



HIGH COURT OF AUSTRALIA

Public Information Officer

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HOWARD RODNEY DARKAN v THE QUEEN
GWENDOLINE CECILY DEEMAL-HALL v THE QUEEN
MARLOW PHILIP ANDREW McIVOR v THE QUEEN

An error in a trial judge's directions to a jury did not amount to a substantial miscarriage of justice and the three appellants' murder convictions should stand, the High Court of Australia held today.

Mr Darkan, 33, Ms Deemal-Hall, 55, and Mr McIvor, 26, were convicted of murdering Ms Deemal-Hall's former partner, Kalman John Toth, 58, in a park in Mareeba in far north Queensland in January 2003. Ms Deemal-Hall had recruited Mr Darkan, Mr McIvor and Shannon Brian Bowen to give Mr Toth "a touch-up" and to "fix him up". She paid the three men, who did not know Mr Toth, \$50 each, with more money to follow. Ms Deemal-Hall dropped the men at the park then fetched Mr Toth. A fist fight broke out and Mr McIvor, who was wearing steel-capped boots, used a pickaxe handle to hit Mr Toth in the back of the neck, knocking him to the ground. The three men kicked him repeatedly. Mr Darkan used the pickaxe handle to strike Mr Toth from the ankles up to the ribs and to beat him around the head. Mr Toth was crying for help. His body was found the next morning. He had severe bruising all over his body, broken upper and lower jaws and facial bones, and facial lacerations. The cause of death was aspiration of blood due to severe facial trauma. Mr Bowen received a reduced sentence for assault occasioning bodily harm while in company in return for giving evidence for the prosecution.

The Queensland Court of Appeal dismissed appeals by Mr Darkan, Ms Deemal-Hall and Mr McIvor. They appealed to the High Court over a direction given by Supreme Court Justice Stanley Jones to the jury on the meaning of "a probable consequence". Under section 8 of the *Criminal Code*, when two or more people form a common intention to carry out an unlawful purpose and an offence occurs that was a probable consequence of their actions, each is deemed to have committed the offence. In this case, the allegation was that Mr Darkan, Ms Deemal-Hall and Mr McIvor formed an intention to cause Mr Toth grievous bodily harm, that the acts done for this purpose were of such a nature as to endanger human life, and that death was a probable consequence of those acts. Alternatively, in Ms Deemal-Hall's case, under section 9 of the Code, when someone counsels another to commit an offence it is immaterial whether the offence actually committed is different or whether it was committed in a different way, provided that the offence committed was a probable consequence of carrying out the counsel. Justice Jones explained probable consequence as "a real possibility or a substantial [chance] or a real chance that the event would happen".

The High Court, by a 4-1 majority, dismissed the appeal. It held that "a probable consequence" was stronger than a real possibility or chance. The Court rejected arguments that Justice Jones should have said nothing about the meaning of the phrase as some explanation to a jury may be desirable or necessary in the circumstances of a particular case. However it was erroneous to use the words he did, which were unduly harsh to the appellants. The consequence must be probable, as distinct from possible, in the sense that it could well happen in prosecuting the unlawful purpose (section 8) or of carrying out the counselling (section 9). Justice Jones's direction was flawed in that it did not convey the idea that the consequence was a probable or likely outcome. The Court held that no substantial miscarriage of justice resulted from the error. Both Mr Darkan and Mr McIvor's admissions showed they intended to do grievous bodily harm to Mr Toth, and either one had killed him or aided the other in killing him. There was strong circumstantial evidence that Ms Deemal-Hall wanted the men to inflict grievous bodily harm on Mr Toth and counselled them to carry out the attack in such a manner that murder – an unlawful killing with intent to cause grievous bodily harm – was a probable consequence.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*