SUPREME COURT OF QUEENSLAND

CITATION:	*R v Spencer* [2023] QCA 210
PARTIES:	**R** **v** **SPENCER, Trevor** (appellant)
FILE NO/S:	CA No 87 of 2021 SC No 1968 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 23 April 2021 (Rafter AJ)
DELIVERED ON:	31 October 2023
DELIVERED AT:	Brisbane
HEARING DATE:	9 August 2023
JUDGES:	Bowskill CJ and Morrison JA and Crow J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of murder following a trial by jury – where the case against the appellant was particularised on the basis that he was liable for murder on three alternative bases: either as the principal offender under s 7(1)(a) of the *Criminal Code*, as an aider under s 7(1)(b) or s 7(1)(c), or by reason of participating in a common unlawful purpose under s 8 – where, on appeal, the appellant contended that a miscarriage of justice occurred by reason of the trial judge failing to direct the jury that they were required to be unanimous as to the basis upon which the appellant was guilty – whether a unanimity direction was required CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the case against the appellant was a circumstantial one – where, on appeal, the appellant contended that the medical and forensic evidence, including DNA evidence, did not support the appellant's direct involvement in the stabbing, and that it was also not open to the jury to find the appellant guilty as an aider or on the basis of the prosecution of a common unlawful purpose – whether

the verdict was unreasonable and could not be supported having regard to the evidence

Criminal Code (Qld), s 7(1)(a), s 7(1)(b), s 7(1)(c), s 8, s 644(1)

Baker v Smith [2021] QCA 66, cited
Country Care Group Pty Ltd v Director of Public Prosecutions (Cth) (2020) 275 FCR 342; [2020] FCAFC 30, cited
Dansie v The Queen (2022) 274 CLR 651; [2022] HCA 25, cited
Lanciana v The King [2023] VSCA 78, considered
Lane v The Queen (2018) 265 CLR 196; [2018] HCA 28, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Pell v The Queen (2020) 268 CLR 123; [2020] HCA 12, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Chignell [1991] 2 NZLR 257, considered
R v Giannetto [1997] 1 Cr App R 1, considered
R v Kirkby [2000] 2 Qd R 57; [1998] QCA 445, cited
R v Koko [2022] QCA 216, considered
R v Leivers and Ballinger [1999] 1 Qd R 649; [1998] QCA 99, considered
R v McCarthy (2015) 256 A Crim R 338; [2015] SASCFC 177, considered
R v Serratore (1999) 48 NSWLR 101; [1999] NSWCCA 377, cited
R v Spathis; R v Patsalis [2001] NSWCCA 476, considered
R v Swindall & Osborne (1846) 175 ER 95; 2 Car & K 230; [1846] EngR 506, cited
R v Walsh (2002) 131 A Crim R 299; [2002] VSCA 98, considered
Ribbon v The Queen (2019) 134 SASR 328; [2019] SASCFC 130, considered
Sadler v The King [2023] SASCA 63, cited
Thatcher v The Queen [1987] 1 SCR 652, considered

COUNSEL: T Pincus and D V Nguyen for the applicant (pro bono)
S L Dennis for the respondent

SOLICITORS: Jasper Fogerty Lawyers for the applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **BOWSKILL CJ:** On 23 August 2016, Gary Ryan was killed, in circumstances where he was severely assaulted with multiple bladed weapons, causing some 59 wounds, the combination of which caused extensive blood loss, resulting in his death.

[2] Five people were charged with his murder, but the Crown ultimately proceeded against only three of them: Mark Crump; his father, Stephen Crump; and the appellant. Mark Crump pleaded guilty to murder, before the trial of the charge against the appellant and Stephen Crump took place in October and November

2019. At that trial, the appellant was convicted of murder; Stephen Crump was found not guilty of murder and manslaughter. The appellant successfully appealed against the conviction on the basis of a misdirection, and a retrial was ordered.[1]

[3] The retrial took place in April 2021. The case against the appellant was particularised on the basis that he was liable for the murder of Mr Ryan because he either (A) caused Mr Ryan's death by inflicting wounds to him with a weapon with the requisite intent (s 7(1)(a) of the *Criminal Code*); or (B) enabled, aided or encouraged Mark Crump to cause the death of Mr Ryan, by travelling with Mark Crump to assist him, assaulting Mr Ryan whilst armed with a weapon(s) and/or by his deliberate presence at the scene whilst armed with a weapon(s) (s 7(1)(b) and/or s 7(1)(c)); or (C) actively participated in a common unlawful purpose with Mark Crump to assault Mr Ryan whilst armed with weapons, and it was a probable consequence of carrying out the common unlawful purpose that Mr Ryan would be murdered (s 8).

[4] On 23 April 2021, the appellant was again convicted of the murder of Mr Ryan. He now appeals the conviction on the grounds:

1. A miscarriage of justice occurred by reason of the trial judge failing to direct the jury of a requirement for unanimity as to whether the appellant was guilty under Basis A, on the one hand, or either of Bases B or C on the other hand.

2. The verdict is unreasonable and cannot be supported having regard to the evidence.

3. A miscarriage of justice occurred by reason of the trial judge failing to direct the jury that the formal admission in respect of Mark Crump was not evidence against the appellant.

4. A miscarriage of justice occurred by reason of the trial judge failing to direct the jury not to speculate about Stephen Crump.

[5] In order to address ground 1 and ground 2, it is necessary to have regard to the whole of the evidence at the trial, and the way in which the Crown's case against the appellant was put to the jury.

The evidence at the trial

[6] The deceased man, Mr Ryan, had previously been in a relationship with a woman, Marilyn, with whom he had a daughter, A. She was 15 at the time he was killed. Mr Ryan and Marilyn separated when their daughter was about one year old. There were disputes about custody, although A lived with her father for most of the time as she was growing up. At the time of Mr Ryan's death, Marilyn was in a relationship with Mark Crump. They had two children of their own, and Mark Crump also had other children from another relationship. They lived in Orange (New South Wales). Mark Crump's father, Stephen Crump, lived in Rockhampton. The appellant, Trevor Spencer, was friends with Mark Crump and his partner, Marilyn. He lived in Dubbo. At the time of his death, Mr Ryan lived in a house in Mundubbera, with his mother and his daughter. Next to the house was a large shed, and at the side of the shed was a small bathroom with a toilet and sink inside. There

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1 *R v Spencer* [2020] QCA 265.

were a number of vehicles outside the shed, and also parts of vehicles (doors and bonnets) as well as tyres.

[7] The custody dispute was ongoing in the lead up to Mr Ryan's death. For some months from late 2015 to mid-2016, A lived with her mother and Mark Crump, before returning to live with her father. The joint admissions at the trial included that:

> "On 15 June 2016 an order was made in the Family Court stating that [A] was to live with her mother [Marilyn] and would stay with her father for half of each school holidays.
>
> On 15 July 2016 a Family Court recovery order was made that [A] was to be returned to her mother.
>
> On 29 July 2016 a Family Court recovery order was made that [A] was to be returned to her mother. The order confirmed that the previous order made on 15 July 2016 was to remain in existence until executed."

[8] A refused to return to live with her mother. That was in circumstances where, as it was also admitted:

> "On 14 July 2016 [A] attended Bundaberg police station and made a sexual assault complaint against Mark Crump. She said that occurred during the six months that she lived at [address in Orange, NSW] between Christmas 2015 and the beginning of July 2016. This information was forward to New South Wales Police."

[9] Then, it was admitted:

> "On 12 August 2016 an order was made in the Family Court that [A] was to live with her father, the deceased. It was further ordered that the previous orders made on 15 June, 15 July and 29 July 2016 were set aside."

[10] On 23 August 2016, Mr Ryan was at home with his mother and his daughter. It was admitted at the trial that:

> "At about 10.30am, Gary Ryan said to [his mother] '*I'll go and see what this strange looking man wants*' and he went outside.
>
> At about 11.15am, [his mother] went to get Gary Ryan from outside as he had not returned. She walked around to the front of the shed and saw Gary lying on the floor in the toilet block. Gary Ryan was lying on his right side in front of the toilet bowl. He said 'mum I'm dying'. She observed wounds to the back of his head and neck."

[11] A came out when she heard the mother screaming. She saw him lying in a pool of blood, semi-conscious. She also saw a knife sitting on some tyres next to the toilet block (described as "a form of Katana") as well as a smaller knife laying in a pool of blood over near another stack of tyres. Although she accepted in cross-examination that Mr Ryan used to keep a 12 inch knife in his car, she said she had never seen those weapons (that is, the ones found at the scene) before.

[12] An ambulance was called, arriving at about 11.23 am. The paramedic who first arrived on the scene, Mr Smith, observed a male, Mr Ryan, lying on his side in the toilet cubicle, with a lot of blood around. He had injuries – incised wounds – to the back of his head, front of his neck and on his hands. Mr Ryan was still conscious and was able to tell the paramedic that he had been assaulted. The paramedic tried in vain to stem the blood flow from the wounds to his head and neck. Upon arriving at Mundubbera Hospital, Mr Ryan went into cardiac arrest and did not recover. He was declared dead shortly after 1 pm on 23 August 2016.

[13] The local police officer, Clarke, also attended the scene. He observed a "machete-style knife" on top of a stack of tyres next to the toilet cubicle area as well as some smaller knives. He described "an area between the [toilet] cubicle and the fence line where there was tyres, and car parts, and car bonnets, and fence panelling and there was pools of blood and blood all over the toilet cubicle. And there was a large machete knife on the stack of tyres next to the cubicle, and then there was smaller knives, I think, it was closer to the fence line". He also found Mr Ryan's phone, covered in blood, inside a tyre, in between the toilet cubicle and the fence line. It was starting to rain, so in order to preserve the evidence he and another police officer who had arrived (Bazzo) used a car bonnet and a number of fence panels to put over the weapons located at the scene. Another officer, Ryan, took steps to protect the weapons that were found, a small knife and a machete, by placing a plastic evidence bag over the knife, and placing the machete partially in a plastic bag, but otherwise leaving them in the places they were found.

[14] Investigating officers arrived at the house in the late afternoon of 23 August 2016. There was evidence from one of the officers that he could see blood on the outside wall and door of the bathroom, as well as inside, and blood on the ground outside as well as on various doors and bonnets from vehicles outside. A smaller knife was found on the ground, as well as a "larger machete sword type knife", sitting on a stack of tyres, in a plastic bag.

[15] The appellant lived in a block of units in Dubbo. Another man who lived there, Mr Porch, gave evidence that, in about July or August 2016, the appellant told him that "Mark had rang him up and asked him would I go up to Queensland to bash a bloke for them… for Mark". In cross-examination, Mr Porch agreed that what the appellant said to him was "Mark wants me to ask you if you want to come up and help belt this bloke in Queensland". Mr Porch said he responded "No, don't be stupid. I'm not into that sort of stuff". Mr Porch told the appellant it was a stupid idea. He said the appellant agreed with him and there was no further discussion about that.

[16] Mr Porch also said that the appellant had told him at some stage there was a girl from Queensland, who was Marilyn's daughter, who had come down to stay with them (Mark and Marilyn) for a couple of days and that the appellant also told him that the girl had gone to the police in Queensland and reported Mark for touching her. Mr Porch went on to say that the appellant told him Mark was "really cranky" about that, because "Mark had spent $10,000 on court proceedings to have that – to be able to have that girl come live with them in Orange".

[17] Mr Porch said there was another occasion, in August 2016, when the appellant came to him and said that he was going down to Sydney with Mark, to Cabramatta, to try and find a gun. Mr Porch said that the appellant went to Sydney, and was gone for two days. When he came back, he came to Mr Porch's unit, and showed him

a Samurai sword. He said a couple of weeks before that, the appellant had shown him a knife that he had bought. He said the appellant told him the Samurai sword came from Mark, who had bought three of them, and gave the appellant one. Mr Porch thought it was an ornament rather than a weapon, and told the appellant it was rubbish.

[18] Mr Porch recalled another time when he was over at the appellant's flat, using his computer. Mark turned up, with two girls, and Mr Porch left. Sometime after that, he remembered the appellant going away again. He returned a day or so later and Mr Porch noticed that he had a cut on his hand. Mr Porch said he asked the appellant what happened with the cut "and he said that he was out chopping some timber to make Mark some furniture and he fell over and cut his hand on the axe".

[19] Mr Porch had lived in the same block as the appellant for three years, and regarded him as a good neighbour. He agreed that the appellant was about 70 at the time, a retired cook, pensioner, unhealthy looking, fat and was "pretty functional" although had some trouble moving around because of his bad knees. He also agreed that Mark was maybe 40 years old, a fairly tall fellow, pretty solidly built or "chunky".

[20] Another neighbour of the appellant's, Mr Robinson, also gave evidence. He had been the appellant's neighbour for about six years. He recalled having a conversation with the appellant in August 2016 when the appellant said he and his friend Mark were heading up to Queensland. He thought the appellant was away for somewhere between three and five days. In the lead up to the appellant going to Queensland, the appellant told Mr Robinson that "Mark was having some issues with one of his daughters that was going through some sort of legal process at the time". He said the appellant told him "[i]t was costing Mark anywhere between 10 to 13, 16 thousand dollars, that Mark was angry about the whole situation at the time". When Mr Robinson next saw the appellant, he had a bandage on his right hand. The appellant told Mr Robinson "he'd been chopping some wood to make furniture for Mark and that he'd injured himself by falling on the axe, almost severing one of his fingers".

[21] Mr Redfern, a friend of Mr Robinson's, who had in that way come to know the appellant, gave evidence of the appellant telling him he was going to Queensland with "a friend" and, later, of receiving a phone call from the Dubbo Hospital, to go and pick up the appellant. When he picked the appellant up, he noticed his hand was taped up. As to what had happened, the appellant said he had been out in the bush, was using an axe, and slipped over. Mr Redfern noticed that the appellant was slurring his speech, and thought that was because of the painkillers he was on. Mr Redfern gave a similar description of the appellant's physical appearance and mobility, and said he had "not really" ever known him to be violent or aggressive.

[22] An admission was made at the trial that the appellant "has no previous criminal convictions for any offences of violence".

[23] The police interviewed Mark Crump's daughter, Jessica, in February 2017. She was almost 14 at the time. The recording of her interview was played at the trial, pursuant to s 93A of the *Evidence Act 1977*. She recalled a time that she went with her dad to the appellant's (Trevor's) place at Dubbo. She said the appellant and her dad were "talking about the gun", that Trevor said he knew where a gun shop was in

Sydney, and that her dad (Mark) was saying "he'll get him to show him where it is so they can get a gun". Trevor came back with them to Orange and stayed the night there, and the following morning Mark and Trevor had gone. They were away for about two days. She did not see Trevor come back. Jessica then said her dad had a plan because "dad really didn't like Gary [Mr Ryan] at all, that he was going up to Queensland". She saw her mum packing the car for her dad, putting in bags of clothes as well as "the swords and the dagger". She said her dad got the swords on eBay and gave her, Chantiel and Jaime "our own big swords". She said her mum took one of these swords and put it in the boot of her dad's blue car. Jessica thought her dad was away for four days. Jessica's further evidence was pre-recorded on 17 September 2019, pursuant to s 21AK of the *Evidence Act 1977*, and also played at the trial.

[24] There was an admission made at the trial that Mark Crump purchased various weapons on eBay and/or a store in Orange in August 2016, including a "crossbow pistol and swords".

[25] A friend of Jessica's, Jaime, was also interviewed by the police. It was admitted that, in the course of that interview, she told police that:

> "Approximately one to two months before Mark Crump and Trevor Spencer went to Queensland, [Jamie] accompanied Mark Crump, Jessica … and Chantiel … on a trip from Orange to Dubbo where they visited Trevor Spencer. Mark Crump brought a number of swords and knives that he had purchased on the internet with him to show Trevor Spencer. Trevor Spencer came back to Orange with them. Mark Crump also gave [Jamie] a knife and [Jamie] asked Mark Crump to show her how to sharpen it. [Jamie] was present when Mark Crump bought an oilstone at Bunnings and Mark Crump showed her how to sharpen it. She saw Trevor Spencer sharpening some knives at that time. This occurred prior to a trip to Sydney that she overheard Mark Crump and Trevor Spencer discussing."

[26] On Friday, 26 August 2016, a search warrant was executed at the appellant's flat in Dubbo. A number of items were seized, including two swords, a shotgun, and a suitcase that contained things including matches, zip ties, batteries and shotgun cartridge rounds. More shotgun shells and a box of disposable gloves were also found, separately from the suitcase. Later that night, the appellant participated in an interview with the police, commencing about 9.18 pm and continuing until just after midnight.

[27] For about the first hour of the interview, the appellant tells a "concocted" (his word) tale of lies about what he had done in the previous five days. He is told the police are investigating the murder of Gary Ryan. The appellant says that name is known to him, as the ex-husband of Marilyn, who is his friend, together with her partner, Mark, and says that he heard something had happened to Gary and he was in a "serious condition", but that's all he knew.

[28] In the video-recorded interview, the appellant has a large bandage on his right hand. He tells the police that on Monday of that week he was home most of the day; if he went anywhere it was only into town to get some supplies or to the chemist. On the Tuesday, he said he went out to a farm to look for suitable wood, because he had an idea to make some outdoor furniture for Mark's kids, who are like his

grandchildren. He said he had an axe with him. He stood up on a piece of wood and slipped because his knees gave way. He said he dropped the axe to save his knees and his hand went down on the axe and that is how he injured his hand. He said he "flaked out", then came to, drove back home, and rang his mate to take him to the hospital, getting there about 11.30 on Tuesday night. He had an operation on his hand on Wednesday afternoon and was discharged on Thursday afternoon.

[29] The appellant told the police he knew that Mark and Marilyn were having some problems because of Marilyn's daughter. He described how Marilyn had tried for a lot of years to get her daughter back, and that there were court cases. He said "Mark was … doing his best and I know he spent a squillion dollars at the solicitors trying to sorta get her back and sorta, and get, get Marilyn to have sole custody and everything. I think it's been somewhere around eighteen thousand dollars at these solicitors". But then the daughter went back to her father (Gary Ryan) for the first week of the school holidays, and then "he wouldn't give her back".

[30] He told police that Mark had dropped off a suitcase containing the swords and shotgun the previous Saturday and asked him to "look after this for a while". He said he did not know what was in the suitcase, until the police opened it when executing the search warrant. The appellant said he believed the shotgun belonged to "a guy named Steve" but said he did not know anything else about him.

[31] After being questioned for about an hour, the police showed the appellant a receipt for purchase of fuel in Goondiwindi just after 8 pm on (Tuesday) 23 August 2016, as well as photographs from the CCTV footage from the service station, of the person who paid for the fuel and the person who was with him. He identified the first person as Mark (Crump) and, in relation to the second person, said "[c]ertainly looks like me but I don't know how I got there". The appellant has a bandage on his right hand in this photograph.

[32] The appellant was also shown some other photos, taken at 6.55 pm on (Sunday) 21 August 2016, at another service station, at Gin Gin in Queensland. There are three people in these photographs. He agreed that it was "Mark and me" in the photographs, but said he did not know who the third person was, and had no recollection of being there.

[33] The police told the appellant at this point that Mark had been arrested and charged with the murder of Gary Ryan. He was asked if he had any involvement in the murder and he said "[i]n the murder as such, no". He went on to say that Mark was "[l]ooking after Marilyn" and that he (the appellant) "was asked to go with Mark to help with the driving because he wouldn't have been able to drive up there and back because he's got back problems". The appellant initially said:

> "I agreed to go with him. Um **it was indicated to me during the course of conversation during the driving that what was likely to take place there**. Um when we got to the address which I don't know the address off the top of my head … [explaining how he had followed instructions to get there]. So I dropped him off there… and then he said oh, just ten minutes and then come back. I went back in ten minutes, he came out, got in the car and we took off."

[34] The appellant said he, that is Mark, had blood on himself and "I did not ask, I did not want to ask"; and said from there they headed back.

[35] The appellant was asked how he received the wound to his hand and, after some prevaricating, said:

> "Yeah, okay. I went in with him, I didn't have anything, ah yes I did, **I had a knife with me at that time**. Um that is how I got this because Mark attacked him [Gary]. He [Gary] fell down on the ground, he lashed out with his feet, he kicked me here. I have got stuffed up knees. I put my hand down to save myself from falling, that part of it is right, that's how I got it, how I got this."

[36] The appellant then said that in fact he and Mark had left his place to go to Queensland on the Saturday night, or Sunday morning – 1 o'clock in the morning – saying "[j]ust the two of us". They drove in Mark's blue Toyota. He said the bag (or suitcase) earlier referred to had ended up at his place when they got back from Queensland, although maintained he did not know what was in it.

[37] As the interview progressed further, the appellant said there were in fact three of them, and the third person was "Steve", and from what he could work out that was Mark's father. At this point, he was shown the photographs from the Gin Gin petrol station again, and said the third person was Steve. He said he first met Steve on Sunday. Steve also had a car, a white Falcon.

[38] The appellant said when they got to the first place they were going to stay, they decided it was too expensive (because they would be charged a minimum of two nights, even if only staying for one) and so drove further to another place (the appellant couldn't remember the name of it, but other evidence indicated it was at Gin Gin) and stayed there on the Sunday and Monday nights.

[39] The admissions at the trial included that:

> "Stephen Crump, Mark Crump and Trevor Spencer went to the Kin Kora Village Caravan Residential Home Park in Gladstone QLD in the afternoon on 21 August 2016. A few days earlier Stephen Crump made an enquiry regarding booking accommodation for three men. He said that he would be meeting two other men and he would arrive before them. It was suggested that they could stay in a villa and could look at it when they arrived. After arriving on 21 August 2016 and making enquiries about the price for one night only, they were informed that the management would only rent a villa for a minimum of two nights. They decided not to stay and left.
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> Between 21 and 23 August 2016, Trevor Spencer, Stephen Crump and Mark Crump stayed at the Gin Gin Motor Inn. They arrived at about 6:00pm. They all stayed in one room together. Two nights' accommodation was paid for by Mark Crump using cash from the wallet of Stephen Crump. They ordered dinner from the motor inn on 22 August and ordered breakfast on both 22 and 23 August 2016. They requested breakfast on 23 August 2016 be brought early as they needed to get away early. They had two cars with them at the motor inn – a grey blue car and a white sedan."

[40] On the Monday (22 August 2016), they went for a drive so they could "have a look at the place, the house", meaning Gary's house, describing this as "recon". They

did this in Steve's car. The purpose of this "recon" was "[j]ust so we, we knew where to go the next day more than anything". Other evidence confirmed that a photograph taken on the phone used by Mark Crump was taken on the street outside Mr Ryan's address in Mundubbera.

[41] As to what was going to happen the next day, the appellant said Mark was going to visit Gary, and described the purpose of the visit as "initially it was to try and talk some sense to him to, to um, to tell him to give [A] back to his mother as per Federal Court Orders… Ah it didn't happen that way and then things got ugly".

[42] After the "recon", they went back to the motel, had dinner and the appellant went to bed. The next morning, they left in the two cars, but dropped Mark's car off at some place before driving to Gary's house in Steve's car. Steve was driving.

[43] When they got to Gary's house, Steve dropped the appellant and Mark off, and drove around the block, with the instruction to come back in about ten minutes.

[44] The appellant said that as he got out of the car, Mark put on a jacket and "somehow or other" he had a sword. The appellant then said:

> "Ah what other weaponry he had with him at that time, I don't know. Um and so I, **I was given this knife**, just holding down out of sight which I did. **And I yeah, didn't really wanna do it, I'm no-, not really into killing people,** um but I took [it] in there and then like I said Mark started talking. He ah, he came down from the house and he was sorta getting all agro and then yeah. Mmm, and ah got ugly and Mark, Mark sorta took a swing at him with the sword I think. It was bent like a bloody banana, so it wasn't really much good. Um and ah after that I, I think Mark had you know, a knife or something. 'Cause he had Gary down on the ground, this is after Gary had kicked me, and at that, that stage I'd done this [indicating to his bandaged hand] and I wasn't really worried about anything else but jeez, I gotta, you now, I gotta do something about this otherwise I'm gonna flake out, so you know, whatever Mark was doing down on the ground to him, I wouldn't be a hundred percent sure."

[45] When asked to describe the sword, the appellant said "[it] wasn't my idea of what a sword should be like if you're going out to kill somebody… it didn't look like the metal was much good for anything".

[46] The appellant said that Mark had given him the knife when they were almost at Gary's place, saying "[b]ring this in, in case you need it". He later described this as a "hell sharp" knife, with a 12 inch blade, like a "Crocodile Dundee knife". The appellant indicated that he asked Mark what he was doing here, and "what's gonna go down" and that Mark said "I'm helping Marilyn". The appellant said that:

> "[a]t that stage I don't think I rightly knew, **well I probably had an inkling about what he was intending to do but um I was hoping it wouldn't get to that**".

[47] In answer to some further questions, the appellant said when he and Mark got out of the car, they walked towards the side of the shed, where there were tyres. Gary

yelled out from the house "what're you doing?" and Mark said they had come to look at some tyres, so Gary came down and they started talking about tyres. Then the conversation switched around to A, with Mark asking when Gary was going to give his daughter back to her mother "like was supposed to of happened", Gary telling Mark to mind his own business and that it had nothing to do with him, Mark saying yes it has because it has cost him thousands of dollars and that "we're here to pick up [A]", and Gary saying no, she does not want to go back.

[48] The appellant said that was the end of the conversation, and then "the sword or lump of steel just sort of, arrived from wherever he [that is Mark] had it hidden" and that Mark "whack[ed]" Gary with it and he fell over, down on the ground. That is when the appellant got kicked, he said. He said when Mark pulled out the sword, that's when he, the appellant, pulled the knife out. The appellant indicated after that "whack", the sword "wasn't worth anything after that". Mark then dropped down on Gary and he had a knife or something in one of his hands and it was doing damage to Gary while he was on the ground.

[49] When asked if there were any other weapons taken in, the appellant said yes, a handheld crossbow, that Mark had on him "somewhere". He said that Mark "aimed it at Gary's head", but "it mis-fired" and that's when he started "pummelling" Gary. The appellant said Mark "[h]ad the crossbow, he had the longsword, and then he had some small knives somewhere".

[50] He said they picked all the weapons up when they left and put them in Steve's car when he returned to pick them up. The appellant's hand was bleeding, so Steve gave him a towel to wrap around the wound. They disposed of the weapons as they were driving. They stopped at various places and Mark got out and walked into the bush and "got rid of them".[2] The appellant also said that they stopped at some stage at a property that belonged to Steve, having picked up Mark's car on the way. On the way to the property, the appellant said that they pulled over in a truck stop and Steve got out a first aid kit and bandaged his (the appellant's) hand. He said Mark also had an injury to his hand, but he was not sure of the extent of the injury.

[51] There were photographs taken on 25 August 2016 of Mark Crump and his injuries before the jury, as well as evidence from the orthopaedic surgeon who treated Mark Crump, Dr Kwa. Dr Kwa gave evidence that Mark Crump had a number of serious injuries to both of his hands, which required surgery. He said the wounds to both hands would have been caused by a sharp implement, such as a knife. Whilst he could not say whether the action that caused the injuries to the left hand was a slice or a stab, Dr Kwa concluded the injury to the right hand had to have been caused by stabbing. In cross-examination, Dr Kwa accepted that Mark Crump could have accidentally injured his right hand himself if his hand slipped over the knife when he was stabbing the deceased. However, Dr Kwa concluded it would have been "very difficult" for the knife to penetrate a long way through Mark Crump's hand if it had simply slipped, having regard to the fact that the sharpened edge of the knife was angled back towards the handle.

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2 In the police interview, this is said in a way that suggests it happened before they went to Steve's property. In the appellant's written statement, at [56]-[57], it is said in a way that suggests it happened after the appellant and Mark left Steve's property, on the way back to Dubbo.

[52] At the property, the appellant got out of Steve's car, got into Mark's car, and they drove back to Dubbo. They dropped "the stuff", like Mark's bag and the other swords and the shotgun, at the appellant's place, and then Mark dropped the appellant at the hospital.

[53] The appellant was asked whether he inflicted any of the injuries on Gary and he said "no".

[54] After the interview, the appellant agreed to make a written statement and one of the interviewing police officers, Cameron, prepared the statement. The appellant read the statement in front of another officer, Francis, asked for some handwritten changes to be made, and then signed the statement. It was tendered in evidence (exhibit 15) and read out to the jury. The statement essentially reflects what the appellant ultimately said during the interview. The background to the trip to Queensland is explained in the statement, as follows:

> "12. I know Mark was doing his best he could to look after his family and I know he spent a lot of money with his solicitor trying to get [A] back for Marilyn. I know there were a couple of court cases. I know Mark was upset about all the money that he had spent eighteen thousand dollars trying to get her back.
>
> 13. I went with Marilyn to Moree a little while back to pick up her daughter [A]. We went up together along with another friend named Jessica. Jessica is a girl that stays with them sometimes. I don't recall the exact dates but it was the end of the first week of the New South Wales school holidays. We were told the police were interviewing Gary and then they were going to interview Marilyn and then mediate. Because Gary had [A], we had gone there with the express purpose of getting her back.
>
> 14. We were rung up to go back to the Moree police station; we thought we would get [A] back. Marilyn went into the back room. I wasn't allowed to go. The police had already told Gary to head back to Orange to collect get [A]'s stuff back from Marilyn's and Marks as they were letting [A] stay with Gary. I later found out that [A] had made a complaint that when she was down visiting with Mark and Marilyn that Mark had been abusing her. Mark told me that it was just all lies and that Gary would have put [A] up to making the complaint. I know that this also put a lot more strain on Mark and Marilyn.
>
> 15. A week or so ago Mark and I went to Sydney and stayed for a couple of nights. The purpose of the trip was to get some presents for his kids birthdays that were coming up. We spoke about a lot of things. Whilst we were travelling Mark was very upset with Gary over the situation between Marilyn and Gary. Mark told me that he also wanted to travel up to Queensland and get [A] back.
>
> 16. Mark asked if I would go with him to share the driving. Mark has a bad back and can't do a lot of driving. So I agreed to go.

> Saturday night last week we left my place I think about 1.30 am in the morning…"

[55] As to what happened just before, and as they arrived at Gary Ryan's house, the appellant said in his statement:

> "30. When we got into Mundubbera, Steve parked out the front, Mark put on a jacket. **I think it was about then that I saw Mark had a sword and he placed it inside his jacket**. It wasn't my idea of what a sword should be like if you are going out to kill someone. It didn't look like the metal was much good for anything, it was two handed it was designed to use with both hands, just black metal. **Mark also had a hand held crossbow he had it on him somewhere and some small knifes**. What other weaponry he had with him at that time I don't know.
>
> 31. Mark told Steve to stay in the car and drive around the bloke. He said by the time you get back we will be finished.
>
> 32. I think the sword and knife were in Steve's white car when I got into it. I think he got the sword from the wheel well. **Mark gave me a knife when we were almost at Gary's place**. It was a one handed knife, stainless steel with twelve inch blade, a crocodile Dundee knife. I was given it to hold down out of sight, which I did. I don't know where he got it from maybe the boot.
>
> 33. Mark said 'bring this in with you in case you need it.'
>
> 34. I said 'Mark what's going to go down here.'
>
> 35. Mark said 'I am helping Marilyn you know that.'
>
> 36. **At that stage I probably had inkling about what he was intending to do. I was hoping it wouldn't come to that**; I didn't bring this up with Mark because it was in the car before all this happened. **I didn't really want to do it I am not really into killing people.** Because it was in the car, because I don't know how much his dad knew I wasn't going to flash the knife in front of him and I was not inclined to discuss it in front of him."

[56] At the trial, a further admission was made that:

> "During the search of Trevor Spencer's residence at … Dubbo, the shotgun was found closed and leaning against the wall, barrels pointing down, behind the door to the second bedroom. When the shotgun was found police asked Trevor Spencer if it was loaded. He replied that it was completely empty. When asked by police how he knew that it was empty, Mr Spencer said that he had checked it. A police officer then broke the shotgun open and checked it was unloaded. A photo of the shotgun is exhibit 22.1."

[57] On 29 August 2016, the appellant was placed in a cell in the Brisbane watchhouse. A police officer posing as a person in custody was placed in the same cell as Trevor Spencer. Their conversation was recorded, and formed part of the evidence at the trial. The appellant made some exculpatory statements in his conversation with the undercover officer, including "I didn't do anything to kill him" and that although "I was there, I saw what was going on. I didn't know he had a blade in his hand…". Otherwise, to the extent the appellant talked about the incident it was generally consistent with what he told the police previously.

[58] One of the investigating police officers, officer Napier, described attending a rural property at Tara, known as "Brumby", on 29 August 2016. There was a front set of gates that was locked by a chain and padlock and then a second set of gates, further up the dirt driveway. In a central paddock on the property, past the second lot of gates, there was an open shed and a fire pit off the side made out of roofing iron. Upon examining the fire pit, officer Napier located a number of rusted knives, what appeared to be an arrowhead, a piece of cardboard that he described as coming from the top of a box of disposable gloves, two pieces of cloth and some other things. Presumptive testing undertaken in respect of both pieces of cloth indicated the presence of blood. It was admitted the Brumby property was owned by Stephen Crump.

[59] An admission was made that the piece of the top of the box of gloves found in the fire pit came from the same box of gloves that was found in the appellant's home. It was also admitted that the knife found on the ground where the deceased was killed had the same serial number as the knives found inside the fire pit.

[60] An admission was made about the results of the forensic examination of two of the items found in the fire pit at this property (cloth scrapings and a piece of cloth), which indicated a high likelihood ratio (greater than 100 billion times) in terms of the appellant having contributed DNA to the time, than if he did not.

[61] There was also evidence at the trial of the results of forensic examination and testing of the scene where Mr Ryan was killed, and the white Falcon driven by Stephen Crump, as well as of the shotgun found during the search of the appellant's home. Admissions were also made about the results of DNA analysis from this examination, which it is not necessary to refer to in any detail for present purposes.

[62] There was also evidence of DNA analysis of the sword (or machete) found at the scene, the deceased's body and clothing, and the front and rear passenger seats of the white Falcon. On the handle of the machete, the analysis indicated a high likelihood of the DNA of the deceased being present (greater than 100 billion times) and also the DNA of Mark Crump (greater than 22 million times) and a lower likelihood ratio of the DNA of the appellant being present (greater than 46,000 times). However, there was a higher likelihood of the appellant's DNA being found on the hilt (greater than 8.1 million times) and the tip of the blade (greater than 100 billion times). The reliability of the DNA analysis evidence was challenged on the basis of the potential for contamination, or transfer of DNA, as a result of the objects having things placed over them, or being placed in a bag.

[63] In relation to the white Falcon, DNA of both Mark Crump and the deceased, but not the appellant, was located on the back cover of the rear passenger seat. Only the appellant's DNA was located in the area of the front passenger seat. There was no

evidence of the appellant's DNA being on the body of the deceased, or his clothes, and equally there was no evidence of the deceased's DNA being on the appellant.

[64] Evidence was called from Dr Chan, who saw the appellant at the Dubbo Hospital emergency department at about 1.30 am on 24 August 2016. He confirmed that the appellant underwent surgery later that day, at about 3 pm, in relation to the injuries to the back of his right hand, which were "big" lacerations, in some respects going through the tendons and also into the joint and bone, describing the tendon as having been "shredded". Dr Chan expressed the view that such injuries would have been caused by a semi-blunt/semi-sharp object (rather than a very sharp object, which would have caused a smooth, sharp cut), and as requiring a "very high" degree of force. When the appellant attended the hospital, he reported tripping and falling on an axe as the cause of the injury. When asked about the likelihood of the injuries to the appellant's hand being caused in that way, Dr Chan said that would be "unusual", because when someone falls, their protective instincts would normally mean they would use their hands to stop the fall, with the result that the injury would most likely be sustained to the front or palm side, not the back of the hand. However, he said, even if unusual, it was "definitely possible". This view was corroborated by that of Dr MacCormick, a forensic physician who gave evidence after reviewing the records of the appellant's treatment.

[65] There was evidence, in photographs of the scene taken by investigating police, of a pair of men's boots found, sitting on the top of a pile of tyres. An admission was made that the deceased's mother identified those boots as belonging to Mr Ryan and also that he was wearing those boots on the day that he died and when his mother found him in the bathroom. He was not wearing shoes when put on the stretcher by the paramedic, Mr Smith, to be taken to hospital, but the evidence did not reveal who had removed his boots.

[66] At the commencement of the trial, before the Crown opened its case, senior counsel for the appellant indicated to the trial judge, in the presence of the jury that "it's been agreed by the defence and the Crown that the defence will make some admissions. And it's been agreed, in the circumstances of this case, to make one before my learned friend opens." He then proceeded to read to the jury the admission (exhibit 1) as follows:

> "… it is admitted on behalf of the accused, Trevor Spencer, that Mark Crump unlawfully killed Gary Ryan. And that at the time that he did the act or acts leading, in whole or part, to Gary Ryan's death, he had an intention to kill Gary Ryan, or do Gary Ryan grievous bodily harm."

[67] An autopsy performed in relation to the deceased, Mr Ryan, found that he had suffered 59 wounds. These wounds were described in a document containing further admissions, and a diagram, tendered at the trial. The forensic pathologist, Dr Storey, expressed the opinion that all of these wounds were inflicted at roughly the same time, although could not say in which order. The wounds included deep cuts and stab wounds to the back and both sides of Mr Ryan's head and neck, a stab wound into the cavity of his mouth and multiple cuts and abrasions to his head, neck, arms and hands. A number of the wounds to his arms and hands were said to be "possible defensive wounds". Dr Storey expressed an opinion about the possible or likely mechanism by which the various wounds were caused. He identified those

which he considered could have been caused by a pointed, narrow bladed instrument, such as the "dagger" (or smaller knife) that was found at the scene. He expressed the opinion that there were at least two different weapons that would have been used to inflict the injuries. He could not say how many assailants could have been involved.

[68] The most serious wounds, which were said to have played a direct role in the death, were a complex stab wound to the front of the neck that went up to the left and cut through the external and internal jugular vein (number 30); two deep cuts to the back of the head, the force of which was likely to have resulted in bleeding on the surface of the brain (numbers 10 and 12) as well as other moderate force deep cuts to the side and back of the head (numbers 15 and 21). These last four were said to be likely to have been caused by a long-bladed heavier instrument, similar to the machete that was found at the scene. Wound 30 was said to be likely to be caused by a narrow-bladed sharp instrument, with either the machete or the dagger found at the scene capable of producing that wound. Although, Dr Storey said, apart from any single individual wound, it was the fact that there were so many cut wounds, with the cumulative potential for blood loss from all those wounds at the same time, that would put a severe stress on the body. As already noted, when Mr Ryan arrived at the hospital, he went into cardiac arrest. Dr Storey expressed the opinion that was likely to have been caused by the cumulative effects of blood loss. Dr Storey's opinion was that Mr Ryan died as a result of the cumulative blood loss consequent upon multiple sharp force wounds to various parts of his body.

[69] The appellant neither gave nor called any evidence at the trial; although of course his version given to the police in the recorded interview, the signed statement, and the recorded conversation in the watchhouse were all before the jury.

The trial judge's summing up

[70] The particulars of the Crown's case against the appellant were as follows:

> "Trevor Spencer is liable for the murder (section 302(1)(a)) of Gary Ryan because he either:
>
> 1. Caused the death of Gary Ryan by inflicting wounds to him with a weapon and with an intent to cause either death or grievous bodily harm (section 7(1)(a)); or
>
> 2. Enabled, aided or encouraged Mark Crump to cause the death of Gary Ryan (caused by Mark Crump inflicting wounds to Gary Ryan with a weapon), knowing that Mark Crump intended to cause either death or grievous bodily harm (sections 7(1)(b) and/or 7(1)(c)) by doing any one, or all, or any combination of the following acts:
>
>   a. Travelling to Mundubbera from Dubbo, New South Wales to assist Mark Crump;
>
>   b. Assaulting Gary Ryan whilst armed with a weapon or weapons;
>
>   c. Deliberate presence while armed with a weapon or weapons; or

> 3. Actively participated in a common unlawful purpose with Mark Crump to assault Gary Ryan whilst armed with weapons, and it was a probable consequence of carrying out the common unlawful purpose that Gary Ryan would be murdered, and in carrying out the common unlawful purpose, Gary Ryan was murdered (section 8)."

[71] The prosecutor put the case to the jury on the basis that, having regard to the whole of the evidence, they would be satisfied to the requisite standard that the appellant, with Mark Crump, was "involved in" the murder of Gary Ryan, in one or other of the ways particularised.

[72] For the appellant, it was submitted the prosecution had not proved the charge of murder by the appellant on any of the bases particularised. It was conceded, however, that the jury might be satisfied that an unlawful but unintentional killing was an objectively probable consequence of the plan agreed upon between the appellant and Mark Crump, to go and have it out with Mr Ryan while they were both in possession of weapons, and on that basis it was submitted "at very most, he is guilty of manslaughter".

[73] In summing up to the jury, the learned trial judge directed the jury that:

> "You must reach a unanimous verdict, that is, a verdict on which you all agree whether guilty or not guilty. What this means is that the [appellant] cannot be found guilty unless all 12 of you are satisfied beyond reasonable doubt that the Crown has established his guilt. Likewise, all 12 of you must agree that the Crown has failed to establish guilt, before a verdict of not guilty could be delivered."

[74] In relation to the admissions, the trial judge directed the jury that:

> "The admitted facts form part of the evidence. With the exception of the admitted facts in exhibit 1, the admitted facts were made jointly by the Crown and the defence. As the facts have been admitted you must treat them as having been established. You must not infer guilt from the fact that there are agreed facts. The reason why facts are agreed is to avoid calling witnesses where there is no issue in relation to the facts the subject of the admissions."

[75] The trial judge appropriately directed the jury in relation to the defendant not giving or calling evidence at the trial, and the evidence that was before the jury of his version given to the police in the recorded interview, the signed statement and the recorded conversation in the watchhouse, including as to how the jury could use the evidence of alleged lies and "post-offence" conduct.

[76] The trial judge directed the jury in detail about the elements of the offence of murder, the alternative offence of manslaughter, and the bases of liability alleged by the Crown. A written document was provided to the jury setting out these matters. His Honour directed the jury that the Crown "does not have to prove each and every basis of liability", "[t]hese three bases of liability are charged or brought in the alternative". His Honour identified the issue as "whether the Crown has proved

beyond reasonable doubt that the [appellant] is criminally responsible in one of the ways particularised".

[77] As to the first basis, that the appellant himself caused the death of Mr Ryan by inflicting wounds with a weapon and that he had the relevant intent to cause death or grievous bodily harm at the relevant time, the trial judge directed the jury that:

> "Before the [appellant] can be found guilty of murder on the first basis particularised by the Crown, you would need to be satisfied beyond reasonable doubt of four things. These are the four elements of murder. (1) that the deceased is dead, (2) that the [appellant] caused the death, (3) that the [appellant] did so unlawfully, and (4) that at the time of the act which caused death, the [appellant] intended to kill or do grievous bodily harm."

[78] After giving further directions in relation to each of those elements, the trial judge further directed the jury in relation to the alternative, manslaughter, which "will be proven if the Crown satisfy you beyond reasonable doubt of the first of the three elements of murder", but not the fourth.

[79] The trial judge then turned to explain the other bases of liability relied upon by the Crown, by reference to ss 7 and 8 of the *Code*, which were set out in the document handed to the jury.

[80] After detailed directions about each of those bases of liability, about which there is no complaint, the trial judge then directed the jury that:

> "The [appellant's] state of mind is relevant to each basis of liability particularised by the Crown. In respect of the first basis of liability for murder under section 7(1)(a) of the Criminal Code, the Crown must prove that the [appellant] intended to cause death or grievous bodily harm. … [a direction was given about "intent" and "intention"]
>
> In respect of the second basis of liability under section 7(1)(b) and 7(1)(c) of the Criminal Code, for murder the Crown must prove that the [appellant] intentionally enabled, aided or encouraged Mark Crump to cause Gary Ryan's death, knowing that Mark Crump intended to cause death or grievous bodily harm. In respect of the third basis of liability under section 8 of the Criminal Code, the content of any common intention to prosecute an unlawful purpose depends upon the [appellant's] own state of mind. The Crown asked you to draw an inference from all the circumstances that the [appellant] held the requisite intent or state of mind. So, members of the jury, as I have said, the [appellant's] state of mind is relevant to each basis of liability."

[81] Appropriate directions were then given about circumstantial evidence, including that "in order to bring in a verdict of guilty based entirely or substantially upon circumstantial evidence it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that can be drawn from the circumstances" and that if there is any reasonable possibility consistent with the appellant's innocence, it was the jury's duty to find him not guilty. Earlier

in the summing up, in directing the jury about drawing inferences, the trial judge directed the jury that:

> "Importantly, if there is an inference reasonably open which is adverse to the [appellant], that is, one pointing to his guilt and an inference in his favour, that is, one consistent with innocence, you may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds."

[82] Counsel were given the opportunity to comment in advance on some aspects of the directions given by the trial judge, as well as the written document handed to the jury. No redirections were sought at the end of the summing up.

Ground 1 – unanimity

[83] The complaint for the purposes of ground 1 is that "a miscarriage of justice occurred by reason of the trial judge failing to direct the jury of a requirement for unanimity as to whether the appellant was guilty under Basis A, on the one hand, or either of Bases B or C on the other hand".

[84] In considering the relevant principles that apply, the starting point is ss 7(1) and 8 of the *Criminal Code*, which relevantly provide:

> "**7 Principal offenders**
>
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> …
>
> **8 Offences committed in prosecution of common purpose**
>
> 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."[3]

[85] The effect of those provisions is that each of the principal actor (s 7(1)(a)), the aider or enabler (s 7(1)(b) and (c)) and/or the persons who commit the offence in prosecution of an unlawful purpose (s 8) are deemed to have committed "the offence", and liable to be prosecuted, tried, convicted and punished as a principal offender. In that sense, it has been said of an equivalent provision(s) that the effect

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[3] Underlining added.

of the provision is to make the distinction between participation as a principal and as an accessory "legally irrelevant".[4]

[86] The point was succinctly made in *Baker v Smith* [2021] QCA 66, where the Court (Sofronoff P, Morrison JA and Davis J) said at [19]:

> "It is not uncommon for convictions to be based on proof of one or more possibilities, with satisfaction beyond reasonable doubt that there was no reasonable hypothesis of any other possibility. For example, where two or more offenders jointly attack and kill a victim, it will often not be possible to determine which of them delivered the lethal blow. As a matter of fact one will have done so, and as a matter of law, he is the actor and liable through s 7(1)(a) of the *Code* and the others are aiders and liable under s 7(1)(b).[5] However, if the jury is satisfied beyond reasonable doubt that any particular offender either delivered the fatal blow or aided the one who did, then, subject to proof of any other elements, that offender may be convicted.[6] Where there are different hypotheses, but each consistent with guilt, a jury generally not need be unanimous as to which hypothesis is accepted. That is because the critical issue is satisfaction beyond reasonable doubt of the legal element(s)."[7]

[87] The same applies where s 8 is relied upon as a basis of liability.[8]

[88] The question is, what are the principles that apply as to whether, in a case in which there is more than one pathway to guilt, unanimity is, or is not, required, not only as to the verdict, but also as to the route or pathway by which that verdict is reached?[9]

[89] The earlier decision of this Court in *R v Leivers and Ballinger* [1999] 1 Qd R 649 (cited in *Baker v Smith*, above) provides some assistance. In this case, the two appellants were convicted of the murder of a man who had been badly beaten, then tied up and knocked unconscious, before being put in a van and taken away, with the van and later his body being found in a river. The case against the appellants was not that either of them had struck the fatal blows, but rather that each of them was guilty either by virtue of s 7(1)(c) or s 8.

[90] The trial judge in that case outlined the prosecution case against each of the appellants, and then instructed the jury that they all might "have different points of view in the course of reaching a decision and you may reach the same conclusion by different routes …in the end you must all agree with the verdict which is announced

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4 *Thatcher v The Queen* [1987] 1 SCR 652 at [80] per Dickson CJ; *Lanciana v The King* [2023] VSCA 78 at [36].

5 Referring to *R v Beck* [1990] 1 Qd R 30.

6 Referring, by way of example, to *R v Stewart & Garcia* [2014] QCA 244; *R v Roughan & Jones* [2007] QCA 443, *R v Struber* [2016] QCA 288.

7 Referring to *R v Leivers and Ballinger* [1999] 1 Qd R 649. Underlining added.

8 Indeed, the earliest of the cases cited in this context, *R v Swindall & Osborne* (1846) 175 ER 95, is an example of this. In that case, two horse and cart drivers were inciting each other to drive at a "dangerous and furious rate". One of the carts ran over a man and killed him; although the prosecutor could not say which one it was. Both drivers were convicted of manslaughter. Pollock CJ accepted that it was immaterial, as a matter of law, whether one or the other (or both) carts had run over the deceased – both drivers were equally criminally liable, because they were engaged in a joint unlawful enterprise, of inciting each other to drive dangerously.

9 See *Sadler v The King* [2023] SASCA 63 at [10] per Doyle JA.

whether it happens to be guilty or not guilty in each instance". As Fitzgerald P and Moynihan J observed, it was at least implicit in that direction that some jury members might find either of the appellants guilty by virtue of s 7(1)(c), while the remainder might find that appellant guilty by virtue of s 8.

[91] The appellants appealed their convictions on the basis that the trial judge misdirected the jury with respect to the need for a unanimous verdict. The appeal was dismissed, on the basis that, on the evidence, there were no significant differences between the alternate bases of liability relied on by the prosecution. Indeed, in that case, it was said the same activities by each appellant were sufficient for either s 7(1)(c) or s 8 (at 663).

[92] In reaching that conclusion, Fitzgerald P and Moynihan J referred, among others, to the decisions of the English Court of Appeal in *R v Giannetto* [1997] 1 Cr App R 1 and the Canadian Supreme Court decision in *Thatcher v The Queen* [1987] 1 SCR 652. Both were cases of murder, in which it was alleged that the accused had either killed his wife (or ex-wife) himself, or had caused someone else to do so.

[93] In *Giannetto*, Kennedy LJ, giving the judgment of the Court, said:

> "Having considered the authorities with some care we are satisfied that in the circumstances of this case the trial judge was right not to direct the jury that before they could convict they must all be satisfied either that the appellant killed his wife or that he got someone else to do so. They were entitled to convict if they were all satisfied that if he was not the killer he <u>at least</u> encouraged the killing, and accordingly this ground of appeal fails.
>
> There are two cardinal principles. The first is that the jury must be agreed upon <u>the basis on which they find a defendant guilty</u>. The second is that a defendant must know what case he has to meet. When the Crown allege, fair and square, that on the evidence, the defendant must have committed the offence either as principal or as secondary offender, and make it equally clear that they cannot say which, the *basis* on which the jury must be unanimous is that the defendant, having the necessary *mens rea*, <u>by whatever means</u> [that is, as principal or procurer[10]] caused the result which is criminalised by the law. The Crown is not required to specify the means, because the legal definition of the crime does not require it; and the defendant knows perfectly well what case he has to meet…"[11]

[94] Likewise, in *Thatcher*, the Supreme Court held that jury unanimity *as to the pathway to their verdict* was not required. Dickson CJ (with whom four other members of the Court agreed) described the equivalent "party" provision as having been:

> "… designed to make the difference between aiding and abetting and personally committing an offence <u>legally irrelevant.</u> It provides that either mode of committing an offence is equally culpable and, indeed, that whether a person personally commits or only aids and

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10 See the discussion in *R v Serratore* (1999) 48 NSWLR 101 at [220] per Greg James J.

11 Underlining added.

> abets, he is guilty of that offence … and not some separate distinct offence."[12]

[95] His Honour concluded that:

> "... if there is evidence before a jury that points to an accused either committing a crime personally or, alternatively, aiding and abetting another to commit the offence, provided the jury is satisfied beyond a reasonable doubt that the accused did one or the other, it is 'a matter of indifference' which alternative actually occurred … It follows, in my view, that s. 21 [the relevant party provision] precludes a requirement of jury unanimity as to the particular nature of the accused's participation in the offence. Why should the juror be compelled to make a choice on a subject which is a matter of legal indifference?"[13]

[96] Dickson CJ also quoted with approval a statement from an academic article[14] that:

> "… if an accused is to be acquitted in situations when every juror is convinced that the accused committed a murder in one of two ways, merely because the jury cannot agree on *which* of the two ways, 'it is difficult to image a situation more likely to bring the administration of justice into disrepute — and deservedly so.'"[15]

[97] In a separate judgment, Lamer J agreed with Dickson CJ that the jury unanimity point failed in that case, but went on to say:

> "...I would suggest, however, that it fails because of the nature of the evidence in this case. It is true that the Crown presented two factually inconsistent theories: that the appellant actually killed the deceased or that he aided and abetted the killer. The overwhelming mass of the evidence against the appellant, however, was consistent with both theories and pointed only to his participation in the murder. The jury could not have been convinced beyond a reasonable doubt of one theory to the exclusion of the other, but must have been convinced beyond a reasonable doubt that the appellant participated in the murder, **either** as principal **or** aider and abettor. Since, as the Chief Justice points out, s. 21(1) of the *Criminal Code* makes the distinction between the participation as a principal and participation as aider and abettor legally irrelevant, it was not necessary for the jury to decide on the form of his participation and the jury was correct in convicting. As Peter MacKinnon wrote in 'Jury Unanimity: A reply to Gelowitz and Stuart' (1986), 51 C.R. (3d) 134, at p 137:

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12 *Thatcher v The Queen* [1987] 1 SCR 652 at 690. Underlining added.

13 Ibid, at 694.

14 Professor Peter MacKinnon, 'Jury Unanimity: A Reply to Gelowitz and Stuart' (1986) 51 CR (3d) 134 at 135.

15 Cited with apparent approval in *R v Leivers and Ballinger* [1999] 1 Qd R 649 at 660 per Fitzgerald P and Moynihan J and at 668 per Pincus JA. See also *R v Sherratt* [2013] QCA 78 at [54] per McMurdo P (Muir JA and Dalton J agreeing) and *R v Spathis; R v Patsalis* [2001] NSWCCA 476 at [272], where Carruthers AJ (Heydon JA and Smart AJ agreeing) described this passage as "undoubtedly correct".

> If, as their deliberations progress, the jurors, though not in agreement in their assessment of the *probable* type of involvement, are satisfied beyond a reasonable doubt that the only *possible* types of involvement establish guilt, they should convict.
>
> However, I am not prepared to go so far as the Chief Justice's unqualified assertion that 's. 21 precludes a requirement of jury unanimity as to the particular nature of the accused's participation in the offence'. Depending on the nature of the evidence presented by the Crown, the jury unanimity issue may arise in any case where the Crown alleges factually inconsistent theories, even if those theories relate to the particular nature of the accused's participation in the offence. If the Crown presents evidence which tends to inculpate the accused under one theory and exculpate him under the other, then the trial judge must instruct the jury that, if they wish to rely on such evidence, then they must be unanimous as to the theory they adopt. Otherwise, the evidence will be taken into account by some jurors to convict the accused under one theory while the fact that the evidence exculpates the accused under the other theory is being disregarded by the other jurors who are taking the latter route. In effect, the jury would be adding against the accused the inculpatory elements of evidence which cannot stand together because they are inconsistent."[16]

[98] The Court of Appeal in *Giannetto* agreed with Lamer J's qualification, extending that to any theory advanced by the defence.[17]

[99] In *R v McCarthy* (2015) 256 A Crim R 338 at [5], Kourakis CJ succinctly captured Lamer J's point, by positing the relevant question as "are the alternative bases mutually destructive?" As his Honour said (at [5]-[6]):

> "The extended jury unanimity issue arises because juries are multi-member tribunals of fact. The principle of logic which has spawned the concept of extended jury unanimity is essentially that a jury, as an institution, cannot be satisfied of guilt beyond reasonable doubt if some of its members, or some of the statutorily prescribed majority of its members, find the offence proved on a factual basis which precludes them from assenting to a verdict on the factual basis found by the remaining members of the jury.
>
> Alternate party liability cases are unlikely to raise a unanimity issue because the ultimate question is – has the prosecution proved beyond reasonable doubt that the accused was criminally complicit in the offence. When the alleged alternatives are that an accused was either the perpetrator, or criminally complicit with the perpetrator, a finding on the latter basis will almost always be founded on the acceptance

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16 *Thatcher v The Queen* [1987] 1 SCR 652 at 703-704. La Forest J expressed a similar qualification (at 704-705), holding that whether unanimity is required would depend on the "nature of the offence, the theories of the parties, and the totality of the evidence". Underlining added.

17 *R v Giannetto* [1997] 1 Cr App R 1 at 7.

> of a common body of evidence which also supports the former finding…"[18]

[100] In *R v Leivers v Ballinger* (at 662), Fitzgerald P and Moynihan J endorsed the more qualified approach taken by Lamer J in *Thatcher*, holding that:

> "When more than one basis of criminal liability is relied on against an accused, it is, in our opinion, necessary for the jury to be unanimously satisfied that the requirements of at least one basis of liability are proved beyond reasonable doubt. It will not necessarily be sufficient for some members of the jury to be satisfied that the requirements of one basis of liability are established and for other members of the jury to be satisfied that the requirements of another basis of liability are established. However, that will be sufficient if the alternate bases of criminal liability do not involve materially different issues or consequences. The point is clearly explained in the judgment of Lamer J. in *Thatcher*."[19]

[101] *R v Spathis; R v Patsalis* [2001] NSWCCA 476 provides another example. In that case, the offenders were charged with murder, with the Crown case formulated on alternative bases of murder with intent and felony murder. On the appeal against their convictions, it was argued that the trial miscarried because the Crown ought to have charged felony murder as a separate count, and the trial judge ought in any event have directed the jury that they had to be unanimous as to the legal basis on which they found the accused guilty. Both arguments were rejected. It was held to be "in accordance with principle, well established practice and logic" for the Crown to include the felony murder alternative in one comprehensive count of murder. Further, there was no requirement for the judge to direct the jury that they should all be satisfied of at least one basis of liability. As Carruthers AJ said at [275] (Heydon JA and Smart AJ agreeing) "[i]n the instant case there is no distinction between the relevant acts and when they occurred. A juror, if satisfied of any of the alternatives other than felony murder, would necessarily have been satisfied of the appellant's guilt under the doctrine of felony murder". Referring to the test from *Leivers*, Carruthers AJ said (at [276]) "the alternate bases of criminal liability in this case do not involve materially different issues or consequences". An application for special leave to appeal was refused,[20] the High Court agreeing with the point made by Carruthers AJ at [275] just referred to, on the evidence and in the light of the directions given at trial.

[102] The reasoning in *Thatcher and Giannetto* was also followed in *R v Walsh* (2002) 131 A Crim R 299, in the context of a different offence, namely conspiracy to defraud. In that case, Phillips and Buchanan JJA (Ormiston JA agreeing) said:

> "45 After examining a good many of the cases, we think that there are two currents of authority and the first of these is in cases of murder, manslaughter and the like. In such cases the jury have to consider the whole of the accused's conduct and to decide on the basis of it all and from among a number of different

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18 Underlining added.

19 Pincus JA, at 668, also held that "the view adopted in *Thatcher*" should be applied in that case, although without expressly endorsing the qualification of Lamer J. Underlining added.

20 *Spathis v The Queen* [2002] HCATrans 566.

possibilities which of the elements of the offence charged are established to the required standard. The clearest example of the jury's being permitted in such cases to arrive at the result by different routes is to be found where the Crown puts its case in the alternative, being unable to choose between them. It may be alleged that the victim was killed by the accused either personally or by an aide, the evidence leaving it unclear which, and in such a case it is enough if the jury agree that it was one or the other; beyond that, agreement is not required.

46 That has been so, it seems, since *Swindall and Osborne*,[21] in which the victim was killed by one of two carts, the driver of one inciting the driver of the other to kill the deceased. The conviction of one driver was upheld because, if he was not the principal, he was an accessory, having incited the other: see also, on murder and manslaughter, *White*,[22] *Giannetto*[23] (drawing on *Thatcher*[24]), *Serratore*[25] and *Leivers and Ballinger*.[26]. In respect of other crimes, see also *Du Cros v Lambourne*[27] (driving at a speed dangerous to the public when the defendant was either driving himself or, being a passenger, inciting the driver), *Gaughan*[28] (damage to a motorcar) and *Fitzgerald*[29] (setting fire to a scooter)."[30]

[103] But as the Court in *Walsh* went on to say, this reasoning does not only apply in the case of "true alternatives" – that is, alternative factual bases of liability, as opposed to alternative legal formulations of liability, based on the same or substantially the same facts. The example given was the case of *R v Cramp*,[31] in relation to which the following was said:

"47 … in *Cramp*, the accused, who was found guilty of manslaughter, had allowed a teenage girl to drive his car after plying her with drinks and urging her to speed, doing so for more than three hours. The case was presented on the basis that death resulted from the accused's unlawful and dangerous act, or from his gross negligence, or from both. No direction was given that the jury had to be unanimous on the relevant basis of guilt, and the conviction was upheld by the Court of Criminal Appeal in New South Wales. In short, this was said to be because the jury were obliged to consider the whole of the offender's conduct in deciding whether he caused the death by his unlawful and dangerous act or by his gross negligence and that, while the process of reasoning was different, each result rested on substantially the same factual basis. What was

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21 See footnote 8 above.
22 (1989) 41 A Crim R 237.
23 [1997] 1 Cr App R 1.
24 (1987) 39 DLR (4th) 275 (see also [1987] 1 SCR 652).
25 (1999) 48 NSWLR 101.
26 [1999] 1 Qd R 649 at 662.
27 [1907] 1 KB 40.
28 [1990] Crim LR 880.
29 [1992] Crim LR 660.
30 Underlining added.
31 (1999) 110 A Crim R 198 at 213 [68] (Barr J, Sully and Ireland JJ agreeing at 200 [1]).

> different was 'the legal formulation of liability'; the alternative bases of liability 'did not involve materially different issues or consequences', an expression earlier adopted by the Court of Appeal in Queensland in *Leivers and Ballinger*."[32]

[104] As to the second current of authority,[33] this was said to arise from a line of cases concerning crimes of dishonesty, in particular obtaining property by means of a false representation, where one offence is charged, but the prosecution alleges the accused committed a number of discrete acts, any of which would entitle the jury to convict (see at [51]). After referring to a number of those authorities, the Court in *Walsh* said (at [57]):[34]

> "To sum-up the foregoing, it seems that the cases give rise to two situations at least (and if there be tension between them, this is not the case to resolve it, for it is only the second with which we are now concerned). The <u>first</u> is that exemplified by the cases concerning murder and manslaughter, where, when alternative legal bases of guilt are proposed by the Crown but depend substantially upon the same facts, there is no need for a direction on 'unanimity' about one or other or more of those bases, at least if they do not 'involve materially different issues or consequences'… The <u>second</u> situation is where one offence is charged, such as obtaining property by deception, but a number of discrete acts is relied upon as proof and any one of them would entitle the jury to convict. If those discrete acts go to the proof of an <u>essential ingredient</u> of the crime charged, then the jury cannot convict unless they are agreed upon that act which, in their opinion, does constitute that essential ingredient.[35] In this type of case, much will depend 'upon the precise nature of the charge, the nature of the prosecution's case and the defence and what are the live issues at the conclusion of the evidence'.[36] When the charge is obtaining property by deception by means of misrepresentation, the making of the misrepresentation has been regarded as an essential ingredient of the crime charged. It is otherwise, however, where the crime is conspiracy to defraud [as it was in *Walsh*] and the means agreed upon by the conspirators to achieve that end is the making dishonestly of false representations. The agreement to make any particular representation is not regarded as an essential element of the crime, but merely a path to arriving at the objective of the conspirators, namely, obtaining an advantage by fraud."[37]

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32 References omitted.

33 See [45] of *Walsh*, extracted at paragraph [101] above.

34 In a passage cited in many subsequent cases, including *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)* (2020) 275 FCR 342 at [79] and *Lane v The Queen* (2018) 265 CLR 196 at [45]; see also *Sadler v The King* [2023] SASCA 63 at [12], and the authorities there referred to.

35 *Magnus v R* (2013) 41 VR 612 is an example of such a case.

36 From *R v More* (1988) 86 Cr App R 234 at 252, referred to in *Walsh* at [55].

37 Underlining added.

[105] In this Court, in *R v Koko* [2022] QCA 216 at [24], Flanagan JA (with whom Mullins P and Dalton JA agreed) articulated two relevant propositions said to flow from *Walsh*,[38] as follows:

> "First, whether a unanimity direction is required will depend upon the precise nature of the charge, the nature of the prosecution's case and the defence and what are the live issues at the conclusion of the evidence. The second proposition is that the necessity for a unanimity direction will depend on whether the relevant acts go to the proof of an essential ingredient of the crime charged…"[39]

[106] A statement of principle to similar effect was made by Doyle J (as his Honour then was) in *Ribbon v The Queen* (2019) 134 SASR 328, in the context of a case said to fall into the second category of case identified in the passage from *Walsh* above, that is, where one offence is charged but the prosecution relies upon more than one discrete act as independently capable of proving an essential ingredient of the charged offence.[40] In that case, Doyle J said, at [260] and [261] (Parker J agreeing, at [255]):

> "In determining whether it is necessary to give an extended unanimity direction in that second type of case, a distinction may be drawn between cases in which the discrete acts are relied upon as independently capable of proving an essential ingredient of the crime charged, and cases in which the discrete acts are relied upon merely as facts that might be found in considering the evidence led in support of an essential ingredient. As the jury must be unanimous as to their conclusion that an essential ingredient of an offence has been established, but need not be unanimous as to the evidentiary route or pathway by which they reach that conclusion, an extended unanimity direction will be required in the former situation, but not in the latter situation.
>
> In drawing this distinction, it will be relevant to have regard to not only the nature of the charge, but also the way the prosecution case is formulated and conducted, and the nature of the acts relied upon and the issues to which they give rise. If the offence charged, and the substance of the prosecution case, is one involving a continuous course of conduct or is reliant upon the cumulative effect of all of the evidence led in respect of the relevant ingredient, then it is unlikely that an extended unanimity direction will be required. However, where the prosecution case relies upon more than one act said to be independently sufficient to establish the relevant ingredient, and those acts are quite separate or different in nature (for example, by reason of their timing, location or circumstance, or by reason of the

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38 By reference to the consideration of *Walsh* in the Full Federal Court's decision in *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)* (2020) 275 FCR 342.

39 See also *Ribbon v The Queen* (2019) 134 SASR 328 at [261]; *Sadler v The King* [2023] SASCA 63 at [15] per Doyle JA.

40 The charge in *Ribbon* was importing a commercial quantity of border controlled precursor, namely pseudoephedrine. The prosecution relied upon three alternative particulars to make out the element of "import", in a way that identified three discrete acts, occurring within two discrete time periods, at different places and in different circumstances. The Court of Criminal Appeal held that the trial judge erred in failing to give a unanimity direction.

> issues to which they give rise), then such a direction may well be required. The distinction will sometimes be a difficult one to draw, and involve questions of degree."[41]

[107] Applying the propositions referred to above to the circumstances of the case in *Koko* led to the conclusion that a unanimity direction was required, but the one given by the trial judge was sufficient. The appellant in *Koko* was charged with the murder of his partner. She died as a result of the combined effects of blunt force head, chest and abdominal injuries and alcohol intoxication. The physical injuries were inflicted upon her by the appellant in the course of four separate incidents of violence during the course of an evening. At the start of the trial, the appellant pleaded guilty to manslaughter, but not guilty to murder – thereby admitting that he had caused the death of the woman. On the evidence, it could not be said exactly which specific acts of violence caused the death. In relation to the element of intention, the trial judge directed the jury that they:

> "… must be unanimous as to which acts either did or may have substantially contributed to death. Having determined that, you would then ask yourself whether you are satisfied beyond reasonable doubt that when the accused committed those acts he committed all of them intending to kill or do grievous bodily harm."

[108] This Court held that that no further direction as to unanimity was required, saying:

> "[26] In light of the issues at trial, the only requirement for unanimity was in relation to the element of intention. As submitted by the respondent, 'the Crown had to prove the requisite intention at *each* point the appellant was assaulting the deceased where an injury substantially contributing to death *could* have been caused'…
>
> [27] The unanimity direction given by his Honour therefore addressed those acts which went to the jury's considerations of the only relevant 'essential ingredient' for the count of murder."

[109] These principles were also recently applied by the Victorian Court of Appeal in *Lanciana v The King* [2023] VSCA 78. In that case, the applicant was charged with armed robbery, false imprisonment and money laundering. The prosecutor alleged two alternative modes of participation – by the first, that the applicant planned or organised those offences, but did not physically carry them out; and by the second, that he was one of the five persons who carried out the offending acts. The Court of Appeal found that the case was of the first kind identified in *Walsh,* namely, where alternative legal bases of guilt are proposed by the Crown depending substantially

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41 Cf *Sadler v The King* [2023] SASCA 63, which concerned a charge of dishonest dealing with a document, in which the "document" was the 2015 and 2016 time books used or produced by the accused in her bookstore. One of the elements of the offence was that the document was false. The prosecution case was that the time books were false by reference to the "overall misleading impression created". It was held by the majority (Doyle JA and Bleby JA) that the falsity of particular entries within the time books was not an essential ingredient of the offence as the case was alleged and presented. Therefore it was not necessary for the jury to be unanimous as to the falsity of any particular entry. Underlining added.

upon the same facts, and not involving 'materially different issues or consequences'; as such, no unanimity was required as to which legal basis applied.

[110] Examples of murder cases in which there was significant difference, such that a direction as to unanimity was said to be required, are *R v Chignell* [1991] 2 NZLR 257 and *Lane v The Queen* (2018) 265 CLR 196. In *Chignell* two accused were charged with murder, in circumstances where the deceased had gone to their home in Auckland for "a bondage and discipline session". Chignell had restrained him, by tying his hands to chains suspended from the ceiling, to the point where he could only stand on tiptoes, as well as tying a chain around his neck, at his request. She left and when she returned, his head was slumped and he was hanging on his arms. The accused concluded he was dead, tied up his body and took him in a car to another place, Taupo, where they dumped it into a river, some five or six hours later. The case was left to the jury on the basis that the murder occurred either in Auckland, or at Taupo. It was held that because the alternatives were separated by place and in time, and involved wholly different acts and, it was said to be likely, different intents on the part of each accused – such that the two cases put by the Crown, murder at Auckland or murder at Taupo, were essentially different – it was necessary for an extended unanimity direction to be given.

[111] In *Lane v The Queen* there were two physical interactions between the appellant and the deceased, after each of which the deceased fell and struck his head, losing consciousness the second time. The events were partially captured on CCTV footage, but that did not clearly depict the appellant punching the deceased before either fall. At the start of the trial, the Crown's case was based on the act of the appellant in punching the deceased, leading to the second fall. However, medical evidence during the trial was to the effect that either injury (first or second fall) could have led to death on its own. So the case for the Crown changed, and it was put to the jury that the actions of the appellant before each fall could found his liability for murder or manslaughter. On the appeal against the conviction, the Court held that the trial judge had erred in failing to give a unanimity direction, that is, directing the jury that they could not convict of either murder or manslaughter unless they were agreed as to whether one or both of the acts said to cause the deceased to fall was a criminal act of the appellant. In this regard, the two incidents were described as "two separate allegedly criminal acts". However, a majority of the Court applied the proviso to dismiss the appeal, concluding that no substantial miscarriage of justice actually occurred, because the evidence was not capable of supporting a finding beyond reasonable doubt that a deliberate act of the appellant caused the first fall. The majority reasoned that the jury necessarily should have entertained a doubt as to whether the deceased's first fall was caused by any voluntary act of the appellant; whereas the footage and other evidence established beyond reasonable doubt that the second fall was caused by a punch thrown by the appellant. The High Court allowed the appeal, holding that the proviso could not be applied to cure the uncertainty as to whether the jury's verdict was unanimous, which resulted from the failure to give the specific unanimity direction that was required. As the plurality observed, at [42]:

> "The absence of a specific unanimity direction in relation to the actus reus that caused the death of the deceased, coupled with the trial judge's direction that it was open to the jury to convict on the basis that a deliberate act of the appellant caused the death of the deceased if it found that either fall was caused by the appellant, means that it

> cannot be assumed that the jury was unanimous that it was the appellant's actions leading up to the second fall that established his guilt beyond reasonable doubt."

[112] It was said, as a matter of fact, to be distinctly possible that some jurors may have been disposed to convict on the basis only of the first fall – regardless of the fact the appellate court concluded the evidence in relation to the first fall was incapable of supporting a conviction (at [43]). The plurality concluded at [45] that the appellant "could not have been lawfully convicted by the jury unless it was agreed upon the action by the appellant that caused the deceased's fatal injury", referring, inter alia, to *Walsh* at [57].

[113] One can readily see how *Lane* fits within the second category identified in *Walsh* at [57] – where one offence was charged (murder), but two discrete acts were relied upon as proof and any one of them would have entitled the jury to convict. That is quite different to the present case, which fits squarely into the first category from *Walsh* at [57] – where alternative legal bases of guilt are proposed by the Crown, depending substantially upon the same facts.

[114] *Koko* is also a different case from the present, because in that case, the potentially lethal acts were spread over four separate episodes of violence (and likewise *Chignell*, which involved hypotheses of killing at two separate places, and some five or six hours apart). In contrast, in the present case, the violence was inflicted in one episode. This case, to use the words from *Ribbon* above, is one in which the offence charged (murder) and the substance of the prosecution case (that the appellant was involved in the murder, either as one of the people who inflicted the fatal wound(s) (s 7(1)(a)), or as an aider/enabler (s 7(1)(b) or (c)), or as a participant in a common unlawful purpose of which murder was the probable consequence (s 8)), is one involving a continuous course of conduct.

[115] The appellant submits that a unanimity direction was required in this case because:

> "A conclusion of guilt on Basis A would not necessarily have subsumed conclusions of guilt on Bases B or C. Nor, perhaps more strikingly, could a conclusion of guilt on Bases B or C have subsumed, or been consistent with, a conclusion of guilt on Basis A. The lack of any direction requiring unanimity on the basis for conviction leaves open the real possibility that some members of the jury convicted on the basis that the appellant intended to and did himself murder the deceased, while others were satisfied only that there was an unlawful common purpose in the pursuance of which, as a probable consequence, Mark Crump committed the murder."

[116] The point made in the authorities discussed above is that because as a matter of law a person is equally culpable whether they personally commit the offence, or aid and abet another person to commit the offence – that is, the distinction between those things is "legally irrelevant" in so far as consequence is concerned – jury unanimity as to the *pathway* by which the jury arrives at their verdict is not required. So it is possible that some members of the jury were satisfied the appellant was guilty of murder on basis A, some on basis B and some on basis C. That does not render the verdict unlawful. That is the point of the authorities discussed above.

[117] The appellant knew the case he had to meet at trial. The Crown alleged that on the evidence, he must have committed the offence of murder either as principal (jointly with Mark Crump) or as a party, and that it could not say which. The jury was required to consider the same body of evidence – the overall course of conduct – in deciding whether they were satisfied, beyond reasonable doubt, that the appellant was criminally liable for the murder of Mr Ryan. Whilst it was necessary for the jury to be unanimous in their decision that the appellant was criminally liable for murder – on at least one or more of the three possible hypotheses – it was not necessary for them to all agree on which hypothesis they accepted.

[118] Contrary to the appellant's submissions, the alternate bases of criminal liability in this case did not involve materially different issues or consequences, to adopt the test from *Leivers*. And they were not "mutually destructive", to adopt the language of Kourakis CJ in *McCarthy*. A finding that the appellant was guilty on basis B or C would be founded on the acceptance of a common body of evidence which also supports basis A – not necessarily in the sense of supporting a conclusion beyond reasonable doubt as to basis A (for that would involve *additional* conclusions about the appellant's direct actions and intent), but as part of the evidence in support of it. That is the point – not that the conclusions as to guilt on all alternative bases are "consistent": how can they be, when the alternative bases are exactly that, "alternatives"? Conversely, finding the offence proved on basis A does not preclude assent to a verdict on the alternative factual basis B or C. The bases are not "mutually destructive".

[119] The appellant's counsel candidly acknowledge that they could refer the Court to no authority in which a unanimity direction was said to be required, in a case such as the present. However, they submitted, nor was there anything in the authorities which "precludes" such a direction being given. That is not an adequate (or any) basis upon which to interfere with a conviction. But in any event, it seems to me there is something in the authorities which precludes such a direction being given in a case such as the present. Having regard to the authorities analysed above, the present case falls squarely within the category of case in which it has consistently been held that the jury are not required to be unanimous as to which of a number of legal bases of guilt put forward by the Crown they accept. The issue at the trial was whether the appellant was criminally liable for the murder of Mr Ryan. That was the issue in respect of which the jury were required to be unanimous; not the pathway by which they arrived at that conclusion. As explained in *Thatcher* – in a passage which has been cited with approval in a number of Australian decisions, including of this Court,[42] there is a relevant policy consideration underpinning the legal principle, namely, that it would bring the administration of justice into disrepute if an accused was to be acquitted in a situation where every juror is convinced the accused committed murder in one of (here) three ways, merely because the jury does not agree on *which* of the three ways.

[120] Ground 1 has not been established.

Ground 2 – unreasonable verdict

[121] Alternatively, the appellant contends, by ground 2, that the verdict is unreasonable and cannot be supported having regard to the evidence.[43]

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42 See paragraph [96] above.

43 Section 668E(1) of the *Code*.

[122] For the purposes of this ground, the question the Court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.[44]

[123] The focus of the appellant's submissions for this ground is on the conviction of murder, particularly on basis A, namely his liability as a principal offender. He accepts that it was open to the jury to find him guilty of manslaughter.

[124] In relation to basis A, the appellant submits that "the medical and forensic evidence included – at best – doubtful bases for inferences of direct involvement in the stabbing by the appellant and strong bases for concluding that he was not so involved". The appellant submits there were three matters relied on by the Crown to support a finding that he was directly involved in stabbing Mr Ryan: the admission by the appellant that he was present and carrying a knife; wounds to the hands of both Mark Crump and the appellant, said to have occurred by accidental mutual wounding while they were both stabbing Mr Ryan; and some DNA evidence of the appellant's blood on the machete found at the scene. As to those, he submits the medical evidence was "at best inconclusive" as to whether, contrary to his version, the knife he carried was used in the attack; the medical evidence did not support the "mutual wounding" scenario; and the DNA evidence regarding the machete was unreliable.

[125] In contrast, he submits, the medical evidence "was substantially to the effect that the wounds – and particularly those most causative of death – were mostly caused by a small dagger", and that there was no evidence to contradict the appellant's version "that Mark Crump carried and used the dagger in a frenzied stabbing and that he was the only stabber".

[126] As to the first point, in fact, the evidence (referred to in paragraph [67] above) was that the most serious wounds were caused by a long-bladed heavier instrument, similar to the machete that was found at the scene and a "narrow-bladed sharp instrument" consistent with either the machete or the dagger. And there *was* evidence to contradict the appellant's version that Mark Crump was the "only stabber" – including the number of wounds inflicted on Mr Ryan; that they were caused by at least two different weapons; that the appellant was there, armed with a large knife; the fact that he suffered a serious injury to his hand – in circumstances where the medical evidence described the mechanism of injury the appellant identified as "unusual"; that there was a high probability his blood was on the machete; and his post offence conduct (noting that this was relevant only to unlawful killing, not intention).

[127] In addition to contending the evidence of DNA on the machete was unreliable, the appellant submits that other DNA evidence was inconsistent with the appellant having participated in the stabbing (for example, the absence of the appellant's DNA on the deceased or his clothes, and in the rear passenger seat of the car). In addition, he submits it was "inherently unlikely" the appellant participated in the stabbing, being "a fat 70 year old man, with no prior convictions for any offences of violence…" and emphasises that there was no discernible motive for him to kill or be involved in the killing of Mr Ryan.

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44 *M v The Queen* (1994) 181 CLR 487 at 493; *Pell v The Queen* (2020) 268 CLR 123 at 145-147; *Dansie v The Queen* (2022) 274 CLR 651 at [8]-[9] and [12].

[128] The appellant relies upon many of the same matters to contend that it was not open to the jury to find him guilty of murder on either of bases B or C.

[129] This was a circumstantial case. As the High Court reiterated in *R v Baden-Clay* (2016) 258 CLR 308 at [47]:

> "For an inference to be reasonable, it 'must rest upon something more than *mere conjecture*. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence'. Further, 'in considering a circumstantial case, *all of the circumstances* established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence'. The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal."[45]

[130] Looking at the evidence in a "piecemeal fashion", arguments may be made about the strength or otherwise of it. However, when one has regard to the whole of the evidence at the trial, considering all of the circumstances, it may readily be concluded that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of murder, on at least one of the three bases of liability relied on by the Crown.

[131] On his own evidence, the appellant travelled to Queensland with his friend, Mark Crump, to help him get Marilyn's daughter back. He knew it would not involve a "polite chat" – he had previously mentioned to a neighbour Mark wanting to "bash" or "belt" Mr Ryan, and Mark being "really cranky" about all the money he had paid to lawyers trying to get the daughter back. The jury could readily have inferred Mark Crump was also angry about the allegations of sexual abuse that had been made, leading to the revocation of the Family Court order. The anticipation of violence was also open to be inferred from the earlier trip to Sydney to acquire a gun and the acquisition of swords.

[132] The appellant said, in his interview with the police, that it was indicated to him, during the course of conversation while driving, what was likely to take place there – meaning Mr Ryan's house. The three men – Mark Crump, his father Stephen and the appellant – undertook a "recon" of Mr Ryan's house the day before. On the day of the killing, as the appellant and Mark got out of the car, the appellant admits he knew Mark was carrying "weaponry" – a sword, which he placed inside his jacket, a hand-held crossbow and some small knives. When they were almost at Mr Ryan's place, Mark had handed the appellant a "hell sharp" "Crocodile Dundee" style knife, and the appellant admits he had an "inkling" about what Mark intended to do, but hoped it would not come to that because "I am not really into killing people".

[133] Mr Ryan was killed as a result of a frenzied attack, resulting in 59 stab wounds to his head, neck, mouth, arms and hands. As already mentioned, at least two weapons were involved and the most serious wounds were likely to have been caused by the long-bladed heavier instrument, similar to the machete that was found, or a narrow-bladed sharp instrument consistent with either the machete or the dagger.

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45 References omitted. See also *Lang v The Queen* [2023] HCA 29 at [251] per Jagot J (Kiefel CJ and Gageler J agreeing, at [1]).

[134] Having regard to the whole of the evidence, there may have been jurors who were satisfied beyond reasonable doubt of the appellant's guilt on basis A – that is, that he was actively involved in the stabbing attack on Mr Ryan, inflicting wounds with a weapon with an intent, at the least, to cause grievous bodily harm. Such a conclusion was open, having regard to the whole of the evidence before the jury. But even if they were not – or not all – satisfied of that, there was a strong circumstantial case against the appellant under basis B and basis C.

[135] The jury were properly directed that they did not have to be satisfied of all three bases – that they were alternatives. The issue for the jury was whether the Crown had proved beyond reasonable doubt that the appellant was criminally responsible in at least one of the ways particularised.

[136] Given the way in which the Crown's case was put to the jury, the question is not whether there was an inference reasonably open on the evidence that the appellant did not directly stab Mr Ryan with intent to kill him or cause him grievous bodily harm. The fact that the Crown put the case on the three alternate bases necessarily means that must be the case. The real question, for this ground 2, is whether there was any inference reasonably open on the evidence consistent with the appellant being innocent of participating in the killing, in at least one of the three ways. The answer to that question, in my view, is no.

[137] Ground 2 is not established.

Ground 3 – admission in respect of Mark Crump

[138] The appellant next contends that "a miscarriage of justice occurred by reason of the trial judge failing to direct the jury that the formal admission in respect of Mark Crump was not evidence against the appellant". This ground relates to the admission made by the appellant, at the commencement of the trial, as follows:

> "… it is admitted on behalf of the accused, Trevor Spencer, that Mark Crump unlawfully killed Gary Ryan. And that at the time that he did the act or acts leading, in whole or part, to Gary Ryan's death, he had an intention to kill Gary Ryan, or do Gary Ryan grievous bodily harm."[46]

[139] For this ground, the appellant relies upon the decision of this Court in *R v Kirkby* [2000] 2 Qd R 57, in which it was held that, on the trial of an accused for procuring the commission of an offence, evidence of the conviction of third party of that offence, in proceedings to which the accused was not a party, was not admissible against the accused to prove the offence was committed. That involved the application of the general rule of evidence, described by McMurdo P at [14] of *Kirkby* as follows:

> "The general rule of evidence is that the conviction of a third party is ordinarily inadmissible as evidence of the facts on which it is based. A plea of guilty by one defendant is in no sense to be regarded as evidence against a co-defendant."[47]

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46 See paragraph [66] above.

47 References omitted.

[140] Importantly, in the present case, the admission was not to the effect that Mark Crump had been convicted of murder. The admission was of the underlying facts – that Mark Crump unlawfully killed Mr Ryan and, at the time he did that, he had an intention to kill Mr Ryan or do him grievous bodily harm.

[141] Also importantly, the admission of those facts was an admission "on behalf of the accused", made only by the accused (the appellant). Section 644(1) of the *Code* provides that:

> "An accused person may by himself, herself or the person's counsel admit on the trial any fact alleged against the person, and such admission is sufficient proof of the fact without other evidence."

[142] The facts that Mark Crump unlawfully killed Mr Ryan, and at the time he did that, he had the requisite intent, were facts alleged against the appellant, for the purposes of the alternative bases of liability B and C.

[143] Relevantly, in relation to s 7(1)(b) and (c) (basis B), the trial judge directed the jury that:

> "… Before the [appellant] can be found guilty of an offence on the basis that he enabled or aided a principal offender to commit that offence, the Crown must prove that (a) the principal offender committed the offence, (b) the [appellant] did acts or made omissions for the purpose of enabling or aiding the principal offender to commit the offence even if those acts or omissions did not actually assist, (c) the [appellant] did so with the intention of enabling or aiding the principal offender to commit the offence, and (d) when the [appellant] did so he knew that the principal offender intended to do the act or acts making up the offence and, where relevant, that the principal offender intended to do the act or acts with the requisite state of mind.
>
> On this basis of liability it is admitted that Mark Crump unlawfully killed Gary Ryan, and that at the time he did the act or acts leading in whole or part to Gary Ryan's death, he had an intention to kill Gary Ryan or do Gary Ryan grievous bodily harm. That is set out in exhibit 1, members of the jury. You would therefore be satisfied that Mark Crump was a principal offender on this basis, and that he was a principal offender who unlawfully killed Gary Ryan with the requisite intent to cause death or grievous bodily harm.
>
> On this basis of liability it is not necessary for the Crown to prove that the [appellant] himself had the intent to kill or do grievous bodily harm to Gary Ryan. The Crown must prove that the [appellant] knew that the principal offender, Mark Crump, had such an intention and that knowing this, the [appellant] did an act to enable or aid the principal offender to commit the offence. However, it is not enough if the Crown proves the alleged aider knew only of the possibility that the offence might be committed. …"

[144] And, in relation to s 8 (basis C), the trial judge directed the jury that:

"The third basis relates to offences committed in the prosecution of an unlawful purpose. This is set out, members of the jury, on page 5 of the document that you have. The law states that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with 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. So when two or more people plan to do something unlawful together, and in carrying out the plan an offence is committed, each of those people is taken to have committed the offence if, but only if the offence was of such a nature that its commission was a probable consequence of the carrying out of the plan.

For the Crown to prove the [appellant] guilty on this basis, you must be satisfied beyond reasonable doubt, first, that there was a common intention to prosecute an unlawful purpose. You must consider fully and in detail what was the alleged unlawful purpose, and what its prosecution was intended to involve. Second, that murder was committed in the prosecution or carrying out of that purpose. Again, you must consider carefully what was the nature of that actual crime committed. And third, that the murder was of such a nature that its commission was a probable consequence of the prosecution of that purpose.

Obviously, a great deal depends on the precise nature of any common unlawful purpose proved by the evidence in the light of the circumstances of the case, particularly the state of knowledge of the [appellant]. It is the [appellant's] own subjective state of mind as established by the evidence, which will determine the content of the common intention to prosecute an unlawful purpose. That common intention is critical because it defines the restrictions on the nature of the acts done or omissions made, which the [appellant] is deemed by this provision of the law to have done.

Here, the Crown alleges that the common unlawful purpose was a plan to assault Gary Ryan while armed with weapons. You will need to consider whether the [appellant] agreed to take part in such a plan. When considering what any common intention was, and what was any common unlawful purpose, you should consider whether you are satisfied beyond reasonable doubt that the [appellant] agreed to a common purpose that involved assaulting Gary Ryan whilst armed with weapons.

If you are satisfied beyond reasonable doubt that there was a common intention to prosecute an unlawful purpose and what that was, you must ask if you are satisfied beyond reasonable doubt that an offence of murder was committed in the prosecution or furtherance or carrying out that purpose. If you are so satisfied, then in considering whether you are satisfied beyond reasonable doubt that the nature of the offence committed was such that its commission was a probable consequence of the prosecution or furtherance or carrying out of the common unlawful purpose, the

> probable consequence is a consequence which would be apparent to an ordinary reasonable person with the [appellant's] state of knowledge at the time when the common purpose was formed. That test is an objective one. I will say that again, members of the jury. That test is an objective one and it is not whether the [appellant] himself recognised the probable consequence or himself realised or foresaw it at the time the common purpose was formed.
>
> A probable consequence is more than a mere possibility. For a consequence to be a probable one it must be one that you would regard as probable in the sense that it could well have happened. So for the offence actually committed to be a probable consequence of carrying out the unlawful common purpose, the commission of the offence must not be merely possible but probable in the sense that it could well have happened in the prosecution of the unlawful purpose.
>
> As I have explained, the offence of murder involves unlawful killing with the specific intent to kill or do grievous bodily harm. In order to convict the [appellant] of murder on this basis you must be satisfied beyond reasonable doubt that the murder was a probable consequence of the prosecution of the common unlawful purpose."

[145] Contrary to the appellant's submission, the making of the admission should be inferred to have been the result of a deliberate, forensic decision on the part of the appellant's experienced senior counsel. In a pre-trial application, senior counsel indicated to the trial judge that he was prepared to admit the *facts underlying* Mark Crump's conviction of murder (as opposed to the conviction itself) which would simplify the task for the jury in the context of a section 7 or section 8 case – because it would focus the jury "on what the real issue is and that is what, if anything, did Trevor Spencer know or intend to do".

[146] On this appeal, the appellant submits the trial judge ought to have directed the jury that the facts admitted (in exhibit 1) were not evidence against the appellant. That would make no sense, in circumstances where the admission was made "on behalf of the accused", of facts alleged against the appellant. The admission was evidence against the accused.

[147] What the trial judge did appropriately do was direct the jury that "the admitted facts form part of the evidence" and "[y]ou must not infer guilt from the fact that there are agreed facts. The reason why facts are agreed is to avoid calling witnesses where there is no issue in relation to the facts the subject of the admissions".

[148] Ground 3 is not established.

Ground 4 – no speculation about Stephen Crump

[149] Lastly, the appellant contends "a miscarriage of justice occurred by reason of the trial judge failing to direct the jury not to speculate about Stephen Crump".

[150] There is no basis on which to conclude any miscarriage of justice occurred because of a failure to give a direction of this kind.

[151] Prior to the trial, the appellant unsuccessfully applied for a direction to the effect that Stephen Crump had been acquitted at an earlier trial. That was in the context, it seems, of a perception that the Crown would particularise the charge against the appellant by reference to a plan involving all three, Mark Crump, Stephen Crump and the appellant. Counsel for the appellant (at trial) sought to rely on the acquittal of Stephen Crump to undermine the Crown's case against the appellant and also because in the absence of such a direction, it was said, the jury would wonder about Stephen Crump's position.

[152] The Crown did not particularise the charge in that way. The particulars at trial made no reference to Stephen Crump (see paragraph [70] above). Stephen Crump was not identified or described as a "co-offender" at the trial of the appellant.

[153] In giving reasons for refusing to give the requested direction, the trial judge observed that the verdict of acquittal of Stephen Crump was of no relevance to the trial of the appellant; the conduct of the Crown case against the appellant did not involve any attempt to undermine the acquittal of Stephen Crump; and to introduce evidence of the acquittal in Stephen Crump's case would complicate the trial and involve speculation on the part of the jury as to the reasons for that acquittal and about the outcome of the other alleged participants at that earlier trial (including the appellant).

[154] At the trial, the jury were directed, in general terms, that they must not speculate; that they must consider the case based only on the evidence presented before them in the trial; and to the extent it had become apparent there was an earlier trial, they were not to speculate about might have happened at that trial or why there was a re-trial. In the face of the pre-trial ruling just referred to, senior counsel for the appellant did not press for any more specific direction to be given to the jury.

[155] The direction the appellant now submits ought to have been given was to the effect that:

> "You have heard about the existence and role of Stephen Crump to give context to the evidence in this case. Obviously, he is not on trial here. There are all sorts of reasons why co-offenders are not tried together. You must not speculate about why he is not here. You are to decide this case only the evidence before you."

[156] The appellant submits that in the absence of such a direction, there was a material risk the jury did speculate as to the position of Stephen Crump, for example, that he was guilty of murder, or manslaughter, too, because he aided Mark Crump, and the appellant's position was worse because he, unlike Stephen, actually entered the deceased's property.

[157] As already noted, Stephen Crump was not identified as a "co-offender" at the appellant's trial; and the Crown's case was not particularised by reference to any involvement on his part. In that context, a direction of the type sought would have drawn the jury's attention to the fact that he could be regarded as a co-offender; rather than leaving him simply as part of the narrative, as the person who drove Mark Crump and the appellant to Mr Ryan's house, and picked them up afterwards.

[158] In the context of this case, the trial judge's general direction – not to speculate, and to act only on the evidence – was adequate.

[159] Ground 4 is also not established.

[160] The appeal against conviction ought to be dismissed.

[161] **MORRISON JA:** I agree with the Chief Justice.

[162] **CROW J:** I agree with Bowskill CJ.