SUPREME COURT OF QUEENSLAND

CITATION:	*R v Licciardello* [2017] QCA 286
PARTIES:	**R** **v** **LICCIARDELLO, Anthony Robert** (appellant)
FILE NO/S:	CA No 49 of 2017 DC No 558 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 23 February 2017 (Moynihan QC DCJ)
DELIVERED ON:	22 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2017
JUDGES:	Sofronoff P and McMurdo JA and Douglas J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – COMPLICITY – AID, ABET, COUNSEL OR PROCURE – KNOWLEDGE – where the appellant was found guilty of two offences which were committed during an altercation between two groups of men in a street – where the appellant appealed against his conviction for unlawfully doing grievous bodily harm – where the prosecution had argued that the jury could convict the appellant by one of several routes, including by s 7(1)(b) or s 7(1)(c) of the *Criminal Code* (Qld) – where the trial judge directed the jury that the prosecution had to prove that the defendant had 'actual knowledge or an expectation of the essential facts of that offence. That is, all the essential matters which make the acts done a crime.' – where the appellant argued that this direction was inadequate because it left it open to the jury to convict if satisfied that the appellant knew or expected a simple assault upon the complainant, regardless of what he knew or expected about the seriousness of that assault or its consequences – whether the appellant needed to know or expect something of the likely result of the assault, or merely needed to know of the assault, to be found guilty under s 7(1)(b) or s 7(1)(c) of the Code *Criminal Code* (Qld), s 2, s 7(1)(b), s 7(1)(c), s 320(1) *Giorgianni v The Queen* (1985) 156 CLR 473; [1985] HCA 29,

considered
Johnson v Youden [1950] 1 KB 544; [1950] 1 All ER 301, cited
R v Barlow (1997) 188 CLR 1; [1997] HCA 19, cited
R v Beck [1990] 1 Qd R 30, considered
R v Brown (2007) 171 A Crim R 345; [2007] QCA 161, considered
R v Da Costa [2005] QCA 385, disapproved
R v Jeffrey [2003] 2 Qd R 306; [1997] QCA 460, distinguished
R v Pascoe [1997] QCA 452, cited

COUNSEL: M J Copley QC for the appellant
M Cowen QC for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and with the order his Honour proposes.

[2] **McMURDO JA:** After a trial by jury in the District Court, the appellant was found guilty of two offences, which were committed during an altercation between two groups of men in a street outside a hotel in Fortitude Valley. He appealed against those convictions but now presses his appeal against only one of them, namely that he unlawfully did grievous bodily harm to a man who, having been punched and kicked many times, and by more than one person, suffered a broken jaw.

[3] The prosecution argued that the jury could convict the appellant by one of several routes. It argued that the appellant was the man who, by assaulting the complainant, had caused his injury, an argument in reliance upon s 7(1)(a) of the *Criminal Code* (Qld). Alternatively, it was said that if another person had caused the injury, the appellant had been a party to that offence by doing an act for the purpose of aiding that person, an argument in reliance upon s 7(1)(b) of the *Code.* Further it was argued that the appellant had aided that other person to commit the offence, an argument in reliance upon s 7(1)(c) of the *Code*. It was also argued that the offence was the probable consequence of the prosecution of an unlawful purpose, which the appellant and others had formed a common intention to prosecute, an argument in reliance upon s 8 of the *Code*.

[4] The sole ground of this appeal is that the trial judge inadequately directed the jury about the state of mind of the appellant which had to be proved under s 7(1)(b) or s 7(1)(c). The judge directed the jury in accordance with the suggested direction contained in the Supreme and District Courts Benchbook. He told the jury that the prosecution had to prove:

> "[T]hat the defendant had actual knowledge or an expectation of the essential facts of that offence. That is, all the essential matters which make the acts done a crime …"

The appellant's argument is that this direction was inadequate, because it left it open to the jury to convict if satisfied that the appellant knew or expected simply an assault upon the complainant, regardless of what he knew or expected about the seriousness of that assault or its consequences.

[5] The respondent argues that the direction was sufficient. But it agrees that if the appellant's argument is accepted, the conviction must be set aside and a new trial ordered, because it is possible that the jury convicted the appellant by the application of s 7(1)(b) or s 7(1)(c).

The evidence at the trial

[6] In summary, the evidence in the prosecution case was as follows. The complainant and two companions went to a hotel in Fortitude Valley. Inside the hotel the complainant and one of them became involved in an altercation with another group of men. The complainant and his friend were asked by hotel staff to leave the premises. They left and waited in the street for the other man in their group to join them. In a statement to police, the appellant said that he had been involved in the incident inside the hotel, as a member of the opposing group. He also left the hotel immediately after the incident.

[7] In the street, the complainant and his companion were approached by a group of men. The complainant was hit in the face and there were blows to his torso and head. He fell to the ground where someone stomped on him. He was punched and kicked by more than one person he said, but he could not say by how many. The complainant's companion was also kicked and punched.

[8] A security guard at the hotel said that he saw two men beating up another on the road. He saw that man being kicked twice.

[9] None of the witnesses was able to identify or describe the assailants, except by descriptions of their clothing. None referred to a man wearing a blue shirt, which the appellant was wearing according to other evidence.

[10] Later that evening, police found the appellant and another man in the bathroom of another hotel in Fortitude Valley washing blood from themselves and with blood on their clothing. The appellant then admitted that he had been involved in the incident in the street outside the (original) hotel, in which, he said, he had pushed or shoved someone. A DNA profile consistent with that of the complainant was found on the appellant's shirt.

[11] The appellant gave evidence at the trial. He admitted being at the scene of the altercation outside the hotel. He admitted that he had touched people in the course of that event but denied that he had assaulted anyone. He recalled the complainant being hit, but he said that he ran away before the complainant was kicked. He said that his intention had been to stop the altercation.

[12] The appellant was tried together with another member of his group. They were each charged with one count of doing grievous bodily harm and one count of unlawfully assaulting that complainant's companion, doing him bodily harm. Each defendant was convicted of the charges, with the aggravating circumstance that the offences had been committed in company. The appellant was sentenced to a term of two and a half years' imprisonment for the offence of doing grievous bodily harm and a concurrent term of 18 months imprisonment for the other offence. He was ordered to be released on parole after serving eight months.

The ground of appeal

[13] Originally the appellant appealed against each conviction upon the basis that "the verdicts were against the weight of the evidence". He also sought to appeal against

his sentences, upon the basis that they were manifestly excessive. At the hearing, he abandoned his challenge to the sentences and was given leave to substitute, as his sole ground of appeal, the following ground:

> "A miscarriage of justice occurred because the jury was not correctly instructed about what needed to be proved in order to return a verdict of guilty of unlawfully doing grievous bodily harm in reliance upon s 7(1)(b) and/or s 7(1)(c) of the *Criminal Code.*"

He thereby abandoned his challenge to the conviction upon the other charge.

[14] I have set out the passage of the summing up which is challenged by the appellant's argument. It is said that the jury was not told, as they should have been, what were the "essential matters" that, they had to be satisfied, the appellant knew or expected. It is said that the jury should have been told that the appellant had to have known or expected an assault involving the use of "serious or significant force", before he could be found guilty in reliance upon s 7(1)(b) or s 7(1)(c). The argument particularly relies upon the judgments in the High Court in *Giorgianni v The Queen*[1] and in this Court in *R v Da Costa*.[2]

The interpretation of s 7

[15] Section 7 of the *Criminal Code* should be set out in full:

> "7 Principal offenders
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> (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;
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> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
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> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.
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> (2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.
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> (3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
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> (4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an

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1 (1985) 156 CLR 473.
2 [2005] QCA 385.

> offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission.

[16] In *R v Barlow*,[3] it was held that the word "offence" in s 7 (and s 8) of the *Code* has its defined meaning in s 2 of the *Code*:

> "An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence."

Brennan CJ, Dawson and Toohey JJ there said:[4]

> "Section 2 of the Code makes it clear that "offence" is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment. Section 7(a) confirms that "offence" is used to denote the element of conduct in that sense. By the ordinary rules of interpretation, the term must bear the same meaning in pars (b), (c) and (d) of s 7 as it bears in par (a). Section 8, which complements s 7 and extends the net of criminal liability for an offence to the parties who have formed a common intention of the kind therein mentioned, reveals no ground for attributing a different meaning to "offence" in s 8."

[17] The appellant here was convicted under s 320(1) of the *Code* which provides:

> "Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years."

An intention to cause grievous bodily harm is not expressly declared by the *Code* to be an element of a crime under s 320. Consequently, the offender's intention is immaterial: s 23(2) of the *Code*.

[18] According to that passage from *Barlow*, in this case the "offence", for the purposes of s 7, was the conduct of punching and kicking the complainant. It was that conduct which, having caused the "prescribed result" of grievous bodily harm to the complainant, rendered the person engaging in that conduct liable to punishment. The person who actually assaulted the complainant was guilty under s 7(1)(a). For that person, there was no need to prove anything about his state of mind.

[19] But the position is different, for a person said to be guilty under s 7(1)(b) or s 7(1)(c). Section 7(1)(b) expressly requires proof of a certain *purpose* of the defendant. And for s 7(1)(c), as Macrossan CJ said in *R v Beck*,[5] it is hardly possible to aid the commission of an offence without an awareness of that offence which is being (or might be) committed. Macrossan CJ there said:[6]

> "It is notable that just as subs.7(b) is not expressed in such terms as 'does any act which has the effect of enabling or aiding another

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3 (1997) 188 CLR 1.
4 (1997) 188 CLR 1 at 9.
5 [1990] 1 Qd R 30 at 37-38 (McPherson J agreeing).
6 [1990] 1 Qd R 30 at 38.

> person to commit the offence', so subs.7(c) is not expressed in terms 'does any act which has the effect of aiding any person in committing the offence'. If subs.7(c) were so expressed it would catch a lot of innocent people in its net, e.g. the taxi driver who innocently drives the passenger part of the way to the place where a crime will be committed by him. For this reason it is obvious enough that "aids" in subs.(c) means "knowingly aids" and this is the way it has been interpreted in the cases."[7]

[20] This requirement of knowledge, in the application of s 7(1)(b) and (c), corresponds with the common law position. In *Johnson v Youden*,[8] in a frequently cited passage, Lord Goddard CJ said:

> "Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence."

Citing that passage and other cases, including *Wilson v Dobra*[9] which was a case under the *Criminal Code* (WA), in *Giorgianni v The Queen*[10] Gibbs CJ said that:

> "[T]he general principle is that a person can be convicted as a secondary party only if he had knowledge of the *essential circumstances*."

Similarly, in *Giorgianni* Mason J said that:[11]

> "The proposition that a person cannot be convicted of secondary participation at common law unless he knows *the facts which must be proved to show that the offence has been committed* has also been embraced in Australia."

And in the same case, Wilson, Deane and Dawson JJ said:[12]

> "To have [aided, abetted, counselled or procured] he must have intentionally participated in the principal offences and so must have had knowledge of the *essential matters which went to make up the offences* of culpable driving on the occasion in question, whether or not he knew that those matters amounted to a crime …"

I have emphasised the words in those statements because of their relevance to the question in this appeal, namely what must be known by a person to be a party to the offence under s 7(1)(b) and (c).

[21] Although *Giorgianni* was a case from New South Wales, those statements have been consistently applied to these provisions of the *Code.* For example, in *R v Pascoe*,[13] McPherson JA, citing *Giorgianni*, said:

> "[I]t was necessary, in order for the prosecution to establish criminal responsibility under s 7(c), or for that matter s 7(b), to prove that the

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7 Citing Philp J. in *R v Solomon* [1959] Qd R 125 and per Matthews J. in *R v Wylie Payne and Harper* (CA 27, 28/1977; Court of Criminal Appeal, 25 May 1977, unreported.) See also *R v Jeffrey* [2003] 2 Qd R 306 at 326.

8 [1950] 1 KB 544 at 546.

9 (1955) 57 WALR 95.

10 (1985) 156 CLR 473 at 482.

11 (1985) 156 CLR 473 at 494.

12 (1985) 156 CLR 473 at 500.

13 [1997] QCA 452 at p5.

> appellant did the act or acts in question knowing that the others were, or at least one of them was, committing an offence … which means that he must have known the essential facts which, being proved, make up that offence …"[14]

[22] It can be seen then that the direction in the Benchbook has a firm basis in the authorities. But the appellant's argument is that the direction, as used in the present case, was deficient because it was incomplete by not explaining what was meant by "the essential facts" of the offence.

[23] In *Giorgianni*, the appellant was charged with an offence of culpable driving causing death pursuant to s 52A and s 351 of the *Crimes Act* 1900 (NSW). He was the owner of a truck which, when driven by his employee, collided with other vehicles when its brakes failed, causing the death of persons in them. Section 52A provided that where the death of a person was occasioned through the impact of a motor vehicle which was being driven at a speed or in a manner dangerous to the public, the person driving the vehicle was guilty of the misdemeanour of culpable driving. By s 351, any person who aided, abetted, counselled or procured the commission of any misdemeanour could be convicted and punished as a principal offender. The trial judge in that case directed the jury that the appellant could be guilty if, when he had his employee drive the truck, either the appellant knew that the brakes were defective and might fail or the appellant acted recklessly not caring whether the facts existed or not. The appellant's conviction was set aside, because what had to be proved was either a knowledge that the brakes were defective and likely to fail, or a wilful blindness to those facts, which was said to be equivalent to knowledge. Recklessness was not sufficient.

[24] *Giorgianni* is said to support the appellant's argument because of the decision in that case that it was necessary to prove "not just that the aider knew the principal was to drive a vehicle, but also that he was to drive with defective brakes."[15] The reasoning in *Giorgianni* is instructive for the present case, but in my view it is adverse to the appellant's argument. The misdemeanour created by s 52A, like the crime created by s 320 of the *Code*, was constituted by an act (driving at speed or in a manner dangerous to the public), accompanied by a result (death to another person), without it being necessary that the principal offender should have considered the possibility of that result. And it was said that the appellant, as the secondary party, need not have considered that possibility. Mason J said:[16]

> "The proposition that a person cannot be convicted of secondary participation at common law unless he knows the facts which must be proved to show that the offence has been committed has also been embraced in Australia …
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> The application of the proposition to the offence created by s.52A does not require that the applicant be shown to have any knowledge or intention concerning the impact with a motor vehicle or the occasioning of death or grievous bodily injury even though these

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14 See also *R v Jeffrey* [2003] 2 Qd R 306 at 310; *R v Adams; Ex parte Attorney-General of Queensland* [1998] QCA 64; *R v Weisz* (2008) 189 A Crim R 93 at [117]; *R v Hawke* [2016] QCA 144; See also *Marchesano v The State of Western Australia* [2017] WASCA 177 at [170] per Buss P, applying what was said in this respect by McPherson JA in *R v Jeffrey*.

15 Appellant's outline of argument paragraph 20.

16 (1985) 156 CLR 473 at 494-495.

> matters must be proved to establish the [offence]. The reason is that the actions of both the principal offender and the secondary party under s.52A are complete where the vehicle is driven in a manner dangerous to the public. The circumstance that liability attaches under the section only where that manner of driving carries certain consequences, which are the natural and probable results of such driving, does not relieve the secondary party of culpability merely because he has no knowledge of those consequences."

Similarly, Wilson, Deane and Dawson JJ distinguished between the conduct (of the principal offender) and the result of that conduct.[17] They said:[18]

> "[T]he requisite intent and knowledge [of the aider] do not, in the case of culpable driving, extend to the occurrence of the death or grievous bodily harm which "ensues upon" the unlawful act the commission of which was aided, abetted, counselled or procured."

[25] The appellant's argument is said to be supported by *R v Jeffrey*,[19] where it was held that for a person to be convicted of murder by s 7(1)(b) or s 7(1)(c), he had to have known that death or grievous bodily harm was intended by the person whose act had killed the victim. It is suggested that, in the same way, the appellant here had to know something of the likely result of the assault. But *Jeffrey* is distinguishable, because the charge in that case (murder) required proof of a specific intent on the part of the principal offender. The person who did the act which killed the victim had to have done so with an intent to kill or do grievous bodily harm. Because that intention of the principal offender was a necessary characteristic of the conduct of that person, an aider must be proved to have known of the fact of that intention. Absent knowledge of that fact, the aider would have assisted in the unlawful killing, but not the murder, of the victim. In a case such as *Jeffrey*, the fact of that intention of the principal offender must be a fact existing at the time of the aider's participation, and as an existing fact, was something which could be known. The same cannot be said, in a case such as the present, about the *result* of the principal's conduct. *Jeffrey* does not assist the appellant's argument.

[26] The appellant's argument has some apparent support from the third of the cases cited by it, namely *R v Da Costa*.[20] The appellant there was convicted of unlawful wounding. He and another man called Shepherd went to the complainant's unit where an altercation occurred. The complainant was wounded by a number of lacerations to his face, as a result of a knife used by either the appellant or Shepherd. Early on in the altercation, Shepherd had taken up an ornamental sword which he had found in the complainant's unit. But it was the knife by which he had probably been wounded. The appellant argued that his conviction was unreasonable, because the hypothesis that Shepherd had wounded the complainant, acting independently of the appellant, could not be excluded. That argument was rejected. One basis of criminal liability, as argued by the prosecution, was under s 7(1)(c). As to that, McPherson JA said:

> "[3] Section 7(1)(c) applied if the appellant was proved to have "aided" another in committing the offence. In this context, aiding

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17 (1985) 156 CLR 473 at 501-503.
18 (1985) 156 CLR 473 at 503.
19 [2003] 2 Qd R 306.
20 [2005] QCA 385.

> means assisting, and the question for the jury therefore was whether the appellant was "aware at least of what is being done or perhaps will be done by the other actor": *R v Sherrington and Kuchler* [2001] QCA 105, at [13]. Apart from the appellant, the only other actor present when the offence was committed and who might have caused the wounding was his co-accused Shepherd. … The appellant is proved to have known that Shepherd was striking the complainant with a sword or was about to do so. Swords, even if they are blunt, are notoriously capable of causing wounding, meaning breaking or penetration of the true skin. … The appellant therefore knew that Shepherd was or was about to wound the complainant when he took part by aiding or assisting him.
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> [4] There may be circumstances in which the primary actor or person committing the offence goes well beyond anything that the assistant is aiding him in doing. In that event, s 7(1)(c) would cease to apply because the assistant would no longer be assisting the primary actor in the offence committed. The "offence" in s 7(1)(c) bears the meaning ascribed to it in s 2 of the Code as the act or omission which renders the person doing it liable to punishment: *R v Barlow* (1997) 188 CLR 1, 9. Here, as I have said, *that act was wounding the complainant*, which, on the hypothesis that he did not do it himself, was what the appellant was aiding Shepherd in doing to the complainant."
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> (emphasis added)

In the same case, Douglas J said:

> "[32] In this context I have also had the advantage of reading McPherson JA's reasons for judgment in this matter. I agree that the approach in *R v Barlow* (1997) 188 CLR 1, 9 to the meaning of "offence" in these sections of the *Criminal Code*, including s. 7(1)(c), requires the Court to focus on the act or omission which renders the person doing it liable to punishment. That leads to the conclusion that *the knowledge required by the participant is of the wounding of the complainant or, in my view also, the foresight that wounding may occur*.
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> …
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> [33] It was open to the jury to conclude that each of the appellant and Mr Shepherd was knowingly assisting the other to attack the complainant, one with his fists and the other, at least initially, with a sword. … Where one of the parties is armed, even with a blunt, ornamental sword, and the other uses his fists to assault the complainant there is every likelihood that both the person punching and the person wielding the sword will be assisting to commit the offence of unlawful wounding, which merely requires the "true skin" of the victim to be penetrated or broken.

> [34] That the injuries were most probably inflicted by the knife does not affect the conclusion on these facts. That the appellant may not have known at first that the knife was to be used to wound does not prevent his earlier assistance from being relevant. Where two people have assisted each other in a course of conduct that they know is likely to result in unlawful wounding it is not a factor excluding criminal liability that the wound was eventually caused by an unanticipated weapon; cf *R v Barlow* at 10-11."
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> (emphasis added)

[27] The judgments in *Da Costa* are relevant to the appellant's argument because they appear to suggest that under s 7(1)(c), the prosecution had to prove not only that the appellant was aiding an *assault* of the complainant, but also that he was aiding a *wounding*. It was said that this could be proved by proof of knowledge that Shepherd was about to wound the complainant (McPherson JA) or proof that he aided him with "foresight that wounding may occur" (Douglas J). Those passages could suggest that an aider must intend to assist a principal, not only to engage in the relevant conduct, but also to achieve the prescribed result (namely wounding).

[28] What was said in *Da Costa*, however, was in response to a different ground of appeal from that in the present case. The Court there was not required to define at a minimum, what had to be proved where a defendant is said to be criminally responsible for an offence committed by another person. The question there was whether it was open to the jury to convict the appellant. In describing a case which it was open to the jury to accept, the Court may have overstated what had to be proved against that appellant.

[29] The appellant's argument is not supported by this Court's subsequent decision in *R v Brown*.[21] The appellant in that case was found not guilty of murder, but guilty of manslaughter of a man who had been killed by several blows to his head, which could have been caused by fists, feet, boots or a blunt object. The appellant and others went to the deceased's home in order to collect a drug debt. The appellant was armed with a hammer and there was evidence that he used it to strike the deceased. But there was some evidence that further violence was inflicted on the deceased by others. The prosecution case was that the appellant was guilty of murder either under s 7 or s 8. The appellant's first ground of appeal was that the trial judge erred in directing the jury about s 7(1)(c), by telling the jury that they could convict him of manslaughter under that provision if they found that he had aided the principal offender with knowledge that that offender had an intention to assault the deceased. It was argued that for the jury to convict the appellant of manslaughter under s 7(1)(c), it was necessary for them to be satisfied both that a reasonable person in his position would have foreseen death as a possible outcome of the assault that he was aiding and that he actually foresaw this.[22] That argument was rejected. McMurdo P said:[23]

> "The case against the appellant at trial under s 7(1)(c) was that he was present and knowingly aided the perpetrator in a lethal assault upon the deceased. To convict the appellant of manslaughter on the basis of

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21 (2007) 171 A Crim R 345.

22 As the argument was summarised by McMurdo P at [23].

23 (2007) 171 A Crim R 345 at [31].

> s 7(1)(c) in this case, the jury had to be satisfied that the appellant knowingly aided the perpetrator *to assault the deceased*; the assault was a substantial or significant cause of the death; the killing was unlawful; but not satisfied that the appellant intended to kill or do grievous bodily harm to the deceased."

In the same case, Holmes JA (as she then was) said:[24]

> "The state of knowledge which the Crown had to prove in order to convict the appellant as an aider under s 7(1)(c) of the *Criminal Code* was of the 'essential facts constituting or making up the offence that [was] being or about to be committed by the person he [was] aiding or assisting';[25] that is to say, *the assault which caused the deceased's death*. The direction given met that requirement."
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> (emphasis added)

Conclusion

[30] To be criminally responsible under s 7(1)(b) or s 7(1)(c), a person must know of the offence which is being, or which is about to be, committed by the person he is aiding or intending to aid. That offence is constituted by the conduct (an act or omission) of the other person which attracts criminal liability. If the principal offender's crime requires a specific intent, then s 7(1)(b) or s 7(1)(c) requires the aider to know that he is aiding the other to act (or omit to act) with that intent. But if "the offence" has no ingredient of an intent (or other state of mind) on the part of the person who does the act or makes the omission, all that the aider need know is that the conduct constituting the offence is occurring or will occur. Of course, what was not foreseen or foreseeable as a consequence might be relevant, in a certain case, for the purposes of s 23 of the *Code*. But s 23 was not said to be relevant here.

[31] In the present case, all that the appellant had to know was that the complainant was being or was about to be assaulted. It was unnecessary for the prosecution to prove that the appellant believed or expected that the assault would be of a certain severity or that it would have any particular result.

[32] As is submitted for the appellant, the directions which were given left it open to the jury to convict upon satisfaction that the appellant knew or expected merely an assault upon the complainant. But if the jury reasoned in that way, there was no error. The only criticism which might be made of the direction is that the jury may have thought that it was necessary that the appellant knew or expected more than merely an assault. If so, the suggested incompleteness of the direction would have been to the potential advantage of the appellant.

[33] I would order that the appeal be dismissed.

[34] **DOUGLAS J:** I agree with the analysis of the decision in *R v Da Costa*[26] in the two passages of McPherson JA's and my reasons discussed by McMurdo JA at [26] and [27]. Those passages, in their references to "wounding" should not be taken to mean that an aider must intend to assist a principal not only to engage in the relevant conduct but also to achieve the prescribed result of wounding. The necessary purpose or

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24 (2007) 171 A Crim R 345 at [48].
25 Citing *R v Jeffrey* and *Giorgianni* at 482.
26 [2005] QCA 385.

knowledge required by s 7(1)(b) and s 7(1)(c) must be of the conduct which caused the prescribed result of wounding, namely, in this case, the assaults. For the reasons so clearly expressed by his Honour, therefore, I agree with the conclusion that it was unnecessary for the prosecution to prove that the appellant believed or expected that the assault would be of a certain severity or that it would have any particular result.

[35] When considering the decision in *Da Costa* it is also important to bear in mind that the charge there was one of unlawful wounding contrary to s 323 of the *Criminal Code*. As with the charge of unlawfully doing grievous bodily harm in this case, an assault is not an element of the offence of unlawful wounding although it may be an incident of a particular act of unlawfully causing grievous bodily harm or of unlawful wounding.[27]

[36] That *Da Costa* was itself a case of unlawful wounding may explain the references in the judgments in *Da Costa* relied on by the appellant here. The more accurate expression of the test is, however, that the prosecution must show that the appellant knew of or had an expectation of the conduct, here an assault, which led to the prescribed result of unlawfully doing grievous bodily harm. It did not need to show that he knew or had an expectation that grievous bodily harm would result. Accordingly the summing up was appropriate and the appeal should be dismissed.

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27 *Kaporonovski v The Queen* (1973) 133 CLR 209, 217, 222; cf Gibbs J at 232-240 and Stephen J at 241.