Commentary

As to majority verdicts see Direction No 52A and the General Summing Up Direction No 24.

It is frequently the case that there is more than one basis on which a jury could arrive at a verdict of guilty. Whether they should be directed that they may do so depends on whether the alternative bases of responsibility "involve materially different issues or consequences": *Leivers and Ballinger* [1999] 1 Qd R 649 at 662. Thus, for example, in *Leivers* the prosecution based its case against the appellants on s 7(1)(c) and s 8 of the *Criminal Code* as alternatives. Although the jury would be required to make different findings in respect of each provision, the same activities by each appellant were, in essence, relied on as a foundation for liability under each. It was proper for the trial judge in that circumstance to instruct the jury that they were entitled to reach the same conclusion by different routes.

It is conceivable, however, that a prosecution case entailing such alternative bases of responsibility might involve a mix of evidence which is capable of being exculpatory on one form of participation in murder, while inculpatory on the other. It would not be permissible for the jury in such an instance to be directed that they could adopt whatever route they chose, because to do so might entail selecting an inconsistent mix of inculpatory and exculpatory pieces of evidence. For a discussion of this scenario, see the judgment of Lamer J in the Supreme Court of Canada in *Thatcher* [1987] 1 SCR 652; 32 CCC (3d) 481 at 518.

In *R v Spencer* [2023] QCA 210, the Court of Appeal (Bowskill CJ, Morrison JA and Crow J) considered a ground of appeal that a miscarriage of justice had occurred by reason of the trial judge's failure to direct the jury about a requirement of unanimity in relation to the basis of the verdict. The Crown case on the charge of murder was put on three alternative bases: (A) causing the death of the deceased with the requisite intent (s 7(1)(a)); (B) enabling, aiding, or encouraging another (s 7(1)(b) and/or s 7(1)(c)); or (C) participating in a common unlawful purpose, a probable consequence of which was that the deceased would be murdered (s 8). The trial judge directed the jury that the three bases of liability were charged in the alternative, and the issue was whether the Crown had proved that the appellant was criminally responsible in one of the ways particularised [76].

The issue on appeal was "… 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?" [88].

The Court referred to *R v Koko* [2022] QCA 216 [24] where two propositions were said to flow from the Victorian Court of Appeal decision in *R v Walsh* (2002) 131 A Crim R 299:

> "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."

The Court referred to the decision of the Victorian Court of Appeal in *Lanciana v The King* [2023] VSCA 78 where it was held that no unanimity direction was required as to which legal basis applied "where alternative legal bases of guilt are proposed by the Crown depending substantially upon the same facts, and not involving 'materially different issues or consequences'…" [109].

After an extensive review of the relevant authorities, Bowskill CJ (Morrison JA [161] and Crow J [162] agreeing) concluded that:

> "[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.
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> [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 [a co-offender]) 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 [the deceased]. 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."

In *Cramp* (1999) 110 A Crim R 198, the New South Wales Court of Criminal Appeal upheld a conviction which might have been based on manslaughter by gross negligence, or manslaughter by an unlawful and dangerous act. The alternative counts relied on similar evidence as to the appellant allowing the deceased to drive his vehicle fast and dangerously while under the influence of alcohol. The Court held that the jury was not obliged to adopt a uniform basis on which to reach its verdict of guilty. A distinction was drawn between "alternative factual bases of liability and alternative legal formulations of liability based on the same or substantially the same facts" at 212; see also *Ryder* [1995] 2 NZLR 271: jury not required to be unanimous as to precise mode of death where stomping on head or blow causing deceased to fall back and strike head both possible.

That distinction seems clear enough when one considers decisions such as *KBT* (1997) 191 CLR 417, in which an appeal was upheld because the jury had not been directed that it must agree as to the acts upon which a conviction of maintaining an unlawful sexual relationship was based. Section 229B(1) of the *Code* created an offence of maintaining an unlawful relationship (now called "Repeated sexual conduct with a child" per s 16 *Domestic and Family Violence Protection (Combating Coercive*

Control) and Other Legislation Amendment Act 2023) which previously required for conviction proof that the offender had committed an offence of a sexual nature with a child on three or more occasions. That finding as to three acts was an essential element of the offence, requiring the jury to reach a unanimous conclusion as to at least three specific acts out of those the subject of evidence. (As at August 2023, the jury has to reach a unanimous conclusion as to the happening of "more than 1" unlawful sexual act.)

Similarly, in *Brown* (1984) 79 Cr App R 115 the English Court of Appeal held that the jury had to be unanimous as to the false, misleading or deceptive character of at least one of several statements in order to convict the appellant of the offence of inducing another to enter into an agreement, by a statement known to be false, misleading or deceptive. Similar reasoning is evident in *Beach* (1994) 75 A Crim R 447 in which the Victorian Court of Criminal Appeal observed that a verdict of causing death by culpable driving which might have been based on negligence or, alternatively, on driving under the influence of alcohol, where no direction as to the need for unanimity had been given, would not ordinarily be permitted to stand. That was because it might well be "based upon quite disparate findings relating to the very foundation upon which the verdict rests". (There was in that case, however, a verdict on a second count which supported the conclusion that the first count was based on a finding of negligence.) To be contrasted are the Canadian decisions in *Thatcher* [1987] 1 SCR 652; 32 CCC (3d) 481 and *GLM* 1999 BCCA 467.

R v Chignell [1991] 2 NZLR 257, was a case in which the victim might have been killed in the course of a bondage session at the defendant's house, or subsequently, when he was thrown over a waterfall. Since the alternatives were "separated by place and in time and involved wholly different acts and …intents on the part of each accused", the NZ Court of Appeal concluded that the jury should have been instructed that they were required to be unanimous as to the alternative they found.

The distinctions between essential and non-essential elements in an offence, and alternative bases of criminal liability not involving "materially different issues or consequences", illustrated by the cases above are not so clear when it comes to the question of manslaughter verdicts which may be based on an absence of finding of a specific intent to kill or do grievous bodily harm, or, alternatively, on a conclusion that although intent is established, the prosecution has not excluded provocation. In practice, however, it has generally not been considered necessary that the jury be required to reach unanimity of approach before convicting of manslaughter. The existence of such a practice in Victoria,(see *R v Clarke & Johnstone* [1986] VR 643 at 661) and New South Wales was discussed in *Dally* . (2001) 115 A Crim R 582 at [59] ff. The rationale is expressed in that case in terms of practicality, rather than involving any attempt to distinguish between essential and non-essential elements or materially different issues or consequences.

For American approaches to this question, see *Schad v Arizona* 501 US 624 (1990) in which the US Supreme Court concluded that unanimity was not required as to whether the petitioner had committed felony murder or premeditated murder; and *Richardson v United States* 526 US 813 (1999) in which it was held that where a "continuing series of violations" had to be proved, it was necessary that the jury agree as to which violations it was satisfied were established. Both cases turn, however, on constitutional and statutory construction questions.

Suggested Direction

Direction where alternative bases of responsibility do not involve materially different issues or consequences

The prosecution has put to you two different bases on which you might find the defendant guilty of the offence [outline alternative bases**]. You must reach a unanimous verdict, but it is not necessary that you all arrive at the same result by the same approach or for the same reasons. You must, however, be unanimous in a conclusion that the defendant is, beyond reasonable doubt, guilty of the offence before you can convict.**

Where there are alternative bases on which the jury might acquit.

Although your verdict must be unanimous, you may find that you entertain a reasonable doubt as to guilt on different bases. It does not matter that different members of the jury entertain a reasonable doubt for different reasons.

Where an offence requires unanimity as to means by which offence committed

The defendant is alleged to have committed the crime of (insert description) in different ways. The first is that he (describe means). The second is that he (describe means). As they are different ways of committing the offence of (insert description), the prosecution does not have to prove both of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one or the other is enough. But in order to return a guilty verdict, all twelve of you must agree that the same one has been proved. To convict, all of you must agree that the prosecution has proved beyond reasonable doubt that the defendant (describe means**); or, all of you must agree that the prosecution has proved beyond a reasonable doubt that the defendant (**here describe alternative method**).**