this appeal and, ironically, his grant of legal aid has been transferred to Douglas Law, the firm of solicitors he always wanted to represent him.

[268] During the pre-trial hearing on 17 August 2009 in Toowoomba, the judge noted that she was considering adjourning the trial; she told Crothers that LAQ seemed to be prepared to offer him a different lawyer from the in-house lawyer to whom he objected, as well as a barrister. The judge advised him it would be in his interests to take up that offer, if it was still available. Her Honour explained that it would be a very difficult trial and she wanted to ensure it was a fair trial. Crothers responded: "And I will prove it. I will prove my case 100 per cent. I have only one thing to prove, and I will prove it."[51] No doubt that "one thing" was self-defence.

[269] The judge gave Crothers the following instructions to assist him in preparing for the trial:

> "Mr Crothers, the normal course of a criminal trial is that the Crown opens its evidence first. Now, that means it makes a broad statement to the jury of what the evidence is going to be. Then witnesses are called by the Crown one by one. [The] Prosecutor will call witness number 1, and then the defendants, each in turn, will have the opportunity to cross-examine that witness and then [the prosecutor] will have a limited opportunity to ask further questions to clear up anything that's arisen in cross-examination. That's called re-examination.
>
> Now, the usual course of a trial is that all of the Crown witnesses will be dealt with that way. Then there will be the close of the Crown case. [The Prosecutor] will say, in effect, 'That's all the evidence I've got to present.' Now, at that stage it is open to the defendants, one or more of them if they wish, if they so assess the case, to make a submission to the judge in the absence of the jury that the evidence presented by the Crown is such that no jury, properly instructed, could return a verdict of guilty. Now, those applications are sometimes made. Sometimes they succeed. Sometimes they don't. They're not always made. If such an application is not made or if it's made but it's not successful, then each defendant will have the opportunity, if he wishes, to himself or herself give evidence and/or call other evidence. Now, we will - what would normally happen would be the defendants would be given that opportunity in the order in which their names appear on the indictment. Accordingly, you, Mr Crothers, would have that opportunity first. If it happened that you decided, yes, you were going to give evidence or you were going to call other witnesses or you were going to do both, then there would be a similar cycle with respect to each of your witnesses of questioning by you, then cross-examination by the others and a limited right for you to re-examine to clarify anything that had arisen in cross-examination. After you have finished - you have closed your case - then Mr David Heathcote would have a similar opportunity. Then Ms Yvonne Heathcote would have a similar opportunity. Then Mr Rogers would have a similar opportunity.

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[51] Supplementary Appeal Book 46.

Now, when all of that is over, there are then the addresses to the jury. I'm not going to trouble you at this stage with what happens there, particularly when someone is self represented. That's an issue we'll deal with down the track.

The last thing that happens is that the Judge sums up to the jury and then the jury goes out to consider its verdict or verdicts plural when there are a number of defendants and a number of charges because there has to be a verdict as against each defendant on each charge.

Now, sometimes the defence takes the view that it would clarify matters for everyone to know virtually at the outset the principal planks of the defence argument. For example - and this is purely hypothetical - it might be that the defence relies on self defence.

Now, it is a matter for the Judge, after the Prosecutor has opened the case, given that overview of the evidence before the witnesses start, whether to allow the defendants, by their barristers if they have a barrister, or, if not, individually, to make a very short statement to the Court, including the jury, of the principal planks of the defence; not to go into argument, not to try to lead evidence at that stage, but simply to say, 'Well, look, in this case, the principal points of my defence will be', for example, identification, self defence, provocation, whatever.

Now, that's what I'm being asked to consider at the moment: whether I should allow you, if you wish, and the defence barristers, if they wished, to make such a short statement at the conclusion of the opening of the Crown case to clarify matters for everyone. Do you understand what I've been saying?

DEFENDANT CROTHERS: Vaguely.

HER HONOUR: Vaguely. Well, you see, this is another reason why this is going to be very difficult for you to conduct this trial. Now, I think, because the trial is not going to go ahead tomorrow, there shouldn't be a determination of this question at this point. I think it should be determined when the trial is really about to start. The question has been raised in Court now so you know what it is that one or more of defence counsel are considering doing and are asking the Judge whether they can do. All right?

Now, all of this will be recorded in the transcript and you'll get a copy of the transcript of this afternoon, so you can go away and think about it. Okay?

…

PROSECUTOR: Yes. I simply wanted to alert Mr Crothers to that opportunity in case he wanted to prepare an opening statement rather than getting on the first day of the trial and then realising he could have done it if he wanted to.

HER HONOUR: All right. Do you understand, Mr Crothers? Thank you."

[270] The judge explained to Crothers that there was a court bench book which had been put together to assist judges and those conducting cases before judges. The judge ensured he was given a copy. The judge explained to Crothers that he needed to prepare for cross-examining the witness Michelle Wood in a "Basha" enquiry the following day and advised him to read Ms Wood's statements and the relevant material overnight. Whilst earlier that day Crothers had described himself as illiterate, he told the judge he could read a little.

[271] The following day the judge explained to Crothers that the purpose of the "Basha" enquiry was to allow the defence to cross-examine Michelle Wood about the extra evidence contained in her recently provided brief additional statement. Crothers stated that he was content for Rogers' counsel to cross-examine Ms Wood first. He thought it would give him "a bit of a picture of how to conduct… [his] questioning". The "Basha" enquiry ensued without incident.

[272] The judge adjourned the trial to commence in Brisbane on 31 August 2009 before a jury. Her Honour directed that Crothers not be taken from the Toowoomba court house until he had been given a transcript of the day's hearing. She also made plain that she wanted him to have the opportunity, if he wished, to contact LAQ before leaving the court house. The prosecutor invited Crothers to inform him urgently if there was any missing material relevant to the trial. Crothers stated that he would be ready to proceed with the trial on 31 August.

[273] At the commencement of the trial in Brisbane on 31 August, Crothers told the judge he believed he would be represented by Douglas Law. Douglas Law and the name of his in-house lawyer from LAQ were called three times but no lawyers appeared. Crothers responded: "Go on, your Honour, I will be right." He told the judge he wanted to use his challenges to make sure there were Indigenous people on the jury; he wanted it to be "a mixed jury". The judge explained to Crothers that the names of jurors were chosen at random irrespective of their racial background. Her Honour next explained the process of empanelling the jury and asked Crothers whether he understood this process; he responded affirmatively.

[274] After the jury was empanelled, the judge explained to Crothers the procedure that would be followed during the trial in these terms:

> "When the jury comes back into Court, and that will be after lunch, the prosecutor will explain to them the nature of the charges and the prosecution case that's alleged against you. I will then allow you and the barristers for the other defendants, if they wish, to make short opening addresses to the jury. There is no obligation on anyone to do that, and one may choose to do it and the others may choose not to. The purpose is to define the real issues in the case, what is in dispute and what is not, to define the principal issues to be raised by the defence. It is not a time for evidence, it is not a time for argument, it is not a time for a long speech.
>
> After that, the prosecutor will call witnesses and perhaps produce documents or other material to prove the charges. Mr Crothers, you have a right to cross-examine any witness, that is to ask questions which you think may help to weaken the case against you or to enhance your case. They have to be questions, not statements or comments, but you may in asking questions in cross-examination suggest answers to the witness.

If you have in mind contradicting the evidence of a witness, or later suggesting that the witness has been telling lies, you should put your allegations to the witness in the form of questions to give that witness the opportunity to answer your suggestions. If you don't do this, I may comment on the failure in my summing-up or else permit the prosecution to call further evidence later in the trial.

You're entitled to object to any question asked by the prosecutor if it may be objectionable in law. If you wish to object, for example if you contend that the question relates to an irrelevant matter or that it invites hearsay, you should stand up as soon as the question is asked and say, 'I object.' Then I will hear whatever you want to say about that question. I may well do so in the absence of the jury. You should understand, it is not a proper ground of objection that you disagree with the evidence that's being given. You can object only on legal grounds.

If you're in doubt as to your right to object to a question on legal grounds, you can ask clarification from me. You may also wish to object to the receipt into evidence of things tendered by the prosecutor such as documents, photographs, tapes or disks. Again, if you wish me to rule that the material should not be received, you should stand and say, 'I object.' I will then hear any argument to support your objection and again I may do so in the absence of the jury.

…

… After the prosecution has called all the evidence for the prosecution, you may submit that the case should be taken away from the jury on the ground that there's insufficient evidence to justify your being called upon to answer the case. If you don't make such an application, or if you do and the application is unsuccessful, you will then have the opportunity to present any evidence you wish in answer to the prosecution case, because at the end of the prosecution case you will be asked by my associate whether you wish to adduce evidence in your defence, that is whether you wish to give evidence or to call other evidence in your defence. But you may choose to do neither. Alternatively, you may choose to go into the witness box and give evidence, just as the prosecution's witnesses have done, and if you do, you will be liable to be cross-examined by the prosecutor and the barristers for the other defendants.

Now, whether or not you go into the witness box yourself, you may if you wish call witnesses to give evidence. If you do call witnesses, you may not ask questions which directly suggest the answers. If you call witnesses, all of your witnesses will be subject to cross-examination, and at the conclusion of any cross-examination you will have the opportunity to ask them further questions to clarify any matters which have become uncertain, and it will also be open to you if you wish to tender documents or other things which you want to go into evidence.

Depending upon whether you call evidence and whether the other defendants do, I will rule upon the order in which the jury is

> addressed at the end of the day, but I won't trouble you with that now, but there will be an opportunity in which you can present arguments to the jury as to why the case against you should not be accepted, or if there's some other reason why you should be found not guilty. You can discuss the law and the evidence given, but at that stage you won't be able to introduce any new evidence.
>
> Now, have you understood what I've said so far?
>
> DEFENDANT CROTHERS: Yes, your Worship.
>
> HER HONOUR: Very well. If the prosecution alleges that you've made any admission, the alleged admission is not admissible in evidence unless it was made voluntarily. Now, it's for me, not for the jury, to decide whether an admission was made voluntarily. If you want that issue to be canvassed you should indicate that to me by saying that there's something you want to raise in the absence of the jury. I'll send the jury out and hear from you. Similarly, if you want to suggest that for some other reason admissions shouldn't be allowed to go into evidence, then stand up and say there's something that you wish to raise in the absence of the jury. I'll send the jury out and I'll listen to you."

[275] The judge then explained how Crothers could adduce evidence of good character and the effect of s 15(2) *Evidence Act* 1977 (Qld). Crothers must have understood the gist of those directions as he asked for a copy of the deceased's criminal history. The prosecution complied.

[276] Crothers noted that the prosecutor had not opened the evidence of police officer Andrews who took a statement from Matthew Hoghes. Crothers wished to challenge the truthfulness of Matthew Hoghes' evidence.

[277] The judge told Crothers that, if at any stage during the trial he wanted guidance, he should stand up and say, "There's a matter I wish to raise in the absence of the jury." The judge explained she would then have the jury taken out and would deal with the matter.

[278] The judge again explained to Crothers that he would have the opportunity, after the prosecution opened its case, to make a statement "identifying the principal planks of the defence". Counsel for Rogers wished to make such a statement but counsel for David Heathcote and Yvonne Heathcote did not. Crothers indicated he did not wish to make such a statement.

[279] After hearing submissions, the judge determined that the order of cross-examination of prosecution witnesses during the trial would be counsel for Rogers,[52] counsel for David Heathcote, then Crothers and finally counsel for Yvonne Heathcote.

[280] The judge explained that officers from the State Reporting Bureau were recording what was said in court and a transcript would be produced at the end of every day. She invited Crothers to express his view as to whether he thought the transcript should at some point be provided to the jury. He said he had no problem with the jury having the transcript, as long as it was accurate. The judge arranged for a transcript of the proceedings each day to be delivered to Crothers in the court cells prior to the departure of the prison van, usually at about 5.15 pm.

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[52] This order continued after Rogers became self-represented.

[281] Crothers stated that he would not be making any admissions to assist the prosecution case.

[282] Before the trial commenced, Crothers was provided with a complete list of the prosecution witnesses. The prosecution indicated which of those witnesses it would be calling in its case. The prosecutor invited Crothers to indicate which additional prosecution witnesses he wished to have called in the prosecution case. Crothers stated that he wanted Ms Lagosha called, and noted that he might also require other witnesses.

[283] After the prosecution opening, counsel for Rogers, as foreshadowed, gave an opening statement. It was to the effect that Rogers' case was primarily that Crothers shot and killed the deceased in self-defence and that the prosecution could not disprove this.

[284] During legal argument in the absence of the jury on the second day of the trial, Crothers stated that, in respect of evidence which he referred to as the "Christmas incident", he:

> "will be bringing that in. I don't care what youse want. I am going to bring that in. So if that is the little thing you want to keep out, you can forget it, thank you very much."

[285] The judge explained that she would hear argument about that issue in due course.

[286] By day three of the trial it emerged that the "Christmas incident" concerned Crothers' wish to cross-examine Matthew Hoghes about an incident the previous Christmas, some four or five months before the deceased was shot, when Crothers was at Matthew Hoghes' premises with the Hoghes' landlord to collect rent. Crothers had a shotgun. There was a verbal confrontation between Crothers and the landlord on the one hand and the deceased and a group of his supporters on the other. On one version, Crothers and Rogers drove up and down Males Road in their vehicle for some hours in a harassing fashion and were ultimately pursued by John Hoghes Snr (the deceased) in a vehicle. The prosecutor contended that if Crothers wished to lead that evidence he could seek to do so in his case: it was not evidence that should be led in the prosecution case as it was not relevant to the issues in the trial. Counsel for the other appellants agreed that this evidence should not be led in the prosecution case as it was prejudicial to their clients. They stated that if Crothers cross-examined on this evidence, it was likely that they would apply for a mistrial. Crothers angrily explained to the judge that he was having difficulty organising his defence and the amount of material he had to process. He emphasised that he attended an opportunity school.

[287] The judge reminded Crothers that he had rejected the opportunity to be represented by LAQ. Crothers responded that he wanted his grant of legal aid transferred to Douglas Law. The judge responded:

> "I'll give you this opportunity: if you wish to speak to someone from Legal Aid this afternoon, I will have someone contact the Legal Aid Office and ask that an officer come up to Court and speak to you. Do you wish to speak to anyone?"

Crothers refused to speak to anybody from LAQ.

[288] When Crothers asked to view some photographs on the court visualiser, the prosecutor arranged for that to be done during an adjournment.

[289] Crothers was at times uncooperative during the trial. For example, in the absence of the jury, the judge invited defence counsel and Crothers to comment on a schedule prepared by the prosecution as a working document setting out the evidence relied on by the prosecution to establish the case against each defendant. The judge said:

> "… [I]f something is said to be admissible against Mr Crothers and Mr Crothers says no, it is not admissible against him, I want him to have the opportunity [to make submissions], and I hope he will say that now."

Crothers twice responded: "Well, he won't".[53]

[290] On the seventh day of the trial, when Rogers still had legal representation, the judge refused an application for a mistrial made by all appellants other than Crothers.[54]

[291] On the 19th day of the trial, Crothers told the judge, in the absence of the jury, that he wanted the prosecutor to lead evidence from a statement of a deceased witness. The prosecutor considered the evidence inadmissible and would not lead it. The judge explained to Crothers that the prosecutor would not call that evidence because he considered it inadmissible. Crothers then said that he wanted some other like evidence to be led in the prosecution case through the witness Sheree Laing. The prosecutor indicated he would not call that evidence. The judge explained to Crothers that she would give him further information at the close of the prosecution case about his decision whether to give or call evidence in his case.

[292] On the 20th day of the trial in the absence of the jury, the judge informed Crothers, and also Rogers who was now self-represented, in these terms:

> "… at the end of the Crown case my associate will ask the defendants whether they wish to give or call evidence in their defence. She will call on the defendants one by one, starting with Mr Crothers, then David Heathcote, then Yvonne Heathcote, then Mr Rogers.
>
> …
>
> … If any one of the defendants does wish to give evidence or call other evidence that will be received before the next defendant is called on. You should understand that you may, if you wish, choose not to give evidence or call evidence. Alternatively, you may, if you wish, enter the witness box and give evidence just as the prosecution witnesses have done. If you do that you will be liable to cross-examination by the Prosecutor and counsel for the other defendants.
>
> Whether or not you go into the witness box yourself and give evidence, you may, if you wish, call witnesses to give relevant evidence. If you do call witnesses you may ask them questions and any witnesses you call will be liable to cross-examination by the Prosecutor and by or on behalf of the other defendants.
>
> You may also tender for reception into evidence, documents or other things which you consider relevant.
>
> You will recall that at the commencement of the trial I told the jury that at the end of all the evidence there would be addresses, that is

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53 Appeal Book 1327.

54 See the more detailed discussion of this application in [119]-[121] of these reasons.

speeches to the jury by or on behalf of the parties, followed by my summing-up. I told you in the absence of the jury that the order in which the jury is addressed will depend on whether you and the other defendants give evidence. I'm going to explain this in more detail before you make your choices whether to give evidence.

There are rules about the order in which the prosecution and the defence may address the jury, rules which have been developed over many years to ensure that a defendant receives a fair trial. The basic rule is if a defendant does not give evidence the Prosecutor addresses first and defence counsel addresses second. That is, he has the last word to the jury before the Judge sums-up. If a defendant does give evidence, the order is reversed.

Where there is more than one defendant and none of them gives evidence, the Prosecutor addresses first and then one by one counsel for the defendants address. Now, you do not have counsel or a solicitor. The law recognises that a person without legal representation may be at a disadvantage and so there are special rules.

If you decide not to give or call evidence you may address the jury but the Prosecutor may not address the jury about the case against you. That is, he may not address the jury about your guilt and he may not refer to evidence which is admissible only against you.

Of course, in this case the allegations against the other two defendants include allegations that they are guilty of offences because they assisted or encouraged you to commit offences and/or because they were participants in a plan to seriously injure Matthew Hoghes. Even if you chose not to go into evidence, the Prosecutor will still have the right to address the jury on the guilt of the other two defendants. He will be entitled to deal comprehensively with the evidence on which he relies to satisfy the jury of the guilt of the other defendants. Much of that evidence relates to you, as well. All he will not be able to do is to refer to evidence such as your respective records of interview, which is admissible only against you. He will not be able to submit that the jury should find you guilty.

I am telling you this so you may understand the significance of your choice whether or not to give and/or call other evidence. If you chose to give or call evidence you will have the right to address the jury before the Prosecutor and the Prosecutor will have the right to address the jury on your guilt. If you chose not to do so, the Prosecutor may not address the jury on your guilt but you should appreciate that he may nevertheless address the jury on the guilt of the other defendants and, in doing so, he may refer to evidence that relates to you.

Now, I want you to think about these matters carefully over the weekend and think about them in making your own choices as to whether you are going to give and/or call evidence.

…

> At the commencement of the trial I told the jury you would be under no obligation to give or call evidence. I will repeat that to the jury in my summing-up. If you chose not to do so, I will direct them that they mustn't draw any adverse inference against you or indeed, against any of the other defendants, from the fact that you have exercised what is a clear right. …
>
> …
>
> Do you have any questions, Mr Crothers?
>
> DEFENDANT CROTHERS: Can an application for an appeal be available at the end of this?
>
> [Discussion between Crothers and her Honour about an appeal ensued.]
>
> …
>
> DEFENDANT ROGERS: I have already made up my decision about giving evidence and that and as far as I am concerned I am not giving evidence.
>
> HER HONOUR: Well, that's fine but you will have until you are formally called upon to change your mind if you want to.
>
> DEFENDANT ROGERS: Okay."

[293] On the 22nd day of the trial, each appellant, when asked whether they would give or call evidence, stated that they would not.

[294] The judge invited submissions as to the order of closing addresses. Crothers stated more than once that he would not be addressing the jury. The judge directed that the prosecutor would address the jury first, followed by Rogers, then Crothers (if he changed his mind), counsel for Yvonne Heathcote and, finally, counsel for David Heathcote.[55]

[295] On the 24th day of the trial, the judge told the jury the order of addresses and continued:

> "Now, in this trial two of the defendants are self-represented. The law appreciates that parties without legal representation can be at a disadvantage and so the law says that when in a criminal trial a defendant is unrepresented, the prosecution may not address as against that defendant. So, when [the prosecutor] addresses you, he will be addressing you on the cases against the other two defendants who have legal representation. Because this is a case where it is alleged that there was a plan in which the defendants were involved and it's alleged also that one defendant assisted another to do various things, it will be inevitable, I think, in his address that he refers to the unrepresented parties, but he will only be able to do so in the course of his address as against the represented parties. He cannot address you about the guilt of the unrepresented parties.
>
> After he concludes, the defendants will then have the opportunity to address you. …"

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55 Appeal Book 1347.

[296] The prosecutor addressed the jury, but not on Crothers' or Rogers' cases.

[297] Rogers was the first of the appellants to briefly address the jury.[56] Crothers then addressed the jury for about 15 minutes. He emphasised his lack of education and legal training. He questioned the reliability of the police investigation and of prosecution witnesses. He pointed out there was no fingerprint or DNA evidence. When he referred to a matter which was not in evidence, the judge interrupted him and told him it was not in evidence. The following exchange then occurred:

> DEFENDANT CROTHERS: No, that'll do me.
>
> HER HONOUR: Is that all you wish to say?
>
> DEFENDANT CROTHERS: Yeah, no, that's enough for me.
>
> HER HONOUR: Very well.
>
> DEFENDANT CROTHERS: I'm not a barrister."

[298] Counsel for David Heathcote and Yvonne Heathcote then addressed the jury in turn. Their addresses included the contention that the jury would conclude that the prosecution had not disproved beyond reasonable doubt that Crothers was acting in self-defence when he killed the deceased.

[299] The judge gave careful and measured directions to the jury in which she thoroughly instructed them as to the applicable law in the case of each appellant. The correctness of her Honour's directions has not been successfully challenged in this appeal. The judge separated and explained which evidence was admissible against which appellant. She reminded the jury that the law recognises:

> "that unrepresented parties can be at a disadvantage and for that reason [the Prosecutor] would not be allowed to address you on the guilt of Mr Crothers …
>
> When Mr Rogers and Mr Crothers addressed you, they were not allowed to go beyond the evidence addressed in the trial. They clearly found addressing you daunting, overwhelming even. No doubt you would have appreciated what I meant when I said that unrepresented parties can be at a disadvantage."

[300] The judge also told the jury to disregard anything they may have heard about the reputation of any of the defendants or witnesses, and to put aside any questions of prejudice or sympathy.[57] The judge clearly and fairly identified to the jury the critical question in Crothers' case: whether the prosecution had disproved beyond reasonable doubt that Crothers had acted in self-defence in killing the deceased.

#### (iv) Conclusion as to the grounds of appeal relating to Crothers' lack of legal representation

[301] The seminal High Court decision, *Dietrich v The Queen*,[58] affirmed that the common law of Australia does not recognise the right of accused people in criminal trials to be provided with counsel at public expense. Importantly, *Dietrich* recognised, however, the power of courts to adjourn or even to stay criminal

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56 See [361] of these reasons.

57 Appeal Book 1424.

58 (1992) 177 CLR 292.

proceedings, where unrepresented accused people cannot otherwise have a fair trial.[59] *Dietrich* is not authority for the proposition that accused people have a right to an adjournment, let alone a stay of proceedings, so that they can be provided with their choice of lawyers at public expense. Were that the law, the criminal justice system would quickly flounder. But *Dietrich* recognises that, ordinarily, the requirement that criminal trials for serious offences must be conducted fairly will result in trials being adjourned rather than indigent accused people being forced to proceed to trial without legal representation. *Dietrich* qualified that general statement of principle by recognising exceptions. Deane J noted:

> "… The most obvious category of case in which that is so is where an accused desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation which is available."[60]

[302] Crothers came squarely within that obvious category of exceptional case referred to by Deane J. Crothers persistently refused to take up his grant of legal aid, even when he was offered a lawyer other than the in-house lawyer to whom he objected. He was insistent that he be represented only by Douglas Law. Ironically, his wish came true when his grant of legal aid for this appeal was transferred to Douglas Law.

[303] With hindsight, it may be regrettable that LAQ did not accede to Crothers' request for that transfer before the trial. The trial, almost certainly, would have been more efficiently conducted had Crothers been legally represented. Any additional public money spent in having him represented by Douglas Law would have been recouped many times over by the savings to the public purse from a much shorter trial. But the grounds of appeal for this Court's determination do not concern whether LAQ should have transferred the grant of legal aid to Douglas Law. They concern whether a miscarriage of justice has occurred because of Crothers' decision not to take up LAQ's offer of legal representation and to represent himself at his trial.

[304] Unlike the appellant in *R v East*,[61] it must be noted that when Crothers' legal aid was withdrawn at his request in late July or early August 2009, he did not seek an adjournment of his trial to obtain new lawyers. On the contrary, on 17 August 2009 the trial judge told Crothers that it was in his interest if the trial was adjourned that day and that he ought to very seriously consider LAQ's earlier offer to provide him with a different solicitor to the in-house lawyer with whom he was unhappy. His trial was adjourned until 31 August 2009 to enable him to prepare for it. He could have taken up LAQ's offer to represent him, but did not. The case had been managed by judges for many months to ensure it would be ready to proceed with all four defendants. Three of the defendants, including Crothers, had been in custody on remand since the killing in May 2007. There was a public interest in the trial proceeding in a timely fashion, providing each defendant could have a fair trial. The trial judge had no reason to hope that a further adjournment of the trial on 31 August 2009, at yet more inconvenience to the parties and witnesses and at even more public expense, would ultimately result in Crothers being legally represented at his trial. On the contrary, Crothers stated on 18 August that, although unrepresented, he would be ready to proceed with his trial on 31 August. And when he appeared unrepresented on 31 August to commence his trial, whilst he seemed to

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59 Above, Mason CJ, McHugh J, 311.

60 Above, 336.

61 [2008] QCA 144.

expect somehow Douglas Law would be acting for him, he told the judge to "go on" with the trial: "[he would] be right". Crothers refused the opportunity the judge gave him on the third day of the trial to contact LAQ.[62] The judge did all that could reasonably be done to give Crothers the opportunity to be legally represented at his trial.

[305] Crothers' most promising defence to the killing was straightforward. It was that the prosecution could not disprove beyond reasonable doubt that he was acting in self-defence when he shot the deceased. His three co-defendants had a great interest in also pursuing that case: if Crothers was acquitted on that basis, they would be acquitted. Rogers' counsel gave an opening statement to the jury to that effect. The key prosecution witnesses, although perhaps not effectively cross-examined by Crothers, were skilfully cross-examined by counsel for Crothers' co-defendants. They explored issues touching on the question of whether Crothers acted in self-defence.

[306] The prosecutor acted reasonably to ensure that Crothers' trial was conducted fairly. The extracts from the transcript which we have set out earlier in these reasons illustrate the care the trial judge took to ensure Crothers understood procedural matters, even though he was self-represented. The judge ensured that, despite Crothers' intellectual and educational difficulties and limitations, he participated in his trial in a meaningful and sometimes focussed and relevant way. She warned the jury to be true to their oaths and to avoid feelings of prejudice.

[307] Although this trial, involving four defendants on serious charges, was challenging to manage because of Crothers' (and later Rogers') self-representation, the trial judge patiently and skilfully conducted it in a way that ensured all defendants had a fair trial. We are unpersuaded that Crothers' lack of legal representation, or the judge's omission to take it upon herself at some point to adjourn the trial in the faint hope that Crothers might ultimately become legally represented, has resulted in a miscarriage of justice. This is so, even taking into account the further evidence Crothers has sought to adduce in his appeal. These grounds of appeal also fail.

### (v) Conclusion on Crothers' application to adduce further evidence

[308] We again observe that there is nothing in the further evidence to show, and nor is it suggested, that Crothers was of unsound mind at the time of the charges were brought against him or that he was unfit to plead at his trial.

[309] Even taking into account the further evidence Crothers seeks to adduce in his appeal, he has failed to establish that there is a significant possibility (or that it is likely) that, had this further evidence been available at trial, a jury acting reasonably would have acquitted him. Nor has he demonstrated that a refusal to accept the further evidence would lead to a miscarriage of justice.[63] For those reasons, his application to adduce further evidence should be refused.

[310] Crothers has not made out any of his grounds of appeal. His appeal should be dismissed.

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62 See [287] of these reasons.

63 *Gallagher v The Queen* (1986) 160 CLR 392, 397, 399, 407; *Mickelberg v The Queen* (1988) 167 CLR 259, 273, 275, 292, 301-302; *R v Katsidis; ex parte Attorney-General Queensland* [2005] QCA 229, at [2]-[4], [11]-[19] and [36].

**COLIN ROGERS – APPEAL NO 277/09**

[311] Rogers, too, appealed only against his conviction for murder. His amended grounds were:

> "(a) A miscarriage of justice has occurred in this case the particulars of which are as follows:
>
> (i) The trial should have been adjourned even for a limited time for the appellant to seek further legal advice.
>
> (ii) The Learned trial judge should have ordered a separate trial from the trial of Mr. Crothers.
>
> (iii) The Learned Trial Judge should have discharged the jury after it was discovered the jury had conducted its own inquiries.
>
> (iv) The Learned Trial Judge should have conducted a voir dire on the admissibility on the record of interview conducted with the Appellant.
>
> (b) The Learned Trial Judge erred in her directions as to:
>
> (i) Self defence
>
> (ii) Section 8 of the *Criminal Code*.
>
> (c) The verdict on the count of murder is unreasonable or cannot be supported having regard to the whole of the evidence."

[312] The Crown case particularised against Rogers was:

> "David Robert Heathcote and Colin Robert Rogers
>
> Section 7(1)(b) and/or (c):
>
> Aided and/or encouraged Michael Crothers to shoot John Frank Hoghes causing his death, by deliberate presence at the time of the shooting, with knowledge that Michael Crothers formed the intention to cause the death or some grievous bodily harm to John Frank Hoghes at the time.
>
> David Robert Heathcote, Yvonne Jean Heathcote and Colin Robert Rogers
>
> Section 8:
> Actively participated in a common unlawful purpose to seriously injure Matthew John Hoghes and it was a probable consequence of that common unlawful purpose that John Frank Hoghes would die from injuries inflicted with an intention to cause death or some grievous bodily harm to him"

**Grounds of Appeal (b) and (c): The trial judge's directions as to self-defence and section 8 and whether the verdict was unreasonable having regard to the evidence and the evidence was insufficient to support the murder conviction**

[313] The complaints with respect to self-defence were the same as those advanced in Crothers' appeal. For the reasons given in that appeal, they are without substance.

[314] Rogers argued that his conviction was unsafe and unsatisfactory, particularly focussing on the factual merits of the prosecution case that he was a party to the

offence of murder under either s 7 or s 8. The submission was that the death of John Hoghes was not a probable consequence of the level of violence originally intended by all of the parties and that Rogers had not shared in any expanded intention to inflict more serious violence than had first been planned.[64] It was said that this was a case where the level of violence exceeded that which was originally intended and where Rogers said that he did not expect death to have resulted.

[315] One argument advanced was that, in this context, her Honour should have given a direction that, whether an event was a probable consequence of the level of violence originally intended means that it was more than a real or substantial possibility.[65] In this case, there is nothing to indicate that there was any particular need to explain the meaning of the expression "a probable consequence" to the jury beyond the use of that language. Her Honour explained what the word "probable" meant by saying that it meant:[66]

> "… a result which is objectively likely, one which would have been apparent to an ordinary, reasonable person in the position of the particular defendant, knowing what that defendant knew at the time the plan was formed. You need to be careful not to consider this question with the benefit of hindsight as to what, in fact, happened. The test is an objective one, whether an ordinary, reasonable person would have recognised it as likely, not whether the particular defendant, in fact, recognised it as likely or foresaw it when the plan was formed."

[316] Her Honour also drew attention to the fact that the probable outcome may have been one of manslaughter rather than murder and gave specific directions about the s 8 case against Rogers where she drew attention to his statement in his record of interview that the plan was to collect "Sarah's things".[67] She pointed out that lies he had told when first interviewed by police were not evidence of his guilt of murder and said "[y]ou may think the section 8 case against Rogers is weak, but that is a matter for you." Her Honour then went on to say:[68]

> "Before you may find him guilty of murder on the basis of section 8, you must be satisfied beyond reasonable doubt that he was party to a plan, that the plan was to seriously injure Matthew rather than simply to collect Sarah's belongings, and that it was a probable consequence of the prosecution of the plan that John Frank Hoghes would be murdered."

[317] The respondent here relied on the undisputed fact that Rogers was present at the time of the killing although there was little evidence as to what he was doing then. He was only seen to get out of the utility after the shot was fired but he had acknowledged to police that he put the shotgun in the vehicle before they left to go to the Hoghes' property and had provided Crothers with two shells which he had in his possession during the trip to put in the shotgun when they arrived at the house. The provision of the shotgun shells was not, however, relied on by the prosecution at the trial as a particular of assistance provided by Rogers to Crothers for the purposes of s 7 at the trial. Although the respondent submitted, accurately in our

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64 See *R v Ritchie* [1998] QCA 188.

65 See *Darkan v The Queen* (2006) 227 CLR 373, 398-399 at [81], 411-412 at [130]-[132].

66 See Appeal Book 1494, lines 20-45.

67 See Appeal Book 1504, lines 20-25.

68 See Appeal Book 1504, lines 40-55.

view, that it can be inferred that his intention in doing so was to assist Crothers in using the weapon, that was not the way the trial was conducted.

[318] Rogers' statement to police included evidence that the assistance he gave to Crothers occurred before the arrival of the deceased and was not done as an act to assist Crothers in the commission of the offence against the deceased. As against that the respondent pointed to his continued association with Crothers after the shooting and his participation in the acts of violence visited on the two sons of the deceased and his de facto partner.

[319] The respondent submitted that it was clearly open for the jury to conclude that the group, including Rogers, had travelled to the property for the purpose of seriously injuring Matthew Hoghes and that Rogers was an active participant in what happened after the shooting which evidenced that his presence was for the purpose of aiding Crothers and David Heathcote. The respondent sought to rely on his having provided the shotgun shells knowing that the weapon was going to be used but the failure to particularise that behaviour as capable of bearing that complexion at the trial makes it problematic for it now to rely on that evidence. Although it was submitted, it was open to the jury to conclude that he was liable under s 7 of the Code because his voluntary and deliberate presence and provision of the shells was intended to assist Crothers, by which he provided encouragement to him for the commission of the offence, the better approach, because of the conduct of the trial by the prosecution, was that adopted by her Honour in summing up where she said:[69]

> "To find Rogers guilty of murder pursuant to section 7 you would have to be satisfied beyond reasonable doubt that when Crothers shot Hoghes, Rogers knew that Crothers intended to kill Hoghes or do him grievous bodily harm, and that knowing that Rogers did something to help him. On Rogers' account Crothers already had the gun loaded by that time. He may have been present, but his mere presence would not have been enough to amount to assistance. You would have to be satisfied that Rogers intended by his presence to encourage Crothers to commit the offence and that his presence did actually encourage Crothers to do so.
>
> If you are satisfied beyond reasonable doubt that Rogers knew Crothers intended to assault Hoghes, for example by threatening him with the gun, but you are not satisfied to that standard that he knew Crothers intended to kill him or to do him grievous bodily harm, then you cannot find Rogers guilty of murder. At most you can find him guilty of manslaughter."

[320] Although the case that Rogers encouraged Crothers by his presence is not a particularly strong basis on which to make him liable as a party under s 7 it was legitimate to leave it to the jury as her Honour did and also open to the jury to rely on it as one means of establishing his guilt.

[321] Under s 8 of the Code the respondent also argued that it was a probable consequence of the plan to injure Matthew Hoghes seriously that his father would be shot. This was on the basis that, once the jury concluded that the group had travelled to the property for the purpose of seriously injuring Matthew Hoghes, it

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[69] Appeal Book 1490, line 45 to Appeal Book 1491 line 25.

was open to them to conclude that another person may be killed as a result of one of the actions of these three men bearing in mind particularly that they were armed with a loaded shotgun and their actions afterwards. Her Honour's summing up on this point was very fair. She said:[70]

> "Rogers said in his record of interview that the plan was to collect Sarah's things. I have analysed the other circumstances relied on by the prosecution when talking to you about the section 8 case against Yvonne Heathcote. You may be satisfied that Rogers was untruthful when police first spoke to him. You may think he was untruthful in some of what he said in the formal interview. That goes only to his credibility. It is not evidence of his guilt of murder or of the second home invasion. You may think the section 8 case against Rogers is weak, but that is a matter for you. Before you may find him guilty of murder on the basis of section 8, you must be satisfied beyond reasonable doubt that he was party to a plan, that the plan was to seriously injure Matthew rather than simply to collect Sarah's belongings, and that it was a probable consequence of the prosecution of the plan that John Frank Hoghes would be murdered."

[322] Given that Rogers knew specifically of the gun and provided shells to load it on arrival at a time when it was obvious that Crothers intended to use it, it seems to us that the jury were perfectly entitled to arrive at the verdict they did in respect of his involvement in the crime. That evidence also fell within the particulars provided with respect to s 8. They were that he:[71]

> "actively participated in a common unlawful purpose to seriously injure Matthew John Hoghes and it was a probable consequence of that common unlawful purpose that John Frank Hoghes would die from injuries inflicted with an intention to cause death or some grievous bodily harm to him."

[323] Accordingly Rogers has not made out grounds (b) or (c) of his notice of appeal.

**Ground of Appeal (a): The trial miscarried because of an accumulation of irregularities**

[324] This leaves for consideration the miscellaneous grounds that the four identified irregularities in the trial caused it to miscarry. The third of these, that the jury should have been discharged because it conducted its own inquiries has been dealt with and need not be considered further. Rogers applied to adduce evidence not given at trial to support these remaining grounds. The jury's consultation of their own map did not cause a miscarriage of justice.

[325] The second particular, that there should have been a separate trial from Crothers has been dealt with in our consideration of Yvonne Heathcote's appeal and, in particular, her ground 5(b). Those reasons apply with equal validity to Rogers' appeal. Accordingly this ground is not made out.

[326] Rogers' remaining grounds of appeal relate to two contentions. The first is that, when he dismissed his lawyers during the trial, the judge should have adjourned the trial to allow him to seek legal advice. The second is that the judge should have

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70 Appeal Book 1504, lines 20-55.

71 Appeal Book 2032.

conducted a *voir dire* on the admissibility of his formal record of interview with police. Relevant to these grounds is his application to adduce further evidence in this appeal.

**(a) Rogers' application to adduce further evidence**

[327] The further evidence included the following. A 1997 report from the Child Guidance Clinic, Wilson Youth Hospital, Division of Welfare and Guidance, described Rogers' full scale IQ as 78, in the borderline mentally deficient range, and his social functioning as dull average. Psychologist Peter Perros interviewed and assessed Rogers on 9 July 2010. Mr Perros found Rogers had a full scale IQ of 75 which placed him in the lowest five per cent of the population. He had:

> "only the most rudimentary knowledge and reasoning capacity to deal with complex issues. His slow processing speed and poor memory mean he would not be able to react quickly to issues as they arose and he would certainly not have the capacity to plan an effective strategy to challenge evidence. …
>
> While Mr Rogers was competent to instruct his solicitors and is fit for trial, he was not competent to conduct his trial, especially considering the gravity of the charges he faced."

[328] Rogers filed an affidavit dealing with the circumstances of his formal police interview concerning the present charges; his instructions to his lawyers to challenge it; and his apprehension of the circumstances leading to his decision to represent himself. He also emphasised his low level of intelligence and that he did not have an independent person present at his formal police interview.

[329] He deposed to the following. He was originally taken into police custody at about 9.30 am on 4 May 2007, the morning after the killing. Police officers took him to the Toowoomba watch house and interviewed him at about 4 pm. They accused him of lying. They took a sample of his DNA. He asked to have Yvonne Heathcote present in the interview as a support person. He was frightened. The police did not tell him of any application to a magistrate to extend the period of his detention in police custody.

[330] The further evidence upon which he seeks to rely includes the transcript of evidence given at the committal hearing by police officer Briese who was cross-examined by Rogers' counsel. Briese agreed that his statement prepared for the committal proceedings did not mention his role in an application under the *Police Powers and Responsibilities Act* 2000 (Qld) to extend the period of time Rogers had been held in custody. Briese agreed that he was the police officer who made that application. He mistakenly omitted to mention his role in making the application in the statement prepared for the committal proceedings as he did not think it was relevant to his statement which concerned his dealings with exhibits. Briese remembered speaking to Rogers but could not be sure if he told him about the application to extend the period of custody. He observed that if the application stated he informed Rogers of this, then he did. He agreed he did not make any notes of any discussions with Rogers about the application. Later, Rogers' counsel showed Briese a copy of the application and he agreed that he had endorsed on it that Rogers had not been provided with a copy of the application as information contained in it, if provided to Rogers, may jeopardise ongoing investigations.

[331] Rogers was legally represented at the pre-trial hearing in Toowoomba on 17 and 18 August 2010 and at his trial in Brisbane commencing on 31 August 2009 by the same counsel who conducted his committal, instructed by LAQ. On the 12th day of

the trial, Rogers dismissed his lawyers. He represented himself for the duration of the trial and at sentence.

[332] On the 16th day of the trial, he told the trial judge that he wanted to set aside his admissions and guilty pleas to count 2 (the aggravated burglary of Matthew Hoghes' premises), count 6 (deprivation of liberty of Michelle Wood) and count 7 (unlawful use of a motor vehicle with a circumstance of aggravation) stating that his lawyers pressured him to make the admissions[72] and did not properly explain things. His lawyers told him he would get 18 years imprisonment if he did not sign the paper indicating he would plead guilty.[73]

[333] On the 18th day of the trial,[74] he told the judge that he would like legal aid, but he wanted to nominate his own legal team and did not want the lawyers who had been acting for him in the trial. He was not told that he could apply at that time for an adjournment to get new lawyers. Had he known he could have, he would have applied for an adjournment. He would have told his new lawyers to challenge the admissibility of his formal police interview. Crothers encouraged him to believe he could adequately represent himself at trial.

[334] Rogers also sought to lead further evidence of his signed instructions to his lawyers dated 7 September 2009. These included: "I have been advised there is no benefit in attempting to argue period of time I was kept in custody before I was taken to court" and "Finally I do confirm that my lawyers should make any application for a separate trial when it becomes available". Rogers claims that his lawyers advised him in these terms and he relied on that advice in signing those instructions. He was not advised that it would benefit him to have the formal police interview excluded as evidence.

[335] Rogers' counsel in this appeal especially emphasises the further evidence which demonstrates Rogers' low IQ; that at all times Rogers wished to challenge the admissibility of his formal police interview; and that the failure of Rogers' lawyers to follow his wishes in this respect was the principal reason for dismissing them. Rogers did not appreciate that, after dismissing his lawyers, he could then challenge the admissibility of the formal police interview. Had he done so, it may have been excluded and Rogers may have been acquitted.

[336] Rogers has a challenging task in persuading this Court to accept the further evidence, even where it is fresh in the sense discussed in *Gallagher v The Queen*.[75] An appellate court, in determining whether to accept fresh evidence, considers whether there is a significant possibility (or that it is likely) that, in light of all the admissible evidence, including the evidence at trial, a jury acting reasonably would have acquitted the appellant: *Gallagher*[76] and *Mickelberg v The Queen*.[77] The courts also recognise that there is a residual discretion in exceptional cases to receive on appeal new or further evidence which is not fresh evidence if to refuse to do so would lead to a miscarriage of justice: *R v Condren; ex parte Attorney-General*;[78] *R v Young (No 2)*;[79] *R v Daley; ex parte Attorney-General*

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72 Appeal Book 915.
73 Appeal Book 971.
74 Appeal Book 1011.
75 (1986) 160 CLR 392, 395; [1986] HCA 26.
76 At 397, 407.
77 (1988) 167 CLR 259, 273, 292, 301-302; [1989] HCA 35.
78 [1991] 1 Qd R 574, 579; (1991) A Crim R 79.
79 [1969] Qd R 566.

*Queensland*;[80] *R v Main*[81] and *R v Katsidis; ex parte Attorney-General Queensland*.[82] In determining those questions, it is necessary to review Rogers' formal police interview, the circumstances surrounding it and the conduct of his case at trial.

**(b) Rogers' formal record of interview with police**

[337] Before considering Rogers' grounds of appeal concerning his formal police interview, it is helpful to set out something of it.

[338] The interview commenced at about 8.00 pm and concluded at about 11.57 pm on 4 May 2009. He made statements in it which were inconsistent with his earlier statements to police recorded on a field tape. The prosecution relied on these earlier statements to attack Rogers' credibility generally, but not as proof of guilt. He made admissions in the formal police interview relied on by the prosecution to establish the case against him under s 8.

[339] But he also gave the following account in it which supported the contention that Crothers was acting in self-defence when he killed the deceased.

[340] On an earlier occasion, he and Crothers had gone to Matthew Hoghes' house at Males Road to collect rent money which Crothers said was owed by Matthew Hoghes. Matthew's father (the deceased) was present.[83]

[341] On 3 May 2009, when Crothers killed the deceased, the deceased first took a swing at Crothers with an iron bar for no apparent reason. Crothers warned the deceased three times to drop the iron bar and it was in that context that the shotgun discharged.

[342] Rogers and Crothers met up earlier that day with Yvonne Heathcote, David Heathcote and Sarah at the Jondaryan Hotel. Yvonne told Crothers "where to go". Crothers, Rogers and David Heathcote left Jondaryan in Crothers' car. All three sat in the front. David was drunk and quite angry with what had transpired between the Hoghes family and Yvonne. David was drunk enough to be aggressive towards those who had called his mother, Yvonne, a slut. He "was saying that he was going to bash these people and that sort of stuff". The three drove to Males Road near Tara. David Heathcote checked Sarah's belongings and found them all smashed. On the way there, David Heathcote was "fired up" and said that he wanted to "punch there (sic) heads in". Crothers said, "we'll see when we get there."

[343] They had a 12 gauge shotgun in the vehicle. The gun was normally stored in a locked cupboard in Crothers' bedroom. Crothers took the unloaded gun to Yvonne Heathcote's place "Cause you have shot gun weddings and that sort of stuff" and David Heathcote had recently become engaged. They put the shotgun into Crothers' utility as "a precautionary thing". Rogers knew it was not loaded; he had three duckshot shells in his pocket which Crothers had taken from the cupboard and given to him. Crothers said he wanted the shotgun "[a]s a precautionary matter … Depending on how many ah aggravated people were at the other end".

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80 [2005] QCA 162.

81 (1995) 105 A Crim R 412, McMurdo P at [16]-[17]; Pincus JA at [22]-[24]; [1999] QCA 148.

82 [2005] QCA 229, at [2]-[4], [11]-[19], [36].

83 This seems to be what Crothers referred to in the trial as "the Christmas incident".

[344] At Males Road, Matthew and little John Hoghes threatened Crothers. Their father (the deceased) then came "bolting in his car and went straight for" Crothers with the iron bar. Before the father arrived, when Matthew and little John Hoghes became aggressive, Crothers got the shotgun and Rogers gave Crothers two shells to put in it. He knew he should not have given Crothers the shells. When the father arrived, Crothers warned him three times to put the iron bar down but he did not. Instead, he swung it at Crothers who:

> "put a shell to him … There was a warning, he tried doing a warning shot at the leg or whatever, right, but would have probably blown the leg clean out, I'm not sure and, ah, cause it's Duck Shot and, ah, he just come straight at [Crothers] with the iron bar".

[345] The iron bar wielded by the deceased on 3 May 2007 was about four feet long and an inch and a half to two inches wide. Rogers reckoned the shooting was self-defence because Crothers told the deceased to drop the weapon three times and Crothers was only there to pick up "the sheila's gear".

[346] At the time of the shooting, Rogers was behind the tailgate of the utility, "having a leak". After the shooting, Crothers, Rogers and David Heathcote walked into the house. David Heathcote "went Berserk", "lost the plot". David Heathcote gave Matthew Hoghes a "flogging" with the baseball bat and with his fists. The deceased was not moving, but there may have been a faint pulse. With the assistance of Matthew and little John Hoghes, they loaded the deceased into the boot of the deceased's car. They travelled to the deceased's home where they spoke with the deceased's partner (Michelle Wood). They had a conversation with her in which she agreed that the deceased's death was self-defence because he had bashed Matthew and other people before, "even her".

[347] Later Rogers spoke by telephone to Yvonne Heathcote who wanted to know the whereabouts of David Heathcote. Rogers had not seen David Heathcote since they all left the house at 16 Males Road.

### (c) The trial judge did not conduct a *voir dire* concerning the admissibility of Rogers' formal record of interview

[348] This ground of appeal concerns Rogers' ground (d). Rogers' counsel now argues that, if Rogers' contention in his further evidence is accepted, that he was not informed that his detention period was to be extended, as required by ch 15, pt I, div 3 *Police Powers and Responsibilities Act* 2000 (Qld), his subsequent formal police interview may well have been excluded by a judge in a *voir dire* because of police non-compliance with that statutory requirement. The judge should have told Rogers once he was self-represented that he could have a *voir dire* to explain this issue or initiated the *voir dire* herself.

[349] It is true that aspects of Rogers' formal police interview were incriminating and his defence position may have been arguably stronger were it excluded. But, contrary to Rogers' contentions, he did not at all times wish to challenge the admissibility of the formal police interview. He gave informed written instructions to his lawyers not to pursue this course. The further evidence does not suggest he was unfit to give these instructions. If, as his further evidence states, his lawyers' advice in this respect was a significant reason for him dismissing them, the fact remains that he did not then immediately apply to the judge to exclude the interview. It is by no means certain or even probable that, had the question of the admissibility of Rogers'

formal police interview been pursued in a *voir dire*, this would have resulted in its exclusion from evidence. His counsel at trial cross-examined Briese at committal and was clearly cognisant of the opportunity to apply to exclude Rogers' formal police interview because of non-compliance with the *Police Powers and Responsibilities Act*. Counsel did not consider that was prudent. Rogers, at least at times, accepted that advice.

[350] Once self-represented, Rogers in cross-examination did put to police officer Briese that Briese did not tell him on 4 May that an application to a magistrate for an extension of Rogers' detention was being made. But Briese rejected that contention. Although Rogers also sought to raise the issue with another witness, police officer Walker, the prosecutor rightly objected as this witness had no personal knowledge of the issue. This was hardly likely to alert the judge to the fact that Rogers wanted to challenge the admissibility of his formal police interview after the trial had proceeded for several weeks.

[351] In any case, aspects of Rogers' formal police interview were helpful to him in that they provided support for his contention that Crothers was acting in self-defence in killing the deceased. Had the jury determined that the prosecution had not negatived self-defence beyond reasonable doubt in Crothers' case, Rogers would have been acquitted of both murder and manslaughter. There was a logical, tactical forensic reason for Rogers' lawyers not to challenge his formal police interview, especially if the plan to obtain a separate trial from Crothers had been successful. Such a forensic decision appears consistent with Rogers' signed instructions to his lawyers dated 7 September 2009 (the sixth day of the trial).

[352] Rogers' counsel now argues that, consistent with the approach of this Court in *R v Walbank*[84] and with the observations of the New South Wales Court of Criminal Appeal in *R v Small*,[85] the trial judge should have informed the self-represented Rogers that he could have had a *voir dire* to explore the admissibility of his formal police interview. Indeed, the submission seems to be that the judge should have conducted the *voir dire* in any case. But the circumstances pertaining here were very different to those in *Walbank* and *Small*. The trial judge would have needed finely tuned intuition amounting to a sixth sense to have understood from the questions raised by Rogers in his cross-examination of police officers Briese and Walker, that he was claiming his formal record of interview with police should be excluded on the basis of unfairness. Intuitive sixth sense is not yet amongst the many attributes appellate courts require of trial judges in the criminal jurisdiction.

[353] We are unpersuaded the judge erred in not undertaking a *voir dire* as to the admissibility of Rogers' formal police interview once Rogers dismissed his lawyers. On the material before this Court, we are not persuaded that such a *voir dire*, if held, would have resulted in the exclusion of the formal police interview or that excluding the interview would necessarily have assisted Rogers' case. It follows that we are not persuaded that the judge's omission to conduct a *voir dire* about the admissibility of the formal police interview has resulted in a miscarriage of justice. This contention is not made out.

**(d) The trial judge did not adjourn the trial for Rogers to seek legal advice after he dismissed his lawyers**

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84 [1995] QCA 149.

85 (1994) 72 A Crim R 462, 469.

[354] Rogers, in his ground of appeal (a), contends that the judge erred in not giving him the opportunity to seek further legal advice or representation after he dismissed his lawyers at the trial.

[355] Rogers told the primary judge when he dismissed his lawyers on the 12th day of the trial that he was happy to continue with the trial self-represented. He did not request an adjournment to obtain new lawyers. It is true that on the 18th day of the trial Rogers appeared to question whether it was possible for his legal aid grant to be used to provide him with lawyers other than those who had acted for him at trial. The judge expressed some doubt about whether this would be possible but told him it was a matter he would have to take up with LAQ. Rogers did not raise the matter again in court. There was no evidence before the trial judge and none before this Court that, had the judge granted an adjournment to allow Rogers to pursue new legal representation through LAQ, he would have succeeded.

[356] As *Dietrich* recognises,[86] it is unquestionably desirable that people accused of serious crimes are legally represented at their trials. As Keane JA observed in *R v East*:[87]

> "So important is the availability of legal representation to the settled understanding in Australia of a fairly conducted criminal trial that the majority of the High Court in *Dietrich v The Queen* [(1992) 177 CLR 292 at 311, 331, 342-343] held that a criminal trial for a serious offence should be adjourned, rather than that an indigent accused should be forced on to trial without legal representation against his or her will, save in exceptional circumstances."[88]

[357] But unlike in *East*, Rogers had legal representation during the two days of pre-trial hearing and the first 12 days of his trial and decided to dispense with it. And unlike in *East*, when Rogers dismissed his lawyers, he did not ask for an adjournment to obtain different legal representation under his grant of legal aid. There was no reason for the judge to think that Rogers then wanted legal representation. In light of Crothers' experience, there was no reason for the judge to think that, even if Rogers later wanted LAQ to supply him with new lawyers, he would be accommodated. Further, unlike in *East*, Rogers' case had been continuing for several weeks and involved three co-offenders, two of whom remained legally represented. Their counsel vigorously pursued Rogers' most promising defence: that the prosecution would not disprove beyond reasonable doubt that Crothers was not acting in self-defence.

[358] After Rogers' became self-represented, he conducted his case in a way which showed some, albeit limited, understanding of what the case was about and appropriate criminal trial procedure. He had by then been watching experienced counsel for 12 days and had heard the judge's explanations of relevant matters to Crothers. As in Crothers' case, the judge was astute to do everything possible to ensure the self-represented Rogers continued to have a fair trial. We have already set out the directions she gave both Crothers and Rogers on the 20th day of the trial in the absence of the jury to assist them in understanding their rights.[89]

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86 See [301] of these reasons.
87 [2008] QCA 144.
88 [2008] QCA 144, [52].
89 See [292]-[295] of these reasons.

[359] Rogers made coherent submissions to the trial judge. For example, in discussion with the judge prior to the commencement of addresses, Rogers emphasised that Matthew and John Hoghes were armed with weapons.[90] In discussions as to what issues had to be explained to the jury, Rogers emphasised that the deceased had drugs and alcohol in his system and had attacked Crothers with an iron bar, arguing that this was relevant to self-defence because you could not argue with a person with drugs and alcohol in their system. He also supported Crothers in his contention to the primary judge that self-defence was raised on the evidence.[91]

[360] The prosecutor did not address the jury on Rogers' case.

[361] It is true that Rogers' address to the jury was brief but it was not necessarily ineffective. He emphasised that the telephone records showed he had little contact with Yvonne Heathcote and Crothers before he and Crothers went to Hoghes' property near Tara. Rogers continued:

> "… the Prosecutor stated that we had a plan. Well, I can say we didn't have a plan. The plan that he's saying that we went up there to - to can kill that person, no way. All we went up there to do is get David's sister's gear. That was all. And whatever happened after that had nothing to do with us."

[362] Rogers also had the benefit of closing addresses by counsel on behalf of Yvonne Heathcote and David Heathcote who both raised issues relevant and helpful to Rogers' case on self-defence and liability under s 7 and s 8 of the *Criminal Code*.

[363] The trial judge carefully and accurately directed the jury as to the law and the evidence in Rogers' case.[92] The judge explained that if they were satisfied that Rogers was initially untruthful in his answers to police, or that he was later untruthful in aspects of what he said in his formal police interview, that went only to his credibility and was not evidence of his guilt. The judge suggested to the jury that they may think the s 8 case against him was weak, but this was a matter for them.[93]

[364] Our review of the way the trial was conducted leaves us unpersuaded that Rogers' trial was unfair because of his self-representation. A miscarriage of justice has not resulted through the judge's omission to give Rogers the opportunity to seek further legal representation or advice after he dispensed with his lawyers during this trial. This contention also fails. It follows that Rogers' ground of appeal (a) is not made out.

**(e) Conclusion on Rogers' application to adduce further evidence**

[365] We have carefully considered the further evidence which Rogers has sought to adduce in this appeal. We note that it does not demonstrate nor suggest that Rogers was of unsound mind at the time of the alleged offending or that he was unfit to plead or instruct his counsel during the trial. Even taking the further evidence into account, none of the grounds of appeal raised has been successfully made out. It follows that, had the further evidence been led at trial, there is no significant possibility, and nor it is likely, that a reasonable jury would have acquitted him.

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90 Appeal Book 1298.
91 Appeal Book 1304.
92 Appeal Book 1488-1491.
93 Appeal Book 1504.

The refusal of the application to adduce the further evidence does not result in a miscarriage of justice.[94] It follows that Rogers' application to adduce the further evidence must be refused.

**APPLICATIONS FOR LEAVE TO APPEAL AGAINST SENTENCE**

[366] Yvonne Heathcote and Rogers applied for leave to appeal against sentence. But as their convictions for murder have been affirmed by this Court, the only sentence that can be imposed on them is mandatory life imprisonment.[95] Their applications for leave to appeal against sentence must be refused.

**ORDERS:**

1. In respect of each appellant, the appeal against conviction is dismissed.

2. In respect of the appellant Crothers, the application to adduce further evidence is refused.

3. In respect of the appellant Rogers, the application to adduce further evidence is refused. The application for leave to appeal against sentence is refused.

4. In respect of the appellant Yvonne Heathcote, the application for leave to appeal against sentence is refused.

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94 *Gallagher v The Queen* (1986) 160 CLR 392, 397, 399, 407; *Mickelberg v The Queen* (1988) 167 CLR 259, 273, 275, 292, 301-302; *R v Katsidis; ex parte Attorney-General Queensland* [2005] QCA 229, [2]-[4], [11]-[19], [36].

95 *Criminal Code* 1899 (Qld) s 305(1).