Southern Queensland Correctional Centre

Visitor information

Booking Times

To book a visit, please phone (07) 5466 6890 between the hours of:

Days	Times	Visit days
Monday	9.00am – 3.00pm	Wednesday visits
Tuesday	9.00am – 12.00pm	Wednesday visits
Monday	9.00am – 3.00pm	Saturday / Sunday visits
Tuesday	9.00am – 3.00pm	Saturday / Sunday visits
Wednesday	9.00am – 3.00pm	Saturday / Sunday visits
Thursday	9.00am – 3.00pm	Saturday / Sunday visits
Friday	9.00am – 12.00pm	New reception prisoners only for Saturday / Sunday visits

Bookings will not be taken outside these hours.

Visiting Times

Days	Visit times
Wednesday	9.30am – 4.30pm
Saturday	8.30am – 4.30pm
Sunday	8.30am – 4.30pm

Arrival Times

All visitors can arrive at the centre anytime between 8.30am – 11.15am, or 12.30pm – 3.15pm (Saturday and Sunday).
All visitors can arrive at the centre between 9.30am – 11.15am, or 12.30pm – 3.15pm (Wednesday).
All visitors, over the age of 18 years, must be enrolled in the biometric identification system database at the centre.

Visit Duration

Prisoners visits entitlements change in accordance with their Incentives and Earned Privileges (IEP) status.

Transport to the Centre

A bus service is available for visitors to the Southern Queensland Correctional Centre. There is no charge to visitors for this service. Visitors MUST be an approved visitor to use this service.
Booking times for Prison Transport Group are Tuesday to Thursday between 10am to 2pm and Friday between 10am to 4pm.
For further information, contact the Prison Transport Group on Toll Free 1800 334 379. Mobility service can be accommodated if required.

Other Information

Tobacco and other smoking related products are prohibited items within a correctional centre. Tobacco and other smoking related products must not be taken into a correctional centre, and must be either secured in a motor vehicle or visitor locker. No smoking is permitted anywhere in the grounds of a correctional centre, including car parks, walkways, visits processing etc.

Contact Details

Postal Address: Locked Mail Bag 1008, GATTON QLD 4343
Street Address: Millers Road, SPRING CREEK QLD 4242
General enquiries: (07) 5466 6888
Visits: (07) 5466 6890
Email: SQCC@dcs.qld.gov.au

SUPREME COURT OF QUEENSLAND

CITATION:	*Carter v Attorney-General for the State of Queensland* [2013] QCA 140
PARTIES:	**STEPHEN WAYNE CARTER** (appellant) **v** **ATTORNEY GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 8863 of 2012 SC No 2587 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2013
JUDGES:	White JA, Atkinson and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – GENERALLY – where appellant convicted of murder for killing another at that other's request – where appellant unsuccessfully petitioned Governor of Queensland for pardon pursuant to s 36 of the *Constitution of Queensland* 2001 – where appellant unsuccessfully applied for statutory order of review of Attorney-General's decision not to refer appellant's whole case to court pursuant to s 672A of the *Criminal Code* – whether Attorney erred in not referring matter to court – whether s 311 of *Criminal Code* is complete code for purposes of ascertaining criminal responsibility where a person has caused the death of another who is desirous of death – whether miscarriage of justice because trial judge failed to direct jury that if deceased was substantial or significant cause of her own death then appellant not guilty of murder *Constitution of Queensland* 2001, s 36

Criminal Code 1899 (Qld), s 1, s 2, s 18, s 25, s 284, s 291, s 293, s 295, s 297, s 298, s 300, s 302(1), s 302(1)(a), s 304, s 304A, s 304B, s 311, Ch 67, s 668, s 668E, s 668E(1), s 672A, s 672A(a), s 672A(b), Ch 26, Ch 28
Judicial Review Act 1991 (Qld), 20(2)(e), s 20(2)(f), s 20(2)(i), s 26

Campbell v The Queen [1981] WAR 286; (1980) 2 A Crim R 157, cited
March v Stramere (E & MH) Pty Ltd (1991) 171 CLR 506; (1991) HCA 12, cited
National Insurance Co of New Zealand Ltd v Espagne (1961) 105 CLR 569; [1961] HCA 15, cited
Nicklinson v Ministry of Justice and Ors [2012] EWHC 304 (QB), cited
Pepper v A-G (Qld) [No2] [2008] 2 Qd R 353; [2008] QCA 207, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Carter [2003] 2 Qd R 402; [2002] QCA 431, cited
R v Carter (2003) 141 A Crim R 142; [2003] QCA 515, considered
R v Grimes and Lee (1894) 15 NSWR(L) 209, cited
R v Lowrie & Ross [2000] 2 Qd R 529; [1999] QCA 305, cited
R v Main (1999) 105 A Crim R 412; [1999] QCA 148, cited
R v Sherrington [2001] QCA 105, cited
Royall v The Queen (1991) 172 CLR 378; [1991] HCA 27, considered
Timbu Kolian v The Queen (1968) 119 CLR 47; [1968] HCA 66, cited
Weld-Blundell v Stevens [1920] AC 956, cited

COUNSEL: A Vasta QC, with K Payne, for the appellant
P J Davis SC, with B A Hall, for the respondent

SOLICITORS: Fraser Power Lawyer and Notary Public for the appellant
Crown Solicitor (Brisbane) for the respondent

[1] **WHITE JA:** The appellant has appealed the dismissal of his application to review the decision of the Attorney-General not to refer his case to the Court of Appeal pursuant to s 672A of the *Criminal Code* (Qld) following his unsuccessful petition to Her Excellency the Governor of Queensland to exercise the prerogative powers of the Crown to pardon him in respect of his murder conviction or, alternatively, to exercise the prerogative of mercy in his favour.

Background

[2] On 16 March 2000 the appellant injected Gail Marke with heroin intending that this would kill her in accordance with her expressed wish to die in this way. He then inserted a syringe containing heroin into the arm of Patrick Smyth at his request and watched as Smyth pushed in the plunger. Smyth died immediately. Marke was still

breathing but unconscious when the appellant left the room that night. She was dead when found the following morning. The appellant had supplied the heroin. The deceased were heroin addicted persons. The appellant was a heroin user. Both deceased had expressed a desire to die and Marke had attempted suicide several times.

[3] On 24 March 2000 police conducted an interview with the appellant in which he explained what had occurred on the night of 16 March 2000. Without his admissions there would have been no way of implicating the appellant in the mechanism of the deaths. He had wiped his fingerprints from the syringe. The following appears in McPherson JA's judgment dismissing the appellant's appeal from his conviction for murder:

> "[4] The appellant said that he had injected Gail first. She was not able to do it herself, or bring herself to do it. He put the needle in her arm, and asked if she was absolutely sure, to which she said "yes, just do it", and he pushed in the plunger of the syringe. She said "what a rush", and lay down on her back, on the left hand side of the bed. At that stage she was still breathing. In the case of Smyth, the appellant inserted the needle, but Smyth pushed the plunger in himself, and he may also have withdrawn the needle. He just dropped down straight away "like a stone".
>
> [5] When asked in the course of the interview, the appellant said he thought that Gail was going to die. That was, he said, "the intention of the exercise"."[1]

The necessary mental element for murder pursuant to s 302(1)(a) of the *Criminal Code* was thus established.

[4] The appellant pleaded guilty to having unlawfully supplied heroin to Smyth and to assisting his suicide contrary to s 311 of the *Criminal Code*. He was arraigned and pleaded not guilty to a charge of murdering Gail Marke but guilty of aiding her to kill herself. The prosecution did not accept that plea and the trial proceeded on the murder charge. The appellant was convicted of murdering Gail Marke and sentenced to life imprisonment. His appeal against his conviction was dismissed.[2]

[5] An earlier conviction had been set aside and a retrial ordered because of the incompetence of trial counsel.[3]

[6] The second appeal was concerned with the question whether the injection of heroin by the appellant had caused Marke's death within the meaning of that expression in s 293 of the *Criminal Code*. The High Court in *Royall v The Queen*[4] explained that while there may be no single cause of the death of a deceased, at common law:

> "if the accused's conduct is a substantial or significant cause of death that will be sufficient, given the requisite intent, to sustain a conviction for murder."[5]

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1 *R v Carter* [2003] QCA 515 at [4]-[5].
2 *R v Carter* [2003] QCA 515.
3 *R v Carter* [2002] QCA 431.
4 (1991) 172 CLR 378.
5 At 411 per Deane and Dawson JJ.

Courts in Queensland, when considering s 293 of the *Criminal Code*, "have applied to killing and causing death the meaning ascribed to those expressions at common law in *Royall v The Queen*."[6]

[7] The issue of causation arose because, as described by McPherson JA[7], one of the principal prosecution witnesses, a clinical pharmacologist, appeared to be making a distinction between a "significant" and a "substantial" cause of the death. The toxicology screening of the deceased revealed other drugs, as well as differently aged derivatives from heroin, suggesting either that she had absorbed significant quantities of morphine in the 24 hours proceeding her death, or that, for her body to have broken down the heroin to the proportions shown in the screening, she had survived for up to half an hour after having been injected with heroin by the appellant.[8] The pharmacologist said that for the heroin injection alone to have caused the death it would have been necessary for the deceased to have survived the injection for at least half and hour. He would have been surprised if the deceased had lived that long. He gave evidence about the additive effect of all the drugs in the deceased's system. The pharmacologist concluded that the heroin injection "could be a significant contribution but ... [not] a substantial contribution given all of the other confounders".[9]

[8] At the close of the prosecution case the defence had unsuccessfully submitted that there was no case for the appellant to answer in light of this body of evidence about the cause of death. On appeal the question was whether, in light of the evidence of the pharmacologist, a reasonable jury could have convicted.

[9] McPherson JA said,[10] of the legal nature of causation, in the circumstances of this case:

> "The function of scientific evidence at a trial at common law is not to usurp the function of the jury but to assist them in reaching their conclusion with the requisite degree of satisfaction. In relation to the element of causing death in homicide, this has been expressly recognised by the High Court in *Royall v The Queen* (1991) 172 CLR 378, 387, where Mason CJ approved a statement by Burt CJ that it is enough if juries are told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them, while appreciating that the purpose is to attribute legal responsibility in a criminal matter."

On that question the court concluded that the jury were entitled to be satisfied beyond reasonable doubt that the appellant had killed the deceased.

[10] The appellant unsuccessfully sought special leave to appeal to the High Court.

[11] On 4 November 2010 the appellant petitioned Her Excellency the Governor of Queensland for a pardon pursuant to s 36 of the *Constitution of Queensland* 2001 (Qld). In the petition the appellant contended that he could not be guilty of the

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6 *R v Carter* [2003] QCA 515 at [6] per McPherson JA referring to *R v Lowrie & Ross* [1999] QCA 305 at [11] and *R v Sherrington* [2001] QCA 105 at [4].

7 *R v Carter* [2003] QCA 515 at [9].

8 *R v Carter* [2003] QCA 515 at [9] per McPherson JA.

9 *R v Carter* [2003] QCA 515 at [11].

10 *R v Carter* [2003] QCA 515 at [13].

crime of murder because his injection of heroin into the deceased was not a "substantial cause" of her death because her procurement of the appellant to do so was such a cause. Accordingly, he should not have been charged with murder and

> "... his conviction upon this charge discloses a grave error of law and ought not to be allowed to stand."[11]

The appellant contended that the only crime of which he was guilty was of assisting suicide pursuant to s 311.

[12] The matter was referred by Her Excellency to the Attorney-General for "a detailed and thorough examination of [the] case and submission".[12] On receipt of certain information Her Excellency sought further advice about provisions in the *Criminal Code*.

[13] On 16 December 2011 the appellant was informed that Her Excellency was of the opinion that "there [was] no justification" for the exercise of any powers conferred by the *Constitution of Queensland* 2001.[13]

[14] On 20 March 2012 the appellant filed an application for a statutory order of review of the decision of the Attorney-General:

> "... not to positively exercise the Crown Law Officer's discretion, conferred by section 672A(a) of the *Criminal Code*, to refer the Applicant's whole case to the Court for hearing and determination by the Court as in the case of an appeal by a person convicted".[14]

He sought an order remitting the decision to the Attorney-General for further consideration and determination in accordance with law.

[15] Section 672A provides that nothing in Ch 67 relating to appeals shall affect the pardoning power of the Governor on behalf of Her Majesty:

> "... but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person ... may –
>
> (a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or
>
> (b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly."[15]

[16] "Court" in s 672A means "the Court of Appeal".[16] Pursuant to s 1 of the *Criminal Code*, "Crown Law Officer" is a reference to the Attorney-General or Director of

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11 AR 58.
12 Letter from Official Secretary to Her Excellency the Governor to appellant's solicitor, dated 15 November 2010, AR 67.
13 AR 68.
14 AR 72.
15 *Criminal Code*, s 672A.
16 *Criminal Code*, s 668.

Public Prosecutions. Nothing in the *Criminal Code* affects the Royal prerogative of mercy.[17]

[17] Section 668E provides for the determination and disposition of appeals generally and is the procedure to be applied to any reference under s 672A(a). Relevantly, s 668E(1) provides:

> "The Court ... shall allow the appeal if ... on any ground whatsoever there was a miscarriage of justice ..."[18]

[18] The application for judicial review was heard by Margaret Wilson J on 19 July 2012. That application included an application for an extension of time, given that the *Judicial Review Act* requires an application for review to be brought within 28 days after the day on which the decision was made.[19] Her Honour declined to extend time, on the basis that the substantive application contained no merit.

[19] As the primary judge observed, the powers conferred by s 672A are enlivened by the presentation of a petition for the exercise of the pardoning power after conviction, and, in a normal case, after an unsuccessful appeal. Her Honour[20] referred to the following observation by Muir JA in *Pepper v Attorney-General for the State of Queensland*:

> "... A reference under s 672A is a mechanism which the Crown may employ so that the exercise of the pardoning power may be properly informed or so as to grant the petitioner, in effect, a further appeal."[21]

[20] As further noted by her Honour, there have been a number of decisions in this court and the Federal Court on applications for judicial review of the Attorney-General's exercise of discretion under s 672A of the *Criminal Code*.[22] These applications have been made on the assumption that the Attorney's decision, having been made under an enactment, is amenable to judicial review. It was not argued by the respondent to the contrary. It was accepted that the provision of reasons was not required.[23]

[21] Before the primary judge the amended grounds of review were:

> "1. The decision by the Attorney General not to refer the whole case to the Court of Appeal ('*the decision*') was an improper exercise of the power conferred by s. 672A of the Criminal Code. (S.20(2)(e) Judicial Review Act 1991).
>
> 2. The decision involved an error of law (S.20(2)(f) Judicial Review Act 1991).
>
> 3. The decision was otherwise contrary to law. (S.20(2)(i) Judicial Review Act 1991)."[24]

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17 *Criminal Code*, s 18.
18 See *R v Main* [1999] QCA 148 at [15] and *Pepper v A-G (Qld) [No2]* [2008] QCA 207 at [12].
19 Section 26(2).
20 Reasons [10]; AR 89.
21 [2008] 2 Qd R 353 at [11]; [2008] QCA 207 at [11].
22 Reasons [11]; AR 89.
23 Reasons [23]-[25]; AR 92-93.
24 Reasons [13]; AR 89-90.

The respondent accepted before her Honour that if he had wrongly understood the law, and the law was as submitted by the appellant, then there had been a miscarriage of justice and the case should be referred to the Court of Appeal.[25]

[22] Before this court the respondent submitted that if the court concluded that the Attorney had erred in not referring the case to the Court of Appeal, since only an error of law is in issue, the point would be decided. In that circumstance it would be otiose to resubmit "the whole case" again under s 672A. Counsel informed the court that, should the court uphold the appeal, the Attorney would formally submit to an order setting aside the conviction and ordering a retrial. In effect, by this appeal, the appellant has achieved the very outcome he sought initially – a consideration of his argument about causation by this court. It is incidental that that is the effect of the appeal.

[23] Her Honour observed that s 672A(b) would seem to apply, not s 672A(a). That is, if the appellant is successful, it is not "the whole case" that should be referred to the court, but a particular "point". However, on the basis of how he articulated it to this court, I am inclined to the view that what the appellant seeks is the referral of "the whole case".

The appellant's contentions

[24] The appellant contends, broadly, that confining the "cause" of the deceased's death to physical phenomena which led "to the cessation of breathing" – rather than directing the jury to consider the importunities of the deceased as a substantial cause – was an error that brought about a miscarriage of justice.[26] He seeks to find support for that argument in *Royall v The Queen*.[27]

[25] In support of that contention the appellant argues that s 311 of the *Criminal Code* is a complete code for ascertaining criminal responsibility in circumstances like the present. Such a conclusion necessarily precludes any resort to s 302 – the crime of murder. While this argument was not advanced at either trial or on either appeal, if it is correct a miscarriage of justice has occurred and the prior failure to raise it will not preclude its consideration now.

[26] To test the argument the relevant provisions must be considered in their context in the *Criminal Code*. The first is located in Ch 26 – "Assaults and violence to the person generally – justification and excuse".

> "**284 Consent to death immaterial**
>
> Consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused."

[27] The balance of the relevant provisions are in Ch 28 – "Homicide – suicide – concealment of birth":

> "**291 Killing of a human being unlawful**
>
> It is unlawful to kill any person unless such killing is authorised or justified or excused by law.

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25 Reasons [15]; AR 90.
26 Appellant's Outline of Argument, paras 2.6-2.7.
27 (1999) 172 CLR 378.

...

293 Definition of *killing*

Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.

...

300 Unlawful homicide

Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case.

...

302 Definition of *murder*

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say –

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of ***murder***.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) is it immaterial that the offender did not intent to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

...

311 Aiding suicide

Any person who –

(a) procures another to kill himself or herself; or

(b) counsels another to kill himself or herself and thereby induces the other person to do so; or

(c) aids another in killing himself or herself;

is guilty of a crime, and is liable to imprisonment for life."

[28] For completeness, s 2 of the *Criminal Code* provides:

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

[29] The appellant's argument about causation proceeds in this way, where s 293 states "any person who causes the death of another ..." the concept of "causation" is broader than mere physical acts causing death. The appellant relies upon certain statements by the High Court in *Royall v The Queen*[28] to support this contention. In *Royall* the accused was charged with the murder of a woman who fell from the bathroom window of her upper floor flat. The couple had had a violent altercation during which the accused (as he subsequently admitted) had punched the deceased. There was evidence of forcible entry into the very small bathroom and of a struggle. The woman's blood was in the flat and bathroom. A chipped glass ashtray was found in the bathroom and gouge marks on the wall were consistent with someone having swung an arm while holding such an object. The Crown case was that the accused had murdered the deceased in one of three ways: he had pushed her out of the window; he had attacked her in the bathroom, and she fell while avoiding the attack; or having a well-founded and reasonable apprehension of life-threatening violence, she jumped from the window.[29]

[30] Although that case was factually quite different from the present, the appellant relies upon the acceptance by all the judges that the cause of the woman's death did not need to be a direct physical act but could occur by virtue of "inducement". The appellant[30] particularly refers to the following statement by Deane and Dawson JJ:

> "Where in a case of that kind[31] the charge is murder, the prosecution must not only prove that the accused caused the death by inducing a well-founded fear or apprehension on the part of the deceased such as to make it a natural consequence that he or she should take steps

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28 (1991) 172 CLR 378.

29 *Royall v The Queen* (1991) 172 CLR 378 at 380.

30 Appellant's Outline of Argument, para 4.2.

31 Their Honours had just referred to *R v Grimes and Lee* (1894) 15 NSWR(L) 209 where the accused had robbed and assaulted the deceased causing him to jump to his death from the window of the carriage of a train. The jury had been directed to consider whether the deceased jumped through the window because he had a well-founded and reasonable fear or apprehension that if he stayed he would be subjected to further violence that would endanger his life; if so, they would conclude that the accused caused the death.

> to flee or escape, but it must also prove that the words or conduct which induced that fear or apprehension were accompanied by the intent which is a necessary ingredient of the crime of murder."[32]

[31] The appellant contends that Marke's actions in planning her own death, deciding on the means by which she would die, and seeking out and persuading the appellant to assist her, must result in a large degree of causal responsibility for her own death being attributed to her. If, according to the appellant, causation is limited to the physical act, then a person who assists a suicide by doing any physical act that causes the death, notwithstanding that there may be other causes of the death, will be guilty of murder. In such a circumstance, the appellant contends, this would defeat the purpose of s 311. The appellant further argues that there is nothing in s 311 to confine the actions of the aider to non-physical actions. That may be accepted.

[32] The appellant contends that it was a fundamental error by the primary judge to conclude that, because the jury was directed on the question of causation in respect of the appellant's actions, it was unnecessary to direct them as to whether the acts of the deceased substantially or significantly caused her own death. The failure of the jury to consider this question deprived the appellant of the chance of acquittal on the charge of murder.

[33] The jury, according to the appellant, ought to have been directed that the acts of both the appellant and the deceased contributed to her death in these terms:

> "that unless they could not exclude beyond reasonable doubt that Marke was the person who substantially or significantly caused her own death, they could not convict the Appellant."[33]

The appellant contends that no reasonable jury could exclude that possibility. In that case, no murder took place as Marke was incapable in law of murdering herself – "any person who unlawfully kills another".[34] The homicide provisions of the *Criminal Code* thus had no application and the appellant's contribution to the death amounted to no more than assisting suicide.

[34] The appellant contends that s 311 of the *Criminal Code* is an exhaustive provision for both criminal responsibility and punishment where a person embarks upon a course of conduct which involves the procurement and urging of another to assist that person in killing him or herself. Where in a case such as the present the facts support a characterisation of the act as one of "unlawful killing", and the mental element for murder is established, the purpose of s 311 would be defeated if the person recruited to assist in the killing were to be charged with murder. The appellant points to the "artificiality" of the different verdicts and the acts of the appellant in the case of Marke and that of Smyth. "Only by considering the non-physical causative actions of the deceased can the true context of Marke's death be properly appreciated and criminal culpability for both deaths be reconciled".[35]

[35] According to the appellant's argument, the goal of statutory construction mandated in *Project Blue Sky Inc v Australian Broadcasting Authority*[36] of harmonious reconciliation of all provisions can be achieved if s 302 is construed to cover all

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32 *Royall v The Queen* (1991) 172 CLR 378 at 410.
33 Appellant's Outline of Argument, para 5.4.
34 *Criminal Code*, s 302.
35 Appellant's Outline of Argument, para 4.4.
36 (1998) 194 CLR 355 at 381.

unlawful killings other than suicides irrespective of whether the act of assisting is minor or substantial or is the very act which causes the cessation of breathing.

The respondent's contentions

[36] The respondent's argument is as follows:

> "24. On a proper construction of [the] provisions [in the *Code*]:-
>
> (a) if an offender causes the death of another then he has killed the person;[37]
>
> (b) the killing is unlawful unless authorised, justified or excused by law;[38]
>
> (c) consent of the person killed to the killing is not an authorization, justification or excuse and the consent is irrelevant to the criminal responsibility of the offender;[39]
>
> (d) where the offender held an intent to kill when he killed the person then the unlawful killing is murder;[40]
>
> (e) therefore, when an offender, with the consent of the person, intentionally causes the death of the person then in the absence of any lawful excuse, the offender is guilty of murder;
>
> (f) where the person causes his own death any person who assists him is not guilty of murder as that person has not killed the person ie. he has not "*caused*" the death;[41]
>
> (g) however, where a person causes his own death and another person assists the person to cause his own death then the person who has assisted is guilty of the offence of aiding suicide.[42]
>
> 25. Therefore, the distinction between a killing which constitutes murder and a killing which constitutes assisted suicide is whether the acts or omissions of the offender caused the death."[43]

Discussion

[37] It is convenient to start with some orthodox statements about causation. In the appellant's second appeal to this court, McPherson JA noted that in the definition of murder in s 302(1), and in speaking in s 300 of murder and manslaughter as forms of homicide:

> "... the Code uses the expression "kills another". In other provisions, such as ss 295, 297 and 298, it refers to an act or omission "which results in the death" of another person, or from

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37 Section 293.
38 Section 291.
39 Section 294.
40 Section 302.
41 Section 293.
42 Section 311.
43 Respondent's Outline of Argument, paras [24] – [25].

> which death results; and in s 293 killing a person is equated with causing the death of another: ...
>
> In consequence, courts in Queensland acting under the Code have applied to killing and causing death the meaning that was ascribed to those expressions at common law in *Royall v The Queen* ... See, for example, *Lowrie & Ross* (1999) 106 A Crim R 565, 570-571; and *R v Sherrington* [2001] QCA 105 §4."[44]

His Honour referred to various passages in the judgments in *Royall*. It is useful to do so here. Mason CJ said:

> "The issue of causation was left to the jury to decide as one of fact. In this respect I agree with the statement made by Burt C.J. in *Campbell v. The Queen*[45], that it is "enough if juries [are] told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter."[46]

[38] Brennan J said:

> "The basic proposition relating to causation in homicide is that an accused's conduct, whether by act or omission, must contribute significantly to the death of the victim ... It need not be the sole, direct or immediate cause of the death. However, when the death is not caused directly by the conduct of the accused but by something done by the victim or by a third person in response to the conduct of the accused, there is a question whether the chain of causation has been broken."[47]

[39] Deane and Dawson JJ observed:

> "Of course, there may be no single cause of the death of the deceased, but if the accused's conduct is a substantial or significant cause of death that will be sufficient, given the requisite intent, to sustain a conviction for murder. It is for the jury to determine whether the connexion between the conduct of the accused and the death of the deceased was sufficient to attribute causal responsibility to the accused ..."[48]

[40] The same idea was expressed by Toohey and Gaudron JJ:

> "Nevertheless the jury must be told that they need to reach a conclusion as to what caused the deceased's death. That does not mean that the jury must be able to isolate a single cause of death; there may be more than one such cause ... In that event it is inevitable that the jury will concentrate their attention on whether an act of the accused substantially contributed to the death."[49]

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44 *R v Carter* [2003] QCA 515 at [6].
45 [1981] WAR 286 at 290; (1980) 2 A Crim R 157 at 161.
46 *Royall v The Queen* (1991) 172 CLR 378 at 387.
47 *Royall v The Queen* (1991) 172 CLR 378 at 398.
48 *Royall v The Queen* (1991) 172 CLR 378 at 411.
49 *Royall v The Queen* (1991) 172 CLR 378 at 423.

And, a little later:

> "In ordinary circumstances, the jury's task may be made easier if they are asked to determine first the cause of death rather than inquire whether an act of the applicant caused the death."[50]

[41] To similar effect was the following observation of McHugh J:

> "To constitute a cause for the purposes of the criminal law, it is not necessary that an act or omission be the sole or main cause of a wrong ... But, as I have indicated, the purpose of the legal doctrine of causation is to attribute legal responsibility, not to determine the factors which played a part in the happening of an event or occurrence."[51]

[42] A not dissimilar issue about causation to that which arose in *Royall* was considered in *Timbu Kolian v The Queen*[52] although in the context of "accident". Windeyer J said:

> "It was an old question, familiar in law, however questionable in philosophy, of asking was there what has been called a break in the chain of causation by what lawyers have described as a novus actus interveniens. Sir Frederick Pollock warned that
>
> > "... the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause".
>
> I said all that I can usefully say on this topic in *National Insurance Co. of New Zealand Ltd. v. Espagne*[53]. However, it may be permissible to say again that, in ascribing effects to causes, and in seeking the cause of an event, the purpose of law, civil and criminal, is to attribute legal responsibility to some person – "to fix liability on some responsible person", Lord Sumner said in *Weld-Blundell v. Stevens*[54]."[55]

[43] In *March v Stramare (E & MH) Pty Ltd*[56] Mason CJ observed of causation in the context of legal responsibility:

> "In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. The law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage."[57]

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50 *Royall v The Queen* (1991) 172 CLR 378 at 424.
51 *Royall v The Queen* (1991) 172 CLR 378 at 441.
52 (1968) 119 CLR 47.
53 (1961) 105 CLR 569 at 590-596.
54 [1920] AC 956 at 986.
55 (1968) 119 CLR 47 at 68-69.
56 (1991) 171 CLR 506.
57 (1991) 171 CLR 506 at 509.

The appellant's argument, although expressed conventionally, is more in the nature of "the sum of the conditions which are jointly sufficient to produce" the death of Gail Marke.

[44] *Royall* does not provide the answer to the appellant's quest for some different characterisation of what he did to the deceased. The relevant question in *Royall* was whether the victim's death could be attributed to the accused's unlawful assault or whether the link to his unlawful acts was broken.

[45] When pressed in argument, the appellant's counsel conceded that the resulting criminal responsibility must be the same whatever the means of bringing about the "cessation of breathing". For example, if a would-be-suicide is too weak or too afraid to pull the trigger on a gun and successfully implores another to do the act; or successfully seeks death by strangulation. There can be no different answer if the act occurs by injection – and the appellant did not suggest otherwise. The response must be that the person who pulled the trigger of the gun, directing the muzzle to the person's heart, caused the death and, intending that the other should die, was guilty of murder. So, too, to a death by strangulation or by lethal injection. The common law has never doubted the characterisation of a positive act which intentionally causes death as murder.

[46] In the course of oral submissions counsel for the appellant made reference to *Nicklinson v Ministry of Justice and Ors*,[58] but in subsequent written submissions said it was not relevant. That case concerned the ambit of the defence of necessity. The appellant here has not sought to argue the application of s 25 of the *Criminal Code* – "Extraordinary emergency" – which is as close as the *Code* comes to the common law defence of necessity. It could not conceivably apply.

[47] No articulation of the concept of causation in the common law supports the argument that where a person does the act, which is a significant or substantial cause of the death of another, and intends to do so, it is not murder, notwithstanding that moral, ethical or other persuasive forces might be operating on him or her.

[48] It is now necessary to consider further the provisions in the *Criminal Code*. The appellant contends that s 284 is relevantly neutral, in a case of this kind, when it provides that consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused. That is correct. In general terms it can be applied to a s 302 or s 311 charge. Section 293 provides that "any person who causes the death of another … is deemed to have killed that other person". Those words are qualified by the expression "except as hereinafter set forth". The appellant contends that that is, relevantly, a reference to s 311 not just the "defence" provisions. I do not accept that argument. The expression is plainly a reference to s 304, s 304A and s 304B, each of which is prefaced by the words:

> "A person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder …"

[49] By s 293, if an accused person causes the death of another they have killed that person. Consent, as mentioned, is irrelevant to the criminal responsibility of such an accused. To hold otherwise would be contrary to the fundamental underpinning of this part of the criminal law: that a human life is valuable.

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58 [2012] EWHC 304 (QB).

[50] Accordingly, to kill someone by a positive act, with the requisite intention, even though that person expressed a desire to die, is murder. The *Criminal Code* is clear. Where a person desirous of death brings about their own death by their own act, any person who assists in that act of autonomy by the suicide, but does not do the deed, has aided the suicide. The degree of moral responsibility may be reflected in the punishment which may be up to life imprisonment.

[51] There are sound reasons in policy not just the application of legal analysis in preferring this result. A person who desires to kill another may readily employ the "assist suicide" argument when murder was intended and against the wish of the victim; or a frail or elderly patient may be "persuaded" that it would be better to die.

[52] The primary judge was correct to dismiss the application to extend time because there is no argument that there has been a miscarriage of justice.

[53] I would dismiss the appeal.

Order

[54] The appeal should be dismissed.

[55] **ATKINSON J:** I agree with the reasons of White JA and the order she proposes.

[56] **MARTIN J:** I agree with White JA.

SUPREME COURT OF QUEENSLAND

CITATION:	*Carter v Attorney-General for the State of Queensland* [2012] QSC 234
PARTIES:	**STEPHEN WAYNE CARTER** (plaintiff) v **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO:	BS2587/12
DIVISION:	Trial
PROCEEDING:	Judicial review application
DELIVERED ON:	29 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2012
JUDGE:	Margaret Wilson J
ORDER:	**1. Application for extension of time refused.** **2. Application for statutory order of review refused.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – where applicant convicted of murder – where applicant unsuccessfully petitioned Her Excellency the Governor for pardon – where applicant seeks statutory order of review of a decision of the Attorney-General not to refer his whole case to the Court of Appeal for hearing and determination pursuant to s 672A of the *Criminal Code* – where applicant applied for an extension of time for the making of the application – where respondent opposed extension of time on ground that substantive application was without merit – where both parties proceeded on the premise that respondent's exercise of discretion under s 672A of the *Criminal Code* was amenable to judicial review – whether the respondent erred in not referring the whole case to the Court of Appeal – where if applicant's construction of provisions of the *Criminal Code* were arguably correct, respondent's failure to refer the matter to the Court of Appeal would be improper exercise of power CRIMINAL LAW – PARTICULAR OFFENCES – HOMICIDE – CAUSATION – where deceased died from heroin overdose – where applicant pushed the plunger of the syringe which contained the heroin – where applicant alleged

that he could not be charged with murder, but only with aiding suicide under s 311 – where applicant submitted that, because the deceased implored the applicant to kill her, causation must be considered in a broader sense than mere physical causation – whether the applicant's acts or omissions were a substantial cause of the death – whether the deceased's consent to death affected the applicant's criminal responsibility

Crimes Act 1914 (Cth), s 50BA
Criminal Code Act 1899 (Qld), s 284, s 291, s 293, s 300, s 302, s 303, s 311, s 668E, s 672A
Judicial Review Act 1991 (Qld), s 26(1)(b)

Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353, cited.
Campbell v The Queen (1981) WAR 286; (1980) 2 A Crim R 157, cited.
Martens v Commonwealth of Australia [2009] FCA 207, cited.
Minister for Immigration and Citizenship v SZMDS and Anor (2010) 240 CLR 611, cited.
Nudd v Minister for Home Affairs [2011] FCAFC 105, cited.
Pepper v Attorney-General for the State of Queensland [2008] 2 Qd R 353, cited.
R v Main [1999] QCA 148; (1999) 105 A Crim R 412, cited.
R v Sherrington & Kuchler [2001] QCA 105, cited.
Royall v The Queen (1991) 172 CLR 378, cited.

COUNSEL: A Vasta QC and K Leigh for the applicant
P J Davis SC for the respondent

SOLICITORS: Fraser Power for the applicant
Crown Solicitor for the respondent

[1] **MARGARET WILSON J:** The applicant, who was convicted of murder, unsuccessfully petitioned Her Excellency the Governor for pardon. He seeks a statutory order of review of a decision of the Attorney-General for the State of Queensland not to refer his whole case to the Court of Appeal for hearing and determination as in the case of an appeal against conviction.[1]

Background

[2] Gail Marke and Patrick Smyth, both heroin addicts, wanted to end their lives. After repeated requests over about two years, they prevailed on the applicant to supply them with a "weight" of heroin. Satisfied that they really wanted to die, the applicant mixed up the heroin and injected Marke, and helped Smyth inject himself. Both of them died shortly afterwards.

[3] The applicant pleaded not guilty to the murder of Marke, but was convicted after a jury trial. He pleaded guilty to aiding Smyth in killing himself.

1 *Criminal Code Act* 1899 (Qld) s 672A.

[4] He appealed against the murder conviction. The Court of Appeal held that the incompetence of his counsel had resulted in a miscarriage of justice, set aside the conviction, and ordered a retrial.[2]

[5] On his retrial, he was convicted of the murder of Marke. The Court of Appeal dismissed an appeal against the conviction.[3] In that appeal the issue was causation: whether, having regard to the large cocktail of drugs found in Marke's system, it was open to the jury to be satisfied that his injection of heroin caused her death.

[6] On 4 November 2010 the applicant petitioned the Governor for a pardon or alternatively mercy.[4] In his petition, the applicant contended that, as a matter of law, he could not have been guilty of murder[5] but only of assisting suicide.[6] He had not raised this argument at his trial or on appeal.

[7] By letter dated 15 November 2010 Her Excellency's Official Secretary advised the applicant's solicitors that the matter had been referred to the respondent "for a detailed and thorough examination of [the] case and submission." On 21 December 2011 the applicant's solicitor received a letter from the Official Secretary dated 16 December 2011 advising:

> "The Governor noted the matters recited in the petition and was informed of the result of enquiries made following receipt of the petition. On examining this information, the Governor sought further information and advice in relation to the Criminal Code, notably with reference to Chapter 26, Section 284 concerning 'consent to death and criminal responsibility' and Chapter 28, Section 302 (1)(a) and this has been provided.
>
> After giving consideration to all the material before her in relation to this matter, I am directed to inform you that there is no justification in this case for the exercise of any powers conferred on Her Excellency by the *Constitution of Queensland 2001*."

Section 672A of the *Criminal Code*

[8] Section 672A of the *Criminal Code* provides:

> **"672A Pardoning power preserved**
>
> Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of Her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may—

2 [2003] 2 Qd R 402.
3 [2003] QCA 515.
4 *Constitution of Queensland* 2001 (Qld) s 36; *Criminal Code* s 18.
5 *Criminal Code* ss 300 and 302.
6 *Criminal Code* s 311

(a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or

(b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly."

[9] "Court" in this section means the Court of Appeal.[7]

[10] The powers conferred by s 672A are enlivened by the presentation of a petition for the exercise of the pardoning power after conviction, and, in the normal case, after an unsuccessful appeal. As Muir JA said in *Pepper v Attorney-General for the State of Queensland*:[8]

> "... A reference under s 672A is a mechanism which the Crown may employ so that the exercise of the pardoning power may be properly informed or so as to grant the petitioner, in effect, a further appeal."

Amenability to judicial review

[11] There have been a number of decisions of this Court and the Federal Court on applications for judicial review of the respondent's exercise of discretion under s 672A of the *Criminal Code* made on the assumption that such a decision is amenable to judicial review, without any detailed consideration of the correctness of that assumption.[9]

[12] Both parties' submissions proceeded on the premise that the decision is one "under an enactment" and amenable to judicial review. In the circumstances, I shall proceed on that premise.

Grounds of review

[13] At the commencement of the hearing, I gave the applicant leave to amend his application by inserting the following grounds in lieu of those in the originating application:

> "1. The decision by the Attorney General not to refer the whole case to the Court of Appeal (*'the decision'*) was an improper exercise of the power conferred by s. 672A of the Criminal Code. (S.20(2)(e) Judicial Review Act 1991).
>
> 2. The decision involved an error of law (S.20(2)(f) Judicial Review Act 1991).

7 *Criminal Code* s 668.
8 [2008] 2 Qd R 353 at [11]
9 *Pepper v Attorney-General for the State of Queensland; Re Fritz* [1995] 2 Qd R 580; *Martens v Commonwealth* (2009) 253 ALR 457; *Nudd v Minister for Home Affairs* [2011] FCAFC 105; Contrast *Von Einem v Griffin* (1998) 72 SASR 110, which turned on a differently worded provision.

> 3. The decision was otherwise contrary to law. (S.20(2)(i) Judicial Review Act 1991)."

[14] During oral submissions there was some debate about whether the applicant needed to establish that the respondent made an absolute error of law (i.e. that he relied on a construction of the *Criminal Code* which was wrong) or merely that he erred in not identifying that the construction for which the applicant contended was arguably correct.

[15] Counsel for the respondent submitted that this application turns on whether the respondent made an error of law in not adopting the construction of the *Criminal Code* for which the applicant contends. The respondent accepted that if he had wrongly understood the law and the law was as submitted by the applicant, then there had been a miscarriage of justice and the matter should be referred to the Court of Appeal.

[16] Had the respondent exercised his discretion by referring the whole case to the Court of Appeal, then the Court of Appeal would have been called on to hear and determine it "as in the case of an appeal by a person convicted".

[17] Section 668E of the *Criminal Code* provides (so far as presently relevant):

> **"668E Determination of appeal in ordinary cases**
>
> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.
>
> ...."

[18] In *R v Main*[10] the Court of Appeal held that the issue to be determined by the Court of Appeal in considering a matter referred under s 672A(a) is the same as that falling for resolution on an appeal – whether there has been a miscarriage of justice.

[19] In *Martens v Commonwealth of Australia*[11] the applicant was convicted in the Supreme Court of Queensland of one count of having sexual intercourse with a person under the age of 16 years while outside Australia contrary to s 50BA of the *Crimes Act* 1914 (Cth). The Court of Appeal dismissed his appeal against conviction and refused his application for leave to appeal against sentence. He requested the Minister for Home Affairs to recommend to the Governor-General that he be pardoned or, alternatively, that he refer the case to the Court of Appeal pursuant to s 672A of the *Criminal Code*. The basis of his requests was fresh evidence. The Minister declined both requests. Martens made an application to the Federal Court for judicial review of the Minister's decision pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). Logan J set aside the Minister's decision to refuse to refer the case to the Court of Appeal, and remitted the matter to the Minister for further consideration according to law. In the course of his reasons for judgment his Honour said:

> "[53] The existence of a discretion undoubtedly means that a convicted offender has no right to the reference of his case. That the reference power is discretionary indicates that it was contemplated that the Minister would make some evaluative judgment as to whether a reference ought to be made but not in so doing usurp the role that was consigned to an appeal court in the event of a reference. In this sense, the Minister is a 'gatekeeper' who has a role in ensuring that the public interest in the administration of justice as furthered by the efficient allocation of judicial resources is not subverted by the referring of cases to the Court of Appeal which must inevitably fail. That the Court of Appeal on a reference itself had power to disregard grounds which it considered frivolous would not, in my opinion, prevent a Minister from refusing to refer a case where there was neither any new evidence nor even a ground of challenge not previously adversely considered, but care would need to be taken not to treat as frivolous a reasonable argument with which the Minister happened to disagree." (Emphasis added.)

Logan J held that a relevant consideration in exercising the power conferred by s 672A was whether evidence was offered which might, arguably, raise a significant possibility that the jury, acting reasonably, would have acquitted. In *Nudd v Minister for Home Affairs*[12] the Full Court of the Federal Court (Dowsett, Bennett and Greenwood JJ) doubted whether that was an exhaustive statement of the circumstances in which the exercise of the power may be appropriate. Their Honours said:

10 [1999] QCA 148; (1999) 105 A Crim R 412 at 415, 416. See also *R v Daley; ex parte Attorney-General* [2005] QCA 162; *Pepper v Attorney-General* [2008] QCA 207 at [12].
11 [2009] FCA 207.
12 [2011] FCAFC 105 at [18].

> "... Section 672A prescribes no criteria for its exercise. Although, as suggested by the Minister, a significant doubt about the correctness of a conviction would no doubt be a justifiable basis for taking either of the two contemplated courses, that may not be the only basis for doing so. It is, for example, possible that public concern about a conviction might lead to the conclusion that for political reasons or reasons of public interest, one or other of the approaches prescribed in s 672A should be adopted in order to quell such public concern, even if the decision-maker does not accept that there is any reason to doubt the correctness of the conviction or the fairness of trial."

[20] In my view, if the construction for which the applicant contended was arguably correct, failure to identify it as such and to refer the matter to the Court of Appeal was an improper exercise of the discretion in s 672A.

Extension of time

[21] By s 26(1)(b) of the *Judicial Review Act* 1991 (Qld), an application for statutory review should be brought within 28 days of receipt of the decision sought to be reviewed. The applicant seeks an extension of time for the making of the present application, which was not filed until 20 March 2012.

[22] The respondent opposes an extension of time, but only because, in his submission, the substantive application is without merit. In the circumstances, I shall consider the merits of the substantive application before ruling on the application for an extension of time.

No statement of reasons

[23] The respondent was not obliged to provide a statement of reasons for his decision not to refer the matter to the Court,[13] and he has not done so.

[24] His decision is nevertheless reviewable. In *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[14] a taxpayer appealed against an assessment by the Federal Commissioner of Taxation. The Commissioner gave no reasons for his decision. Dixon J said:[15]

> "13. ... [The commissioner's] decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the

13 *Judicial Review Act* 1991 (Qld) s 31; schedule 2 item 1; *Pepper v Attorney-General for the State of Queensland* [2008] 2 Qd R 353.
14 (1949) 78 CLR 353.
15 At 360.

> material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

His Honour went on to consider and reject the only error suggested. He concluded:[16]

> "21. Both for this reason and because no ground has been shown for interfering with the commissioner's judgment, I think that the appeal should be dismissed with costs."

[25] In *Minister for Immigration and Citizenship v SZMDS and Anor*[17] Gummow ACJ and Kiefel J observed that many of the leading High Court authorities in which administrative decisions were challenged concerned legislative regimes where there was no obligation to give reasons. Their Honours went on:

> "...The decisions at stake in those cases presented an inscrutable face. Thus, in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*,[18] s 80(5) of the *Income Tax Assessment Act 1936* (Cth) required the taxpayer company, if prior losses were to be allowed deductions, to satisfy the Commissioner of the state of its voting power on the last day of the year of income. No reasons were given by the Commissioner for the disallowance of the taxpayer's objections to its assessment. In that context Dixon J explained[19] the circumstances in which the conclusion of the Commissioner was liable to review by the court. Likewise, the inadequacy of the material before the decision maker may support an inference that the decision maker has applied the wrong test or was not 'in reality' satisfied of the requisite matters[20] or from the absence of reasons the court may infer the absence of any good reason.[21]"

The facts

[26] In considering the applicant's contention that, as a matter of law, he could not have been guilty of murder but only of assisting suicide, I respectfully adopt the summary

16 At 365.
17 (2010) 240 CLR 611 at 623.
18 (1949) 78 CLR 353; [1949] HCA 26.
19 [1949] HCA 26; (1949) 78 CLR 353 at 360.
20 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22; (1953) 88 CLR 100 at 120.
21 *Public Service Board of NSW v Osmond* [1986] HCA 7; (1986) 159 CLR 656 at 663-664.

of his recorded interview with police that is contained in McPherson JA's reasons for judgment in the appeal after the retrial.[22]

> "[3] On 24 March 2000, which was a week after the murder, police conducted a recorded interview with the appellant at the Noosa Heads Police Station concerning the deaths of the two deceased. He lived at Tewantin and said he was a drug user. He knew the deceased and Smyth, who had been asking him for about two years to provide them with a 'weight' of heroin. A weight is the equivalent of about a gram. They had repeated the request about a fortnight before the events leading to their deaths. On 16 March, they had come round to collect the heroin. Gail had then gone home, and Smyth had accompanied him in the car to Nambour to pick up the heroin the appellant had arranged to supply them with. The appellant and Smyth had injected some of it on the way back to Tewantin. He and Smyth returned to his place, where they slept until 9 p.m., when the appellant took Smyth back to Gail's house. On arriving there, Smyth said they both wanted him to kill them, but the appellant cautioned them to think it over, and went home. Shortly afterwards, Smyth rang him saying that he and Gail really wanted to do it, so he drove back to their house, where he had a conversation with them, lasting some 20 or 30 minutes in Gail's bedroom, in the course of which they said they really wanted him to do it. He mixed up the heroin and injected Gail, and helped Smyth inject himself. Before leaving, he wiped the syringe of fingerprints and left it on the floor of the bedroom. There is evidence suggesting it was then about 11.00 on the night of 16 March.
>
> [4] The appellant said that he had injected Gail first. She was not able to do it herself, or bring herself to do it. He put the needle in her arm, and asked if she was absolutely sure, to which she said 'yes, just do it', and he pushed in the plunger of the syringe. She said 'what a rush', and lay down on her back, on the left hand side of the bed. At that stage she was still breathing. In the case of Smyth, the appellant inserted the needle, but Smyth pushed the plunger in himself, and he may also have withdrawn the needle. He just dropped down straight away 'like a stone'.
>
> [5] When asked in the course of the interview, the appellant said he thought that Gail was going to die. That was, he said, 'the intention of the exercise'. He knew he was taking their lives. ..."

Relevant provisions of the *Criminal Code*

[27] Section 284 of the *Criminal Code* provides:

22 *R v Carter* [2003] QCA 515.

"**284 Consent to death immaterial**

Consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused."

[28] Sections 291 and 293 provide:

"**291 Killing of a human being unlawful**

It is unlawful to kill any person unless such killing is authorised or justified or excused by law."

"**293 Definition of *killing***

Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person."

[29] Sections 300, 302 and 303 provide:

"**300 Unlawful homicide**

Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case."

"**302 Definition of *murder***

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of ***murder***.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result."

"**303 Definition of *manslaughter***

A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter."

[30] Murder is the unlawful killing of another person in any of the circumstances in s 302. Suicide is not within the definition of murder.

[31] Section 311 provides:

"**311 Aiding suicide**

Any person who—

(a) procures another to kill himself or herself; or

(b) counsels another to kill himself or herself and thereby induces the other person to do so; or

(c) aids another in killing himself or herself;

is guilty of a crime, and is liable to imprisonment for life. "

Submissions

[32] Counsel for the applicant submitted that although under the *Criminal Code* the survivor of a suicide pact could not be charged with murder (by aiding or counselling the deceased to take his or her own life) or with being an accessory before the fact of murder (as was the case at common law), that person would not escape criminal responsibility by virtue of ss 284 and 311. Their submissions continued:

"19. Because suicide is excluded from the definition of murder, a person who embarks upon a course of planning with others to kill himself or herself, cannot be guilty of conspiracy to murder. By the same reasoning, persons who procure, counsel or aid a person in killing himself cannot be charged with murder pursuant to s.7 of the Code. Nor can they be charged with being an accessory after the fact to murder. (s.307 of the Code). It is for this precise reason that the Code has made special provision for such persons to be made criminally responsible for their actions under s.311 of the Code. Their actions are regarded as serious, since the maximum punishment is imprisonment for life.

20. The effect of s.311 of the Code therefore, is to provide an exhaustive provision for both criminal responsibility and punishment in cases where a person embarks upon a course of conduct which involves the procurement, counselling or aiding of another person in killing himself or herself. Accordingly, where the Crown case alleges that the deceased wanted to kill himself or herself, the provisions of s.302 of the Code have no application. It is for this reason that a person who aids another to kill himself or herself and who does an act which falls short of achieving the result intended, cannot be charged with '*attempted murder*' pursuant to section 306 of the Code.

21. Section 311 of the Code is therefore a '*code*' within the Criminal Code and speaks exhaustively in cases where the cornerstone of the Crown case is that the deceased was intent on killing himself or herself."[23]

[33] In oral submissions senior counsel for the applicant submitted that in a case such as this, where the deceased planned and implored the applicant to kill her, causation must be considered in a broader sense than mere physical causation. Having prevailed on the applicant to help her die, Marke ultimately caused her own death: she died, directly or indirectly, by virtue of her own acts. It was suicide, and the most the applicant could have been charged with was assisting suicide under s 311.[24]

[34] The written submissions for the applicant continued:

"22. On the face of it, this argument may seem to show the existence of an inconsistency between the provisions of s.311 and s.302. That is because in a case where the person prevailed upon to assist in the death, will inevitably do an act or acts which amount to '*unlawful killing*'.[sic] Since that act or acts will be accompanied by an '*intention to kill*' the act will have all of the elements of '*murder*'.

23 Applicant's Outline of Submissions filed 15 June 2012.
24 Transcript pages 1-16 – 1-19.

23. The High Court observed in *Project Blue Sky v ABA*[25]:-

> *'The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language of all the provisions of the statute.'*[26]

24. The Court further stated (paragraph 70):-

> *'A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.'*[27]

25. The provisions of s.302 and s.311 can be construed '*to give effect to harmonious goals*'. Section 302 of the Code involves all unlawful killings other than suicides. In cases other than suicides, if the unlawful killing is accompanied with the intention to kill, the crime is '*murder*'.

26. On the other hand, in cases where the Crown unequivocally contends that the deceased person was intending to kill himself or herself (as in Mr Carter's case) section 311 speaks exhaustively on the subject. Therefore, any person who comes within the description set out in that provision is liable to prosecution according to this section and no other. This is so, irrespective of whether the act assisting is minor, substantial or (as in Mr Carter's case) the act that causes the cessation of breathing. The distinction among the infinite variety of acts which may be termed '*assisting*' is merely relevant to punishment and not to criminal responsibility for any other offence."

[35] Senior counsel for the respondent submitted that the key issue is whether the offender's acts or omissions were a substantial cause of the other's death. He submitted:

"17. On a proper construction of those provisions:-

(a) if an offender causes the death of another then he has killed the person;[28]

(b) the killing is unlawful unless authorised, justified or excused by law;[29]

(c) consent of the person killed to the killing is not an authorisation, justification or excuse and the consent

25 (1998) 194 CLR 355 at 381 (paragraph 69).
26 *Taylor v Public Services Board (NSW)* (1976) 137 CLR 208 at 213 per Barwick CJ.
27 *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J.
28 Section 293.
29 Section 291.

is irrelevant to the criminal responsibility of the offender;[30]

(d) where the offender held an intent to kill when he killed the person then the unlawful killing is murder;[31]

(e) therefore, when an offender, with the consent of the person, intentionally causes the death of the person then in the absence of any lawful excuse, the offender is guilty of murder;

(f) where the person causes his own death any person who assists him is not guilty of murder as that person has not killed the person ie. he has not '*caused*' the death;[32]

(g) however, where a person causes his own death and another person assists the person to cause his own death then the person who has assisted is guilty of the offence of aiding suicide.[33]

18. Therefore, the distinction between a killing which constitutes murder and a killing which constitutes assisted suicide is whether the acts or omissions of the offender caused the death."[34]

[36] He submitted that, because a person's consent to his or her own death is immaterial to the criminal responsibility of any person who causes that death (s 284), it is wrong to say that if a person wishing to die procures another to assist him or her to do so, and that other person's conduct is a substantial cause of the death, the other person cannot be charged with murder under s 302, but only with aiding suicide under s 311.

Discussion

[37] In a criminal trial causation is a question of fact for the jury.

[38] In *R v Sherrington & Kuchler*[35] McPherson JA said of s 293:

> "[4] ... In the application of that section, courts in Queensland follow the decision in *Royall v The Queen*[36] that a person causes the death of another if his act or conduct is a substantial or significant cause of death, or substantially

30 Section 284.
31 Section 302.
32 Section 293.
33 Section 311.
34 Outline of Submissions on behalf of the Attorney-General for the State of Queensland filed 20 June 2012.
35 [2001] QCA 105 at [4].
36 (1991) 172 CLR 378 at 411.

> contributed to the death.[37] See *Lowrie & Ross*.[38] As was said in *Royall*, that question is not a philosophical or scientific one, but a question to be determined by the jury applying their common sense to the facts as they find them, at the same time appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter."[39]

[39] In *Royall* the deceased died when she fell from the bathroom window of a sixth floor flat which she shared with the accused. Her relationship with the accused had not been harmonious, and there was a violent argument between them before she died. The deceased went into the bathroom: she locked the door, undressed and began to shower. The accused forced his way into the bathroom, where the violence continued. The lapse of time between his entry into the bathroom and her leaving through the window was insignificant.

[40] The trial judge instructed the jury that there were four alternatives open to them on the evidence – (i) that she was pushed or forced out of the window in a physical way by the accused; (ii) that she fell from the window while avoiding a blow or an attack from the accused; (iii) that immediately before the fall from the window she had a well-founded and reasonable apprehension that, if she remained in the bathroom, she would be subjected to life-threatening violence from the accused, and, in order to escape that violence, she jumped out of the window; (iv) that she jumped of her own volition: that the act of leaving the window was not the result of or causatively linked to the acts of the accused. The Crown case was that the accused had murdered the deceased in one of the first three of these scenarios. His Honour left the case to the jury on the basis it was for them to determine the accused had caused the death in any of the three ways suggested by the Crown. If they were satisfied the accused had caused the deceased's death, then they had to consider whether he had the requisite intent.

[41] The High Court agreed that any of the three possibilities put forward by the Crown could have amounted to an act causative of the death.

[42] Mason CJ and Deane, Dawson, Toohey and Gaudron JJ[40] approved the statement of Burt CJ in *Campbell v The Queen*[41] that it is

> "...enough if juries [are] told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter."

Toohey and Gaudron JJ continued:

> "Burt CJ's comments have much to commend them. In particular, there is little to be gained, but there is a risk of confusion, if the members of a jury are introduced to the sophisticated notions of

37 (1991) 172 CLR 378, 398, 423.
38 (1999) 106 A Crim R 565, 570-571.
39 *Royall v The Queen* (1991) 172 CLR 378 at 387, 425, 441.
40 At 387, 411 – 412, 423. See also McHugh J at 441.
41 (1981) WAR 286 at 290; (1980) 2 A Crim R 157 at 161.

> causation that tend to bedevil the law of torts. Nevertheless the jury must be told that they need to reach a conclusion as to what caused the deceased's death. That does not mean that the jury must be able to isolate a single cause of death; there may be more than one such cause: *The Queen v. Butcher*;[42] *Reg. v. McKinnon*.[43] In that event it is inevitable that the jury will concentrate their attention on whether an act of the accused substantially contributed to the death."[44]
>
> ...
>
> "In ordinary circumstances, the jury's task may be made easier if they are asked to determine first the cause of death rather than inquire whether an act of the applicant caused the death. But, in the circumstances in which the deceased met her death, it was not inappropriate for his Honour to put the matter in terms of whether an act of the applicant caused the death. Section 18(1)(a) of the *Crimes Act* requires that there be an 'act of the accused ... causing the death charged'. Unless the jury were satisfied beyond reasonable doubt that the applicant caused the death, that was the end of the Crown case..."[45]

[43] In the applicant's trial for murder, the jury had to decide whether they were satisfied beyond reasonable doubt that he substantially contributed to Marke's death. Even if they were satisfied that her own conduct substantially contributed to her death, it did not necessarily follow that the applicant's conduct did not substantially contribute to it. As Toohey and Gaudron JJ observed in *Royall*, the jury did not have to isolate a single cause of death.

[44] In my view counsel for the applicant's submission that, in the circumstances of this case, s 311 speaks exhaustively as to the applicant's criminal responsibility is not arguably correct.

[45] First, causation is a question of fact. The submission fails to take account of the causative effect of the applicant's conduct in pushing in the plunger of the syringe after he inserted the needle in Marke's arm (in contrast to Smyth's case, where the applicant inserted the needle, but Smyth pushed the plunger in himself). His conduct in pushing in the plunger was the physical act which ultimately caused her to stop breathing. The decision in *Royall* did not signal any "broader" than usual approach to the question of causation. On the contrary, the High Court applied the orthodox approach to causation, reiterating that it was a question of fact to be determined in a common sense way. It accepted that, where the deceased died in the course of escaping someone who had induced a well-founded apprehension of physical harm, that person's conduct was a substantial cause of her death.

[46] Secondly, s 284 is concerned with the criminal responsibility of a person who causes the death of another person. Consent by "a person" to "the causing of the person's own death" does not affect the criminal responsibility of "any person by

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42 [1986] VR 43 at 55-56.
43 [1980] 2 NZLR 31 at 36.
44 At 423.
45 At 424.

> whom such death is caused". There may be more than one cause of death. Marke's consent did not affect the applicant's criminal responsibility if his conduct was a substantial cause of her death.

Disposition

[47] Because the construction of the *Criminal Code* for which the applicant contended was not arguably correct, there is no merit in the substantive application.

[48] The application for an extension of time should be refused, and the application for a statutory order of review should be refused.

[49] I will hear the parties on costs.

SUPREME COURT OF QUEENSLAND

CITATION:	*Carter v Attorney-General for the State of Queensland* [2013] QCA 140
PARTIES:	**STEPHEN WAYNE CARTER** (appellant) v **ATTORNEY GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 8863 of 2012 SC No 2587 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2013
JUDGES:	White JA, Atkinson and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – GENERALLY – where appellant convicted of murder for killing another at that other's request – where appellant unsuccessfully petitioned Governor of Queensland for pardon pursuant to s 36 of the *Constitution of Queensland* 2001 – where appellant unsuccessfully applied for statutory order of review of Attorney-General's decision not to refer appellant's whole case to court pursuant to s 672A of the *Criminal Code* – whether Attorney erred in not referring matter to court – whether s 311 of *Criminal Code* is complete code for purposes of ascertaining criminal responsibility where a person has caused the death of another who is desirous of death – whether miscarriage of justice because trial judge failed to direct jury that if deceased was substantial or significant cause of her own death then appellant not guilty of murder *Constitution of Queensland* 2001, s 36

Criminal Code 1899 (Qld), s 1, s 2, s 18, s 25, s 284, s 291, s 293, s 295, s 297, s 298, s 300, s 302(1), s 302(1)(a), s 304, s 304A, s 304B, s 311, Ch 67, s 668, s 668E, s 668E(1), s 672A, s 672A(a), s 672A(b), Ch 26, Ch 28
Judicial Review Act 1991 (Qld), 20(2)(e), s 20(2)(f), s 20(2)(i), s 26

Campbell v The Queen [1981] WAR 286; (1980) 2 A Crim R 157, cited
March v Stramere (E & MH) Pty Ltd (1991) 171 CLR 506; (1991) HCA 12, cited
National Insurance Co of New Zealand Ltd v Espagne (1961) 105 CLR 569; [1961] HCA 15, cited
Nicklinson v Ministry of Justice and Ors [2012] EWHC 304 (QB), cited
Pepper v A-G (Qld) [No2] [2008] 2 Qd R 353; [2008] QCA 207, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Carter [2003] 2 Qd R 402; [2002] QCA 431, cited
R v Carter (2003) 141 A Crim R 142; [2003] QCA 515, considered
R v Grimes and Lee (1894) 15 NSWR(L) 209, cited
R v Lowrie & Ross [2000] 2 Qd R 529; [1999] QCA 305, cited
R v Main (1999) 105 A Crim R 412; [1999] QCA 148, cited
R v Sherrington [2001] QCA 105, cited
Royall v The Queen (1991) 172 CLR 378; [1991] HCA 27, considered
Timbu Kolian v The Queen (1968) 119 CLR 47; [1968] HCA 66, cited
Weld-Blundell v Stevens [1920] AC 956, cited

COUNSEL: A Vasta QC, with K Payne, for the appellant
P J Davis SC, with B A Hall, for the respondent

SOLICITORS: Fraser Power Lawyer and Notary Public for the appellant
Crown Solicitor (Brisbane) for the respondent

[1] **WHITE JA:** The appellant has appealed the dismissal of his application to review the decision of the Attorney-General not to refer his case to the Court of Appeal pursuant to s 672A of the *Criminal Code* (Qld) following his unsuccessful petition to Her Excellency the Governor of Queensland to exercise the prerogative powers of the Crown to pardon him in respect of his murder conviction or, alternatively, to exercise the prerogative of mercy in his favour.

Background

[2] On 16 March 2000 the appellant injected Gail Marke with heroin intending that this would kill her in accordance with her expressed wish to die in this way. He then inserted a syringe containing heroin into the arm of Patrick Smyth at his request and watched as Smyth pushed in the plunger. Smyth died immediately. Marke was still

breathing but unconscious when the appellant left the room that night. She was dead when found the following morning. The appellant had supplied the heroin. The deceased were heroin addicted persons. The appellant was a heroin user. Both deceased had expressed a desire to die and Marke had attempted suicide several times.

[3] On 24 March 2000 police conducted an interview with the appellant in which he explained what had occurred on the night of 16 March 2000. Without his admissions there would have been no way of implicating the appellant in the mechanism of the deaths. He had wiped his fingerprints from the syringe. The following appears in McPherson JA's judgment dismissing the appellant's appeal from his conviction for murder:

> "[4] The appellant said that he had injected Gail first. She was not able to do it herself, or bring herself to do it. He put the needle in her arm, and asked if she was absolutely sure, to which she said "yes, just do it", and he pushed in the plunger of the syringe. She said "what a rush", and lay down on her back, on the left hand side of the bed. At that stage she was still breathing. In the case of Smyth, the appellant inserted the needle, but Smyth pushed the plunger in himself, and he may also have withdrawn the needle. He just dropped down straight away "like a stone".
>
> [5] When asked in the course of the interview, the appellant said he thought that Gail was going to die. That was, he said, "the intention of the exercise"."[1]

The necessary mental element for murder pursuant to s 302(1)(a) of the *Criminal Code* was thus established.

[4] The appellant pleaded guilty to having unlawfully supplied heroin to Smyth and to assisting his suicide contrary to s 311 of the *Criminal Code*. He was arraigned and pleaded not guilty to a charge of murdering Gail Marke but guilty of aiding her to kill herself. The prosecution did not accept that plea and the trial proceeded on the murder charge. The appellant was convicted of murdering Gail Marke and sentenced to life imprisonment. His appeal against his conviction was dismissed.[2]

[5] An earlier conviction had been set aside and a retrial ordered because of the incompetence of trial counsel.[3]

[6] The second appeal was concerned with the question whether the injection of heroin by the appellant had caused Marke's death within the meaning of that expression in s 293 of the *Criminal Code*. The High Court in *Royall v The Queen*[4] explained that while there may be no single cause of the death of a deceased, at common law:

> "if the accused's conduct is a substantial or significant cause of death that will be sufficient, given the requisite intent, to sustain a conviction for murder."[5]

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1 *R v Carter* [2003] QCA 515 at [4]-[5].
2 *R v Carter* [2003] QCA 515.
3 *R v Carter* [2002] QCA 431.
4 (1991) 172 CLR 378.
5 At 411 per Deane and Dawson JJ.

Courts in Queensland, when considering s 293 of the *Criminal Code*, "have applied to killing and causing death the meaning ascribed to those expressions at common law in *Royall v The Queen*."[6]

[7] The issue of causation arose because, as described by McPherson JA[7], one of the principal prosecution witnesses, a clinical pharmacologist, appeared to be making a distinction between a "significant" and a "substantial" cause of the death. The toxicology screening of the deceased revealed other drugs, as well as differently aged derivatives from heroin, suggesting either that she had absorbed significant quantities of morphine in the 24 hours proceeding her death, or that, for her body to have broken down the heroin to the proportions shown in the screening, she had survived for up to half an hour after having been injected with heroin by the appellant.[8] The pharmacologist said that for the heroin injection alone to have caused the death it would have been necessary for the deceased to have survived the injection for at least half and hour. He would have been surprised if the deceased had lived that long. He gave evidence about the additive effect of all the drugs in the deceased's system. The pharmacologist concluded that the heroin injection "could be a significant contribution but … [not] a substantial contribution given all of the other confounders".[9]

[8] At the close of the prosecution case the defence had unsuccessfully submitted that there was no case for the appellant to answer in light of this body of evidence about the cause of death. On appeal the question was whether, in light of the evidence of the pharmacologist, a reasonable jury could have convicted.

[9] McPherson JA said,[10] of the legal nature of causation, in the circumstances of this case:

> "The function of scientific evidence at a trial at common law is not to usurp the function of the jury but to assist them in reaching their conclusion with the requisite degree of satisfaction. In relation to the element of causing death in homicide, this has been expressly recognised by the High Court in *Royall v The Queen* (1991) 172 CLR 378, 387, where Mason CJ approved a statement by Burt CJ that it is enough if juries are told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them, while appreciating that the purpose is to attribute legal responsibility in a criminal matter."

On that question the court concluded that the jury were entitled to be satisfied beyond reasonable doubt that the appellant had killed the deceased.

[10] The appellant unsuccessfully sought special leave to appeal to the High Court.

[11] On 4 November 2010 the appellant petitioned Her Excellency the Governor of Queensland for a pardon pursuant to s 36 of the *Constitution of Queensland* 2001 (Qld). In the petition the appellant contended that he could not be guilty of the

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6 *R v Carter* [2003] QCA 515 at [6] per McPherson JA referring to *R v Lowrie & Ross* [1999] QCA 305 at [11] and *R v Sherrington* [2001] QCA 105 at [4].

7 *R v Carter* [2003] QCA 515 at [9].

8 *R v Carter* [2003] QCA 515 at [9] per McPherson JA.

9 *R v Carter* [2003] QCA 515 at [11].

10 *R v Carter* [2003] QCA 515 at [13].

crime of murder because his injection of heroin into the deceased was not a "substantial cause" of her death because her procurement of the appellant to do so was such a cause. Accordingly, he should not have been charged with murder and

> "... his conviction upon this charge discloses a grave error of law and ought not to be allowed to stand."[11]

The appellant contended that the only crime of which he was guilty was of assisting suicide pursuant to s 311.

[12] The matter was referred by Her Excellency to the Attorney-General for "a detailed and thorough examination of [the] case and submission".[12] On receipt of certain information Her Excellency sought further advice about provisions in the *Criminal Code*.

[13] On 16 December 2011 the appellant was informed that Her Excellency was of the opinion that "there [was] no justification" for the exercise of any powers conferred by the *Constitution of Queensland* 2001.[13]

[14] On 20 March 2012 the appellant filed an application for a statutory order of review of the decision of the Attorney-General:

> "... not to positively exercise the Crown Law Officer's discretion, conferred by section 672A(a) of the *Criminal Code*, to refer the Applicant's whole case to the Court for hearing and determination by the Court as in the case of an appeal by a person convicted".[14]

He sought an order remitting the decision to the Attorney-General for further consideration and determination in accordance with law.

[15] Section 672A provides that nothing in Ch 67 relating to appeals shall affect the pardoning power of the Governor on behalf of Her Majesty:

> "... but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person ... may –
>
> (a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or
>
> (b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly."[15]

[16] "Court" in s 672A means "the Court of Appeal".[16] Pursuant to s 1 of the *Criminal Code*, "Crown Law Officer" is a reference to the Attorney-General or Director of

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11 AR 58.
12 Letter from Official Secretary to Her Excellency the Governor to appellant's solicitor, dated 15 November 2010, AR 67.
13 AR 68.
14 AR 72.
15 *Criminal Code*, s 672A.
16 *Criminal Code*, s 668.

Public Prosecutions. Nothing in the *Criminal Code* affects the Royal prerogative of mercy.[17]

[17] Section 668E provides for the determination and disposition of appeals generally and is the procedure to be applied to any reference under s 672A(a). Relevantly, s 668E(1) provides:

> "The Court ... shall allow the appeal if ... on any ground whatsoever there was a miscarriage of justice ..."[18]

[18] The application for judicial review was heard by Margaret Wilson J on 19 July 2012. That application included an application for an extension of time, given that the *Judicial Review Act* requires an application for review to be brought within 28 days after the day on which the decision was made.[19] Her Honour declined to extend time, on the basis that the substantive application contained no merit.

[19] As the primary judge observed, the powers conferred by s 672A are enlivened by the presentation of a petition for the exercise of the pardoning power after conviction, and, in a normal case, after an unsuccessful appeal. Her Honour[20] referred to the following observation by Muir JA in *Pepper v Attorney-General for the State of Queensland*:

> "... A reference under s 672A is a mechanism which the Crown may employ so that the exercise of the pardoning power may be properly informed or so as to grant the petitioner, in effect, a further appeal."[21]

[20] As further noted by her Honour, there have been a number of decisions in this court and the Federal Court on applications for judicial review of the Attorney-General's exercise of discretion under s 672A of the *Criminal Code*.[22] These applications have been made on the assumption that the Attorney's decision, having been made under an enactment, is amenable to judicial review. It was not argued by the respondent to the contrary. It was accepted that the provision of reasons was not required.[23]

[21] Before the primary judge the amended grounds of review were:

> "1. The decision by the Attorney General not to refer the whole case to the Court of Appeal ('*the decision*') was an improper exercise of the power conferred by s. 672A of the Criminal Code. (S.20(2)(e) Judicial Review Act 1991).
>
> 2. The decision involved an error of law (S.20(2)(f) Judicial Review Act 1991).
>
> 3. The decision was otherwise contrary to law. (S.20(2)(i) Judicial Review Act 1991)."[24]

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17 *Criminal Code*, s 18.
18 See *R v Main* [1999] QCA 148 at [15] and *Pepper v A-G (Qld) [No2]* [2008] QCA 207 at [12].
19 Section 26(2).
20 Reasons [10]; AR 89.
21 [2008] 2 Qd R 353 at [11]; [2008] QCA 207 at [11].
22 Reasons [11]; AR 89.
23 Reasons [23]-[25]; AR 92-93.
24 Reasons [13]; AR 89-90.

The respondent accepted before her Honour that if he had wrongly understood the law, and the law was as submitted by the appellant, then there had been a miscarriage of justice and the case should be referred to the Court of Appeal.[25]

[22] Before this court the respondent submitted that if the court concluded that the Attorney had erred in not referring the case to the Court of Appeal, since only an error of law is in issue, the point would be decided. In that circumstance it would be otiose to resubmit "the whole case" again under s 672A. Counsel informed the court that, should the court uphold the appeal, the Attorney would formally submit to an order setting aside the conviction and ordering a retrial. In effect, by this appeal, the appellant has achieved the very outcome he sought initially – a consideration of his argument about causation by this court. It is incidental that that is the effect of the appeal.

[23] Her Honour observed that s 672A(b) would seem to apply, not s 672A(a). That is, if the appellant is successful, it is not "the whole case" that should be referred to the court, but a particular "point". However, on the basis of how he articulated it to this court, I am inclined to the view that what the appellant seeks is the referral of "the whole case".

The appellant's contentions

[24] The appellant contends, broadly, that confining the "cause" of the deceased's death to physical phenomena which led "to the cessation of breathing" – rather than directing the jury to consider the importunities of the deceased as a substantial cause – was an error that brought about a miscarriage of justice.[26] He seeks to find support for that argument in *Royall v The Queen*.[27]

[25] In support of that contention the appellant argues that s 311 of the *Criminal Code* is a complete code for ascertaining criminal responsibility in circumstances like the present. Such a conclusion necessarily precludes any resort to s 302 – the crime of murder. While this argument was not advanced at either trial or on either appeal, if it is correct a miscarriage of justice has occurred and the prior failure to raise it will not preclude its consideration now.

[26] To test the argument the relevant provisions must be considered in their context in the *Criminal Code*. The first is located in Ch 26 – "Assaults and violence to the person generally – justification and excuse".

> "**284 Consent to death immaterial**
>
> Consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused."

[27] The balance of the relevant provisions are in Ch 28 – "Homicide – suicide – concealment of birth":

> "**291 Killing of a human being unlawful**
>
> It is unlawful to kill any person unless such killing is authorised or justified or excused by law.

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25 Reasons [15]; AR 90.
26 Appellant's Outline of Argument, paras 2.6-2.7.
27 (1999) 172 CLR 378.

...

293 Definition of *killing*

Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.

...

300 Unlawful homicide

Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case.

...

302 Definition of *murder*

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say –

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of ***murder***.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) is it immaterial that the offender did not intent to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

...

311 Aiding suicide

Any person who –
(a) procures another to kill himself or herself; or
(b) counsels another to kill himself or herself and thereby induces the other person to do so; or
(c) aids another in killing himself or herself;
is guilty of a crime, and is liable to imprisonment for life."

[28] For completeness, s 2 of the *Criminal Code* provides:

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

[29] The appellant's argument about causation proceeds in this way, where s 293 states "any person who causes the death of another ..." the concept of "causation" is broader than mere physical acts causing death. The appellant relies upon certain statements by the High Court in *Royall v The Queen*[28] to support this contention. In *Royall* the accused was charged with the murder of a woman who fell from the bathroom window of her upper floor flat. The couple had had a violent altercation during which the accused (as he subsequently admitted) had punched the deceased. There was evidence of forcible entry into the very small bathroom and of a struggle. The woman's blood was in the flat and bathroom. A chipped glass ashtray was found in the bathroom and gouge marks on the wall were consistent with someone having swung an arm while holding such an object. The Crown case was that the accused had murdered the deceased in one of three ways: he had pushed her out of the window; he had attacked her in the bathroom, and she fell while avoiding the attack; or having a well-founded and reasonable apprehension of life-threatening violence, she jumped from the window.[29]

[30] Although that case was factually quite different from the present, the appellant relies upon the acceptance by all the judges that the cause of the woman's death did not need to be a direct physical act but could occur by virtue of "inducement". The appellant[30] particularly refers to the following statement by Deane and Dawson JJ:

> "Where in a case of that kind[31] the charge is murder, the prosecution must not only prove that the accused caused the death by inducing a well-founded fear or apprehension on the part of the deceased such as to make it a natural consequence that he or she should take steps

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28 (1991) 172 CLR 378.
29 *Royall v The Queen* (1991) 172 CLR 378 at 380.
30 Appellant's Outline of Argument, para 4.2.
31 Their Honours had just referred to *R v Grimes and Lee* (1894) 15 NSWR(L) 209 where the accused had robbed and assaulted the deceased causing him to jump to his death from the window of the carriage of a train. The jury had been directed to consider whether the deceased jumped through the window because he had a well-founded and reasonable fear or apprehension that if he stayed he would be subjected to further violence that would endanger his life; if so, they would conclude that the accused caused the death.

> to flee or escape, but it must also prove that the words or conduct which induced that fear or apprehension were accompanied by the intent which is a necessary ingredient of the crime of murder."[32]

[31] The appellant contends that Marke's actions in planning her own death, deciding on the means by which she would die, and seeking out and persuading the appellant to assist her, must result in a large degree of causal responsibility for her own death being attributed to her. If, according to the appellant, causation is limited to the physical act, then a person who assists a suicide by doing any physical act that causes the death, notwithstanding that there may be other causes of the death, will be guilty of murder. In such a circumstance, the appellant contends, this would defeat the purpose of s 311. The appellant further argues that there is nothing in s 311 to confine the actions of the aider to non-physical actions. That may be accepted.

[32] The appellant contends that it was a fundamental error by the primary judge to conclude that, because the jury was directed on the question of causation in respect of the appellant's actions, it was unnecessary to direct them as to whether the acts of the deceased substantially or significantly caused her own death. The failure of the jury to consider this question deprived the appellant of the chance of acquittal on the charge of murder.

[33] The jury, according to the appellant, ought to have been directed that the acts of both the appellant and the deceased contributed to her death in these terms:

> "that unless they could not exclude beyond reasonable doubt that Marke was the person who substantially or significantly caused her own death, they could not convict the Appellant."[33]

The appellant contends that no reasonable jury could exclude that possibility. In that case, no murder took place as Marke was incapable in law of murdering herself – "any person who unlawfully kills another".[34] The homicide provisions of the *Criminal Code* thus had no application and the appellant's contribution to the death amounted to no more than assisting suicide.

[34] The appellant contends that s 311 of the *Criminal Code* is an exhaustive provision for both criminal responsibility and punishment where a person embarks upon a course of conduct which involves the procurement and urging of another to assist that person in killing him or herself. Where in a case such as the present the facts support a characterisation of the act as one of "unlawful killing", and the mental element for murder is established, the purpose of s 311 would be defeated if the person recruited to assist in the killing were to be charged with murder. The appellant points to the "artificiality" of the different verdicts and the acts of the appellant in the case of Marke and that of Smyth. "Only by considering the non-physical causative actions of the deceased can the true context of Marke's death be properly appreciated and criminal culpability for both deaths be reconciled".[35]

[35] According to the appellant's argument, the goal of statutory construction mandated in *Project Blue Sky Inc v Australian Broadcasting Authority*[36] of harmonious reconciliation of all provisions can be achieved if s 302 is construed to cover all

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32 *Royall v The Queen* (1991) 172 CLR 378 at 410.
33 Appellant's Outline of Argument, para 5.4.
34 *Criminal Code*, s 302.
35 Appellant's Outline of Argument, para 4.4.
36 (1998) 194 CLR 355 at 381.

unlawful killings other than suicides irrespective of whether the act of assisting is minor or substantial or is the very act which causes the cessation of breathing.

The respondent's contentions

[36] The respondent's argument is as follows:

> "24. On a proper construction of [the] provisions [in the *Code*]:-
>
> (a) if an offender causes the death of another then he has killed the person;[37]
>
> (b) the killing is unlawful unless authorised, justified or excused by law;[38]
>
> (c) consent of the person killed to the killing is not an authorization, justification or excuse and the consent is irrelevant to the criminal responsibility of the offender;[39]
>
> (d) where the offender held an intent to kill when he killed the person then the unlawful killing is murder;[40]
>
> (e) therefore, when an offender, with the consent of the person, intentionally causes the death of the person then in the absence of any lawful excuse, the offender is guilty of murder;
>
> (f) where the person causes his own death any person who assists him is not guilty of murder as that person has not killed the person ie. he has not "*caused*" the death;[41]
>
> (g) however, where a person causes his own death and another person assists the person to cause his own death then the person who has assisted is guilty of the offence of aiding suicide.[42]
>
> 25. Therefore, the distinction between a killing which constitutes murder and a killing which constitutes assisted suicide is whether the acts or omissions of the offender caused the death."[43]

Discussion

[37] It is convenient to start with some orthodox statements about causation. In the appellant's second appeal to this court, McPherson JA noted that in the definition of murder in s 302(1), and in speaking in s 300 of murder and manslaughter as forms of homicide:

> "... the Code uses the expression "kills another". In other provisions, such as ss 295, 297 and 298, it refers to an act or omission "which results in the death" of another person, or from

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37 Section 293.
38 Section 291.
39 Section 294.
40 Section 302.
41 Section 293.
42 Section 311.
43 Respondent's Outline of Argument, paras [24] – [25].

> which death results; and in s 293 killing a person is equated with causing the death of another: ...
>
> In consequence, courts in Queensland acting under the Code have applied to killing and causing death the meaning that was ascribed to those expressions at common law in *Royall v The Queen* ... See, for example, *Lowrie & Ross* (1999) 106 A Crim R 565, 570-571; and *R v Sherrington* [2001] QCA 105 §4."[44]

His Honour referred to various passages in the judgments in *Royall*. It is useful to do so here. Mason CJ said:

> "The issue of causation was left to the jury to decide as one of fact. In this respect I agree with the statement made by Burt C.J. in *Campbell v. The Queen*[45], that it is "enough if juries [are] told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter."[46]

[38] Brennan J said:

> "The basic proposition relating to causation in homicide is that an accused's conduct, whether by act or omission, must contribute significantly to the death of the victim ... It need not be the sole, direct or immediate cause of the death. However, when the death is not caused directly by the conduct of the accused but by something done by the victim or by a third person in response to the conduct of the accused, there is a question whether the chain of causation has been broken."[47]

[39] Deane and Dawson JJ observed:

> "Of course, there may be no single cause of the death of the deceased, but if the accused's conduct is a substantial or significant cause of death that will be sufficient, given the requisite intent, to sustain a conviction for murder. It is for the jury to determine whether the connexion between the conduct of the accused and the death of the deceased was sufficient to attribute causal responsibility to the accused ..."[48]

[40] The same idea was expressed by Toohey and Gaudron JJ:

> "Nevertheless the jury must be told that they need to reach a conclusion as to what caused the deceased's death. That does not mean that the jury must be able to isolate a single cause of death; there may be more than one such cause ... In that event it is inevitable that the jury will concentrate their attention on whether an act of the accused substantially contributed to the death."[49]

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44 *R v Carter* [2003] QCA 515 at [6].
45 [1981] WAR 286 at 290; (1980) 2 A Crim R 157 at 161.
46 *Royall v The Queen* (1991) 172 CLR 378 at 387.
47 *Royall v The Queen* (1991) 172 CLR 378 at 398.
48 *Royall v The Queen* (1991) 172 CLR 378 at 411.
49 *Royall v The Queen* (1991) 172 CLR 378 at 423.

And, a little later:

> "In ordinary circumstances, the jury's task may be made easier if they are asked to determine first the cause of death rather than inquire whether an act of the applicant caused the death."[50]

[41] To similar effect was the following observation of McHugh J:

> "To constitute a cause for the purposes of the criminal law, it is not necessary that an act or omission be the sole or main cause of a wrong ... But, as I have indicated, the purpose of the legal doctrine of causation is to attribute legal responsibility, not to determine the factors which played a part in the happening of an event or occurrence."[51]

[42] A not dissimilar issue about causation to that which arose in *Royall* was considered in *Timbu Kolian v The Queen*[52] although in the context of "accident". Windeyer J said:

> "It was an old question, familiar in law, however questionable in philosophy, of asking was there what has been called a break in the chain of causation by what lawyers have described as a novus actus interveniens. Sir Frederick Pollock warned that
>
> > "... the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause".
>
> I said all that I can usefully say on this topic in *National Insurance Co. of New Zealand Ltd. v. Espagne*[53]. However, it may be permissible to say again that, in ascribing effects to causes, and in seeking the cause of an event, the purpose of law, civil and criminal, is to attribute legal responsibility to some person – "to fix liability on some responsible person", Lord Sumner said in *Weld-Blundell v. Stevens*[54]."[55]

[43] In *March v Stramare (E & MH) Pty Ltd*[56] Mason CJ observed of causation in the context of legal responsibility:

> "In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. The law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage."[57]

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50 *Royall v The Queen* (1991) 172 CLR 378 at 424.
51 *Royall v The Queen* (1991) 172 CLR 378 at 441.
52 (1968) 119 CLR 47.
53 (1961) 105 CLR 569 at 590-596.
54 [1920] AC 956 at 986.
55 (1968) 119 CLR 47 at 68-69.
56 (1991) 171 CLR 506.
57 (1991) 171 CLR 506 at 509.

The appellant's argument, although expressed conventionally, is more in the nature of "the sum of the conditions which are jointly sufficient to produce" the death of Gail Marke.

[44] *Royall* does not provide the answer to the appellant's quest for some different characterisation of what he did to the deceased. The relevant question in *Royall* was whether the victim's death could be attributed to the accused's unlawful assault or whether the link to his unlawful acts was broken.

[45] When pressed in argument, the appellant's counsel conceded that the resulting criminal responsibility must be the same whatever the means of bringing about the "cessation of breathing". For example, if a would-be-suicide is too weak or too afraid to pull the trigger on a gun and successfully implores another to do the act; or successfully seeks death by strangulation. There can be no different answer if the act occurs by injection – and the appellant did not suggest otherwise. The response must be that the person who pulled the trigger of the gun, directing the muzzle to the person's heart, caused the death and, intending that the other should die, was guilty of murder. So, too, to a death by strangulation or by lethal injection. The common law has never doubted the characterisation of a positive act which intentionally causes death as murder.

[46] In the course of oral submissions counsel for the appellant made reference to *Nicklinson v Ministry of Justice and Ors*,[58] but in subsequent written submissions said it was not relevant. That case concerned the ambit of the defence of necessity. The appellant here has not sought to argue the application of s 25 of the *Criminal Code* – "Extraordinary emergency" – which is as close as the *Code* comes to the common law defence of necessity. It could not conceivably apply.

[47] No articulation of the concept of causation in the common law supports the argument that where a person does the act, which is a significant or substantial cause of the death of another, and intends to do so, it is not murder, notwithstanding that moral, ethical or other persuasive forces might be operating on him or her.

[48] It is now necessary to consider further the provisions in the *Criminal Code*. The appellant contends that s 284 is relevantly neutral, in a case of this kind, when it provides that consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused. That is correct. In general terms it can be applied to a s 302 or s 311 charge. Section 293 provides that "any person who causes the death of another ... is deemed to have killed that other person". Those words are qualified by the expression "except as hereinafter set forth". The appellant contends that that is, relevantly, a reference to s 311 not just the "defence" provisions. I do not accept that argument. The expression is plainly a reference to s 304, s 304A and s 304B, each of which is prefaced by the words:

> "A person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder ..."

[49] By s 293, if an accused person causes the death of another they have killed that person. Consent, as mentioned, is irrelevant to the criminal responsibility of such an accused. To hold otherwise would be contrary to the fundamental underpinning of this part of the criminal law: that a human life is valuable.

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58 [2012] EWHC 304 (QB).

[50] Accordingly, to kill someone by a positive act, with the requisite intention, even though that person expressed a desire to die, is murder. The *Criminal Code* is clear. Where a person desirous of death brings about their own death by their own act, any person who assists in that act of autonomy by the suicide, but does not do the deed, has aided the suicide. The degree of moral responsibility may be reflected in the punishment which may be up to life imprisonment.

[51] There are sound reasons in policy not just the application of legal analysis in preferring this result. A person who desires to kill another may readily employ the "assist suicide" argument when murder was intended and against the wish of the victim; or a frail or elderly patient may be "persuaded" that it would be better to die.

[52] The primary judge was correct to dismiss the application to extend time because there is no argument that there has been a miscarriage of justice.

[53] I would dismiss the appeal.

Order

[54] The appeal should be dismissed.

[55] **ATKINSON J:** I agree with the reasons of White JA and the order she proposes.

[56] **MARTIN J**: I agree with White JA.