

SUPREME COURT OF QUEENSLAND

CITATION: *R v Spencer* [2020] QCA 265

PARTIES: **R**
v
SPENCER, Trevor
(appellant)

FILE NO/S: CA No 331 of 2019
SC No 1968 of 2018

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane – Date of Conviction:
15 November 2019 (Burns J)

DELIVERED ON: 1 December 2020

DELIVERED AT: Brisbane

HEARING DATE: 12 October 2020

JUDGES: Fraser, McMurdo and Mullins JJA

ORDERS: **1. Appeal allowed.**
2. Conviction set aside.
3. New trial ordered.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was convicted of murder – where the appellant was interviewed by police and there was a recorded conversation between the appellant and a covert police officer – where both the prosecution and defence relied on some of the same evidence in the out of court statements for the purpose of drawing different inferences – where the defence relied on additional statements from the out of court statements not relied on by the prosecution – where the trial judge directed the jury that the answers of the appellant could only be relied on “one way or the other” if the jury “accept[ed] that they were made and ... they were true and accurate” – where that was a misdirection in relation to the use of the appellant’s exculpatory statements – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE –

MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was convicted of murder – where the alternative prosecution case under s 8 *Criminal Code* (Qld) was that the appellant actively participated in a common unlawful purpose to assault the deceased whilst armed with weapons – where the second requirement for criminal responsibility under s 8 is that the offence was committed in the “prosecution of that purpose” – whether the jury were sufficiently directed on this second requirement for liability under s 8 – where during the summing up the trial judge interchangeably used the phrases “in carrying out that plan” and “prosecution of that purpose” – whether there was a misdirection

De Silva v The Queen (2019) 94 ALJR 100; [2019] HCA 48, considered

R v Collins, ex parte Attorney-General [1996] 1 Qd R 631; [1994] QCA 467, cited

R v Mitchell [2008] 2 Qd R 142; [2007] QCA 267, cited

R v Phillips and Lawrence [1967] Qd R 237, considered

R v Ritchie [1998] QCA 188, considered

COUNSEL: C Eberhardt for the appellant
D Balic, with C L Birkett, for the respondent

SOLICITORS: Jasper Fogerty Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of Mullins JA and the orders proposed by her Honour.
- [2] **McMURDO JA:** I agree with Mullins JA.
- [3] **MULLINS JA:** Mr Spencer was convicted by a jury of the murder of Mr Ryan (the deceased) who was killed on 23 August 2016 at Mundubbera.
- [4] Mr Spencer appeals against the conviction on two grounds:
- (a) Ground 1 – A miscarriage of justice occurred by reason of the directions given as to how the jury could use the evidence contained in Mr Spencer’s recorded and written statements tendered in the prosecution case.
 - (b) Ground 2 – A miscarriage of justice occurred due to the inadequacy of the directions given to the jury on the operation of s 8 of the *Criminal Code* (Qld) in the context of the prosecution and defence cases.
- [5] Mr Spencer stood trial with Mr Stephen Crump (Crump Senior) who was found not guilty of murder and manslaughter. Before the trial Crump Senior’s son, Mr Mark Crump (Mr Crump), pleaded guilty to the murder of the deceased and that was an admitted fact in Mr Spencer’s trial.

Relevant evidence

- [6] In August 2016, Mr Spencer who was 70 years old and a pensioner lived in Dubbo in New South Wales and was friendly with Mr Crump who was in a relationship

with a woman who had previously been in a relationship with the deceased and they had a daughter together (the child). There was an ongoing custody dispute between this woman and the deceased concerning the child and Mr Crump had spent a great deal of money to assist his partner in getting custody of the child. In July 2016 the child did not want to return to live with her mother and made a complaint to the police that Mr Crump had sexually abused her. On 12 August 2016 the Family Court of Australia vacated earlier orders requiring the child to be returned to her mother in New South Wales.

- [7] In July or August 2016, Mr Spencer told his neighbour Mr Porch that Mr Crump had asked him to ask Mr Porch, if he would go to Queensland with Mr Crump to “bash” or “belt” the deceased. In August 2016 Mr Spencer told Mr Porch that he was going to Sydney with Mr Crump to look for a gun. Between 9 and 11 August 2016 Mr Spencer and Mr Crump stayed in Sydney.
- [8] Mr Crump recruited Mr Spencer to travel to Queensland with him to secure the child’s return to New South Wales. It was an admission made at the trial that Mr Crump purchased various weapons on eBay and/or at a store in Orange in August 2016 including crossbow, pistols, throwing knives, swords, throwing knife sets and a throwing axe set. Mr Spencer told his neighbour Mr Robinson that he was going with Mr Crump to Queensland and Mr Spencer was away for three to four days.
- [9] Mr Crump and Mr Spencer met Crump Senior at a hotel in Gin Gin on 21 August 2016. On 22 August 2016 the three men travelled to Mundubbera to conduct a reconnaissance of the deceased’s premises which Mr Spencer said in his interview was so they “knew where to go the next day” for the purpose of talking “some sense” to the deceased and to “tell him to give [the child] back to [the] mother as per Federal Court Orders”. On 23 August 2016 the three men travelled to the deceased’s premises. Initially Mr Crump and Mr Spencer travelled in Mr Crump’s car, but at some point they all got into Crump Senior’s car and Crump Senior drove them to the deceased’s house in Mundubbera. Crump Senior dropped Mr Crump and Mr Spencer off at the premises and drove away.
- [10] According to Mr Spencer’s statement, just prior to entering the premises Mr Crump gave Mr Spencer a large Crocodile Dundee knife and told him to “bring this in, in case you need it”. At this stage Mr Spencer saw that Mr Crump had the crossbow and a sword and some small knives. Mr Spencer told police that he “probably had an inkling about what [Mr Crump] intending to do” but “was hoping it wouldn’t come to that”. Mr Spencer walked with Mr Crump to the side of the shed on the premises and the deceased came down from the house to speak with them. There was some discussion about the child returning to her mother. Mr Spencer described in his statement that “things went bad” when the deceased told Mr Crump that it had nothing to do with him.
- [11] There was no eyewitness to the assault of the deceased. The deceased was 43 years old and relatively fit. Mr Spencer gave his version as to what occurred in his statement to the police and denied taking any part in the killing or being a party to any plan to assault the deceased (with or without weapons). He described that the “sword or lump of steel” just appeared and Mr Crump used it to take a swing at the deceased hitting him with the sword, Mr Crump also aimed the crossbow at the deceased’s head and it misfired, the deceased fell down on the ground and Mr

Crump was on top of him and started pummelling into the deceased. Mr Spencer said that the deceased kicked him and he got the injury to his hand. Mr Spencer had pulled the knife out after Mr Crump took a swing at the deceased, because he “didn’t know what was going to happen”. Mr Spencer said that he landed on the ground after being kicked by the deceased and he presumed it was the knife that he was holding himself that slashed himself.

- [12] Mr Crump and Mr Spencer left the scene in Crump Senior’s car. Both had injuries to their hands and were bleeding heavily. The deceased’s mother discovered the deceased mortally wounded and called an ambulance. The deceased told the ambulance officers he thought he had been attacked with a crowbar. The deceased had been cut and stabbed multiple times and suffered other blunt force injuries. The forensic pathologist noted 59 injuries to the deceased, mainly to his head, and from all directions, including a stab wound to the front of the neck which penetrated the jugular veins. The injuries suggested two different edged weapons had been used in the attack. A dagger and a machete were found at the scene. The Crocodile Dundee knife was never found.
- [13] Mr Spencer used a towel in Crump Senior’s car to treat the wound to his hand. Crump Senior drove Mr Crump and Mr Spencer to Mr Crump’s car. Crump Senior and Mr Spencer went in Mr Crump’s car to a rural property near Tara and Mr Crump followed in Crump Senior’s car. Mr Crump put some things from Crump Senior’s car into his own car and he and Mr Spencer then left Crump Senior at the property and returned to their homes. On the return journey Mr Crump disposed of the weapons used in the attack by dumping them into the bush and on arrival in Dubbo Mr Crump gave Mr Spencer two swords and a shotgun. Mr Crump sought treatment for the stab wound through his right hand and a slicing injury to his left ring finger. Mr Spencer sought treatment for the deep lacerations to his right index, middle and ring fingers on the back of his hand that involved the bone and tendons on the middle and index fingers and broken bones on those two fingers and soft tissue injuries to the back of his right hand. The evidence of the treating doctor and the forensic physician were that the injuries to the back of Mr Spencer’s right hand were the result of blunt force trauma. When police searched Mr Spencer’s home, they found some swords, the shotgun and ammunition and a box of disposable gloves which Mr Spencer told them that Mr Crump had given him those items when he dropped him off. There was no evidence that any of Mr Spencer’s blood or DNA was located on the deceased or his clothing.
- [14] Mr Spencer did not give or call evidence at the trial. When arraigned at the commencement of the trial, Mr Spencer pleaded not guilty to murder, but guilty to manslaughter. The prosecutor did not accept that plea in discharge of the indictment against Mr Spencer. The question therefore of whether Mr Spencer was guilty or not guilty of murder was for the jury and, if they acquitted him on the charge of murder, the question of whether he was guilty or not guilty of manslaughter was also left to the jury, in accordance with the practice suggested as “more sensible” by McPherson JA and Lee J in *R v Collins, ex parte Attorney-General* [1996] 1 Qd R 631, 640.

Prosecution case

- [15] The prosecution put its case against Mr Spencer on the basis that he was either a principal offender pursuant to s 7(1)(a) of the *Code* or enabled, aided or encouraged

Mr Crump and was liable on that basis pursuant to either s 7(1)(b) or (c) of the *Code*. The alternative prosecution case based on s 8 of the *Code* was particularised in writing for the jury (exhibit 6) as Mr Spencer actively participated in a common unlawful purpose with Mr Crump and/or Crump Senior to assault the deceased whilst armed with weapons, and it was a probable consequence of that common unlawful purpose that the deceased would be murdered. Those written particulars omitted the second requirement for liability under s 8 of the *Code* that the deceased was murdered in carrying out that common unlawful purpose, but the trial judge's handout for the jury entitled "Information for Jurors" given during the trial judge's opening remarks correctly set out all three requirements for liability under s 8 (and the trial judge explained to the jury that all directions on law would be given by the trial judge):

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

- [16] The out of court statements made by Mr Spencer (namely his record of interview with the police on 26 August 2016 (exhibit 16), his written statement (exhibit 18) and the audio recording of a conversation between Mr Spencer and a police officer posing as a prisoner in the watch house on 29 August 2016 (exhibit 19)) were adduced in the prosecution case and were relied on by the prosecution as evidence of Mr Spencer's involvement in the events that resulted in the deceased's death, his knowledge of Mr Crump's intentions, his intentions at various times and that he agreed to participate in the unlawful common purpose.
- [17] The prosecution identified the specific statements of Mr Spencer in the out of court statements that the prosecution submitted were lies to the police and other post-offence conduct which were relied on by the prosecution as consciousness of guilt of the offence of manslaughter only (in accordance with authorities such as *R v Mitchell* [2008] 2 Qd R 142 at [31] and [50]). There were some statements made by Mr Spencer when interviewed by the police or in his covertly recorded conversation with the police officer in the watch house that the prosecutor submitted the jury would reject, but there were other statements relied on by the prosecution for the truth of the statements to enable the jury to draw inferences relevant to proving Mr Spencer had committed the offence of murder on one of the three bases relied on by the prosecution.
- [18] The prosecution's case put to the jury was that Mr Crump and Mr Spencer engaged in a frenzied attack on the deceased and, in the course of that attack which was a dynamic situation where both were using knives, they struck each other which accounted for the injuries to their hands.

Defence contentions

- [19] Counsel who appeared for Mr Spencer at the trial (who was not the counsel who appeared on this appeal) submitted to the jury that they would find Mr Spencer guilty of manslaughter on the basis that he was party to an unlawful common purpose and that it was a probable consequence of that unlawful purpose that it

would lead to the possible death of the deceased. It was conceded by counsel in his address to the jury that Mr Spencer told some lies to his neighbours and to the police about the cause of injuries to his hand, his movements for the days of and surrounding the death of the deceased and about the last time he had seen Mr Crump, but those lies should be used as consciousness of guilt on Mr Spencer's part of the unlawful killing of the deceased and not of murder. After the first 57 pages of the transcript of Mr Spencer's interview with the police, Mr Spencer's counsel drew the jury's attention to the change in his account to the police about relevant events. It was submitted to the jury by his counsel that Mr Spencer was then telling the truth to the police and that was consistent with his written statement and what he said in the covertly recorded conversation on 29 August 2016 with the police officer posing as a prisoner. The submission was made to the jury by Mr Spencer's counsel that they would accept that version of events. It was also submitted by Mr Spencer's counsel to the jury that in considering the prosecution case based on s 8 of the *Code*, as there was a rational inference that could be drawn from all the circumstances that Mr Spencer was guilty of manslaughter, the jury could not be satisfied that the only rational inference that could be drawn from the circumstances was that Mr Spencer was guilty of murder.

- [20] Mr Spencer's counsel at trial also made extensive references to Mr Spencer's out of court statements to the police to support the submission to the jury they would reason in respect of the prosecution case based on s 8 of the *Code* that a rational inference that could be drawn from all the circumstances was that Mr Spencer was guilty of manslaughter and that should therefore be the verdict they returned. (It should be noted that there were passages in Mr Spencer's out of court statements that were relied on by his counsel for this purpose that were not the subject of submissions by the prosecutor at the trial.)

Ground 1

- [21] Before considering the detailed submissions directed to ground 1, it is relevant to note that the trial judge directed the jury that if they did not find that Mr Spencer was guilty of murder as a principal offender, on the basis he enabled or aided Mr Crump to commit the offence of murder, or on the basis of s 8 of the *Code*, they should consider whether the prosecution had proved beyond reasonable doubt that Mr Spencer was guilty of manslaughter as a principal offender, as enabler or aider, or pursuant to s 8 of the *Code*.
- [22] The trial judge in his summing up summarised Mr Spencer's counsel's address in relation to the out of court statements in terms that it was accepted that until about page 57 of the transcript of the record of interview Mr Spencer "was maintaining a falsehood as to what had happened", but from that point on he answered the questions in a way that was submitted by Mr Spencer's counsel to be "fulsome". The trial judge repeated the submission that had been made by Mr Spencer's counsel that "everything from about page 57 on was an account of what occurred, to Mr Spencer's knowledge, an account of what he knew and what he believed and what he intended that was accurate in all respects". The jury was reminded of the submission that had been made by Mr Spencer's counsel that there was no evidence otherwise in the prosecution case that controverted what Mr Spencer was saying after page 57 in the transcript which was also repeated in his conversation with the undercover police officer.

- [23] The trial judge's oral summing up was supplemented by written handouts that had been given to the jury during the course of the trial and to which reference was made in the course of the summing up. The handout headed "Information for Jurors" set out at the outset under the heading "Burden and Standard of Proof", the following standard direction:

"An accused in a criminal trial is presumed to be innocent. So, before you may return a verdict of guilty with respect to any one of the accused persons, the prosecution must satisfy you of the guilt of that accused, and must satisfy you of that beyond reasonable doubt."

- [24] In the oral summing up, the trial judge repeated the directions on the burden of proof and the onus of proof and emphasised the burden on the prosecution of proving Mr Spencer's guilt in giving the usual directions about circumstantial evidence and the drawing of inferences and the fact that Mr Spencer neither gave nor called evidence did not affect the prosecution's responsibility to prove his guilt beyond reasonable doubt. The trial judge emphasised that the jury had to accept and apply all directions he gave them on the law, including that directions on how the jury were to treat particular evidence were directions as to matters of law.

- [25] Because of the emphasis placed by both the prosecution and the defence at the trial on the content of Mr Spencer's out of court statements, the directions given by the trial judge to the jury in respect of the use to be made of them was critical. The direction given by the trial judge in relation to what the jury had to be satisfied about in order to act on evidence in the out of court statements that was relied upon by the prosecution in its case was unremarkable. The jury were directed that in order to rely on that evidence, they had to be satisfied that the answers to a number of questions relied on by the prosecution to support its case were, in fact, given and they were true and accurate. The direction finished in these terms:

"It is up to you to decide whether you are satisfied about those things, but unless you are, you cannot rely on those statements or those answers as going to prove the Crown case or assist the Crown to prove its case against the relevant accused."

- [26] The trial judge then proceeded to direct the jury on exculpatory statements made in those out of court recordings which had been the focus of Mr Spencer's counsel's address to the jury. It is that part of the trial judge's directions concerning Mr Spencer's out of court statements that supported the defence contentions at trial that is the subject of ground 1:

"Do not think, though, that it is all one-way traffic with the recordings. There are answers which you might think go towards indicating or proving the accused's innocence. I am simply talking here about you relying upon this evidence at all, one way or the other. You are entitled, as I say, to have regard to the answers given by either accused if you accept they were made and if you accept that they were true and accurate and to give them whatever weight you think appropriate, but bear in mind that they have not been tested. That is, the answers have not been tested by cross-examination by anyone. In relation to both the answers which the Crown relies on as indicating guilt and those which point to innocence, it is entirely up to you what use you make of them and what weight you give them."

- [27] Mr Spencer submits that the use of the phrase “indicating or proving the accused’s innocence” (to which I will refer as the first slip) had a real tendency to reverse the onus of proof that was then reinforced by the remainder of the direction which conveyed a direction to the jury that the answers could only be relied on “one way or the other”, if the jury “accept[ed] that they were made and ... they were true and accurate”. I will refer to that part of the direction as the second slip.
- [28] The first slip has to be considered in the light of the balance of the written and oral directions that were clear and firm on the fact that Mr Spencer did not bear any onus whatsoever and that it was the prosecution’s burden to prove Mr Spencer’s guilt beyond reasonable doubt. Mr Eberhardt of counsel who appears for Mr Spencer frankly concedes that Mr Spencer would not now have a complaint about the first slip, if the trial judge had not placed the condition on the jury that Mr Spencer’s exculpatory statements had to be accepted by the jury as true and accurate before they could use them.
- [29] The direction on how to use any exculpatory statements concluded with the observation that applied to both the answers relied on by the prosecution as indicating guilt and those which point to innocence and that it was entirely up to the jury as to what use they made of them and what weight they gave them. Mr Spencer submits that did not remedy the second slip.
- [30] The context of Mr Spencer’s counsel’s address to the jury where he asserted that they would accept the second half of Mr Spencer’s interview with the police after p 57 of the transcript as truthful was probably the source of the second slip. Even though Mr Spencer’s counsel addressed the jury in terms that they should accept his client was truthful after p 57 of the interview, it was incorrect for the trial judge to direct the jury that they had to accept that Mr Spencer’s answers in that interview were true and accurate before they used them in evaluating the prosecution case. Even if the jury did not accept the relevant statements as true and accurate, there was the possibility that the jury might consider the statements “might be true”: see *De Silva v The Queen* (2019) 94 ALJR 100 at [12]. If that were the case, it was a matter for the jury whether any of the exculpatory statements that they considered might be true raised a reasonable doubt for them in respect of any of the inferences which the prosecution urged them to draw against Mr Spencer.
- [31] Mr Spencer therefore argues that the circumstances that applied to the use that could be made by the jury of his out of court statements warranted a direction as described in *De Silva* at [10]:

“This is not to say that the occasions calling for a *Liberato* direction should be few. The *Liberato* direction serves to clarify and reinforce directions on the onus and standard of proof in a case in which there is a risk that the jury may be left with the impression that the evidence on which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt. Subject to statute, a *Liberato* direction should be given in a case in which the trial judge perceives that there is a real risk that the jury might view their role in this way.” (*footnote omitted*)

- [32] The respondent submits that the impugned passage from the trial judge's direction about the out of court statements was merely drawing a distinction between exculpatory statements and admissions by Mr Spencer and the jury was correctly directed that it was a matter for them to decide the weight to be given to a particular statement.
- [33] The respondent submits that this was an unusual case in which both the prosecution and the defence at trial relied on the same evidence in the out of court statements for the purpose of drawing different inferences. The respondent therefore submits that it was not a case calling for a *Liberato* direction, as there was no risk in the context of the entire summing up that the jury would have concluded from the impugned direction that the burden and onus of proof had in any way shifted from the prosecution.
- [34] The offender in *De Silva* had been charged with two counts of rape arising from the digital penetration of the complainant. He participated in a recorded police interview where he denied the digital penetration. He was found not guilty of one count and guilty of the other. The trial judge had directed the jury in relation to the offender's exculpatory statements in the record of interview that "he also gave answers which you might view as indicating his innocence ... you are entitled to have regard to those answers, if you accept them, and to give them whatever weight you think appropriate." The offender was unsuccessful in his appeal to the Court of Appeal (*R v De Silva* [2018] QCA 274) and his further appeal to the High Court was dismissed by a majority. The Court of Appeal had held (at [43]) that the reference to answers as "indicating his innocence" was descriptive of the answers as exculpatory and (at [44]) that the instruction "if you accept them" in respect of the exculpatory answers related to the earlier direction concerning the record of interview that the jury had to consider first whether to accept the answers were given. The majority judgment in the High Court found (at [34]) that it would have read too much into the impugned direction to take from it that the jury would have understood the direction as meaning "if you accept the truth of" the answers, particularly when the further instruction was given to them to give the answers "whatever weight you think appropriate". In the context of the summing up in *De Silva*, the majority judgment in the High Court also concluded (at [35]) that the reference to the answers indicating "innocence" was descriptive of the answers as exculpatory.
- [35] *De Silva* was a relatively straightforward case where the exculpatory statements were focused on the offender's description of hugging the complainant only and the denials of penetration. The ambit of Mr Spencer's out of court statements was much greater and extensive passages from them were referred to by both the prosecutor and the defence counsel in their addresses to the jury at trial. It was unusual in Mr Spencer's trial that both the prosecution and the defence relied on some of the same passages in out of court statements for the purpose of drawing different inferences, particularly in relation to the case based on s 8 of the *Code*. It is relevant to this ground that Mr Spencer's counsel at trial also relied on parts of the out of court statements that were not specifically relied on by the prosecution.
- [36] The first slip would have been mitigated by the balance of the summing up, but for the second slip. Mr Spencer did not bear any onus whatsoever of proving his innocence and the jury did not need to be satisfied that the answers he gave which were relied upon by his counsel for drawing the inferences that pointed to a guilty verdict of manslaughter were true and accurate, before they could be satisfied there

was a reasonable doubt about the inferences that the prosecution was seeking to draw for the jury to be satisfied that Mr Spencer was guilty of murder. The concluding words to the impugned direction, that in respect of the answers the prosecution relied on as indicating guilt and those which pointed to innocence, it was up to the jury what use they made of them and what weight they gave them, could not overcome the effect of the first and second slips.

- [37] The first and second slips would have been better avoided altogether, but a *Liberato* direction (as modified in *De Silva* at [12]) would have mitigated both the first and second slips.
- [38] No redirection was sought at the trial in relation to the directions given by the trial judge on how the jury could use the exculpatory statements made by Mr Spencer in the out of court statements. That could not be explained as a forensic decision, as there was nothing to be gained for Mr Spencer in not seeking the redirection. The prosecution did not endeavour to show that the misdirection in respect of the use by the jury of the exculpatory statements made by Mr Spencer did not result in a substantial miscarriage of justice. The appeal must therefore be allowed, the conviction set aside and a new trial ordered.

Ground 2

- [39] It is not necessary to deal with ground 2, but as it may have relevance for the retrial, it is appropriate to make some observations in relation to the substance of this ground. There are two aspects to ground 2. The first is that the trial judge failed to direct the jury that in considering the common purpose question, they needed to take into account the evolving circumstances and an evolving plan to determine what, if any, plan was actually agreed to by Mr Spencer. The second is that the directions failed to emphasise the necessity for the murder to have been committed in “furtherance” of the common purpose.
- [40] For a person to have criminal responsibility on the basis of s 8 of the *Code*, three requirements must be proved:
- (1) the formation by two or more persons of a common intention to prosecute an unlawful purpose in conjunction with one another;
 - (2) the commission of an offence in the prosecution of that purpose; and
 - (3) the offence is of such a nature that its commission is a probable consequence of the prosecution of that purpose.

See *R v Ritchie* [1998] QCA 188 at pp 4-5 per McPherson JA.

- [41] With respect to the first requirement, the prosecution case against Mr Spencer was that he “actively participated in a common unlawful purpose ... to assault [the deceased] whilst armed with weapons”.
- [42] Mr Spencer submits that, consistent with the approach in *Ritchie*, the common purpose question required the jury to be directed upon, and carefully consider, the evolving circumstances (and potentially an evolving plan) confronting Mr Spencer, what (if any) plan was actually agreed to by him and to determine the level of violence that was commonly intended.

- [43] The factual circumstances in *Ritchie* showed that there was escalating violence inflicted on the victim and a question arose in relation to Ms Ritchie whether the plan to which she was originally a party was replaced by one in which the other participants engaged in acts of violence against the victim going beyond the level of force that was initially contemplated by all participants including Ms Ritchie. The evidence that pointed to an evolving plan amongst the participants (other than Ms Ritchie) required the jury in that matter to be directed that the prosecution had to prove that Ms Ritchie “formed and ... shared the intention to inflict more serious violence than was originally in the common contemplation of all concerned”.
- [44] Unlike *Ritchie*, the case against Mr Spencer proceeded on the basis of a relatively simple plan, as particularised by the prosecution, and the timing of the formation on the unlawful common purpose was, at the latest, when Mr Crump gave Mr Spencer the Crocodile Dundee knife (and Mr Spencer saw that Mr Crump was also armed) before they walked together to meet Mr Crump at his premises. There was nothing in the evidence that pointed to any change of plan on the part of Mr Crump after that point. This was not a case of evolving circumstances.
- [45] The trial judge gave a direction to the jury to show how Mr Spencer would not be found guilty of murder on the basis of liability under s 8 of the *Code*. The trial judge directed that “if there is any reasonable possibility that there was not a common intention to prosecute the unlawful common purpose advanced by the Crown in this case, which is to attack [the deceased] with weapons, then you must acquit”. On the basis of a submission that had been made that, if there was any awareness by Mr Spencer of a plan, it did not rise “much higher” than that the deceased would be belted, the trial judge directed that if the jury accepted that as a reasonable possibility, then their duty was to find Mr Spencer not guilty [of murder].
- [46] Mr Spencer cannot succeed on the first aspect of the directions in respect of s 8 of the *Code*.
- [47] Mr Spencer bases the second aspect that the directions failed to emphasise the necessity for the murder to have been committed in “furtherance” of the common purpose rather than simply having been committed by Mr Crump in the course of the “carrying out the plan” on *R v Phillips and Lawrence* [1967] Qd R 237 at 258 and 284. Mr Spencer concedes that the distinction raised by this aspect is subtle, but argues that it is still important, as the jury may have found the second element satisfied because they found the deceased was murdered by Mr Crump during the incident without considering whether Mr Crump murdered him in “furtherance” of the unlawful common purpose actually agreed upon. This aspect is directed at the second requirement for liability under s 8 of the *Code*.
- [48] In the first part of the oral summing up, the trial judge referred to the basis of liability on which the prosecution case was advanced against Mr Spencer under s 8 of the *Code* and read out that section which sets out the three requirements for liability. The trial judge then rephrased the provision in simpler language in similar terms to that set out in the *Supreme and District Courts Criminal Directions Benchbook* at 74.7:

“So another way of stating that would be to say when two or more persons plan to do something unlawful together and, in carrying out

that plan, an offence is committed, ... each of the people who [was] party to the plan is taken to have committed the offence that was, in fact, committed, but only if the offence was of such a nature that its commission was a probable consequence of carrying out the plan.”

[49] The trial judge’s written handout for the jury entitled “Further Information for Jurors” that was incorporated by reference during the oral summing up repeated at paragraph 23 the explanation for liability under s 8 that the trial judge had used to explain the wording of s 8, but also at paragraph 24 set out the three requirements that must be proved by the prosecution that reflect the actual wording of the provision. In dealing with the first requirement, the trial judge set out at paragraph 25 the prosecution’s allegation that the common unlawful purpose was a plan to assault the deceased whilst armed with weapons and the jury were directed that they needed to consider whether Mr Spencer agreed “to take part in such a plan”. In paragraph 26 of the handout, in dealing with the second requirement for liability under s 8 that the murder was committed in the prosecution of that purpose, the trial judge directed the jury that they must consider “whether, in carrying out that plan, [the deceased] was murdered (i.e., assaulted by a person or persons armed with weapons and with the intention of causing grievous bodily harm or death)”. The trial judge in the oral summing up similarly used the phrase “in carrying out that plan” interchangeably with “the prosecution of that purpose” and expressly stated to the jury that “carrying out of the plan” was another way of saying “the prosecution of that purpose”. The trial judge in both the written handout and oral summing up gave directions on liability under s 8 for the offence of manslaughter where the second requirement to establish liability was also explained.

[50] Mr Spencer’s complaint is based on an assumption that the use by the trial judge of the expression “carrying out the plan” in giving directions on the second requirement of s 8 of the *Code* did not convey fully the second requirement of s 8 that the commission of an offence occurred in the prosecution of the unlawful common purpose. The expression “furtherance” was used in *Phillips and Lawrence* as another way of expressing the second requirement of s 8 that the offence be committed in the prosecution of that unlawful common purpose. The word “furtherance” is not an essential part of any direction based on s 8, provided the second requirement is fully explained. The use of the alternative form of expression “the commission of an offence in the carrying out of that plan” for the second requirement of “the commission of an offence in the prosecution of that purpose” is another way of explaining fully the second requirement for liability based on s 8. Both the written and oral directions given by the trial judge used the form of words set out in s 8 of the *Code* and the alternative permissible expressions for conveying the second requirement. There was no misdirection in respect of the second requirement.

Orders

- [51] As Mr Spencer has succeeded on ground 1, it follows that the orders should be:
1. Appeal allowed.
 2. Conviction set aside.
 3. New trial ordered.