PARTIES:	BREEDON, Scott Aaron
	v
	THE QUEEN
TITLE OF COURT	COURT OF CRIMINAL APPEAL (NT)
JURISDICTION	SUPREME COURT (NT)
FILE NO:	No. CA 9 of 1992
DELIVERED:	Darwin 17 December 1993
HEARING DATES:	7 & 17 December 1993
JUDGMENT OF:	Martin CJ., Gallop & Angel JJ.

CATCHWORDS:

Criminal law - Appeal and new trial - Miscarriage of justice - Particular circumstances involving miscarriage - Trial Judges summing up - Misdirection and non-direction - Felony murder - Involuntary act or accident -

Criminal Code Act, 1983 (NT), ss31, 162.

Criminal law - Particular offences - Property offences - Robbery - Intention - Effect of change of mind during act - Use of violence in order to obtain money -

Criminal Code Act, 1983 (NT), s211 -

The Queen v Trott and Nobbs (1991) 1 NTLR 174, 175-6, followed.

Criminal law - Particular offences - Offences against the person - Homicide - Murder - Code provision - Effect of codification - Felony Murder - Construction - Defences -

Criminal Code Act, 1983 (NT), ss161, 162

Stuart v The Queen (1974) 134 CLR 426, 437-8, referred.
The Queen v Bradley (1986) 40 NTR 6, 12, referred.
Pregeli v Manison (1987) 51 NTR 1, 12, referred.
Jabarula & Ors v Poore (1989) 68 NTR 26, 30 referred.

Criminal law - General matters - Criminal liability and capacity - Defence matters - Voluntariness - Unwilled Act - Accident - Construction of s31 Criminal Code - 'Act' - 'Event' - Applicability of s31 to felony murder -

Criminal Code Act, 1983 (NT), ss1, 31, 162

R v Krosel (1986) 41 NTR 34, referred.
Pregeli v Manison (1987) 51 NTR 1, 12, 14-16, followed.
Vallance (1961) 108 CLR 56, 61, referred.
Kaporonovski v The Queen (1975) 133 CLR 209, 220-222, 231, 438, followed.

REPRESENTATION:

Counsel:

Appellant: S. Odgers
Respondent: R Wild QC

Solicitors:

Appellant: NT Legal Aid
Solicitors: DPP

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. CA 9 of 1992

BETWEEN:

SCOTT AARON BREEDON
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ., GALLOP & ANGEL JJ.

REASONS FOR JUDGMENT

(Delivered 17 December 1993)

THE COURT: The court has before it an application for an extension of time within which to seek leave to appeal, an application for leave to appeal and an appeal - all ordered by Martin CJ, on 25 May 1993, to be heard concurrently - from a conviction for murder and a conviction for aggravated robbery entered on 30 August 1991 after a trial by jury. The jury returned a verdict of guilty upon two counts, first, that on 28 September 1990, at Darwin in the Northern Territory of Australia, the applicant murdered Stephen Clive Sargent contrary to s162(1)(a) and (b) of the Criminal Code, and secondly, that on 28 September 1990 at Darwin, the applicant robbed Stephen Clive Sargent of approximately $3,800 cash and

that the said robbery involved the following circumstance of aggravation, namely that the applicant was armed with a dangerous or offensive weapon, namely a knife, contrary to s211(1) and (2) of the Criminal Code.

In the circumstances of the applicant's delay in bringing his applications it is convenient to deal with the merits of the appeal at the outset, as the success of the other applications is dependent upon the merits of the appeal rather than other considerations.

The grounds of appeal urged upon this court are as follows:

"1. The learned trial judge erred in law in his directions to the jury on the elements of murder as charged and, in particular, in relation to:

(a) causation;

(b) the necessity that the act causing death be voluntary;

(c) the necessity that the act causing death be done when committing or attempting to commit the robbery;

(d) the issue whether the act causing death was intended or foreseen by the Applicant as a possible consequence of his conduct; and

(e) the issue whether the event constituted by the death of Sargent was intended or foreseen by the Applicant as a possible consequence of his conduct.

2. The learned trial judge erred in law in his directions to the jury regarding the elements of count 2 as charged and, in particular, in relation to the requirement that the Applicant be armed with a knife "at the time of the robbery".

3. The verdict in respect of both counts was

unreasonable and cannot be supported having regard to the evidence."

There was a considerable body of evidence led at the trial that was not disputed. At the outset of the trial, counsel for the applicant formally admitted a number of matters, first, that on 28 September 1990, the deceased, Stephen Clive Sargent, died from injuries received during an altercation with the applicant at Darwin, secondly, that following the death of the deceased, the applicant dismembered and hid the body of the deceased in a wardrobe at premises at Parap and that the applicant endeavoured to clean away blood stains within those premises and that during the evening of 28 September 1990, the applicant drove south of Darwin where he deposited the remains of the deceased at various locations in bushland and, thirdly, that the applicant subsequently deposited bags used for carrying the body of the deceased and items belonging to the deceased in an industrial waste bin at Beaurepaires Tyre Service, Stuart Highway, Parap.

When first interviewed the applicant tried to place the blame for the killing upon another person and in the accused's absence (AB121, 122), but later in a written record of interview in question and answer form (AB253-6) told how he owed money for drug dealing, had been threatened with violence if he did not pay and how it was suggested to him that he might be able to get the money by organising for the deceased to go to his house with money to buy drugs from him (AB255). He rang the deceased and told him that a person was coming

around with some "pot" and invited him to his house. They arranged to meet. After a while the applicant confronted the deceased and demanded the money of him. In the course of an interview with police the applicant said:

> "Immediately after I told him he got up off the chair and went off and came at me throwing punches. Which I blocked with my right arm up in front of my face and I grabbed him, and when I grabbed hime[sic], cos he'd come into the kitchen and I grabbed him to stop him from hitting me and I dragged him. I pushed out of the kitchen, holding on to him and as I went past the bench holding him I picked up the knife. I had him up against the wall near the kitchen table and held the knife up in front of him, I had my hand on his neck and said just give me the money and get out of here. He reached up and grabbed the knife and pulled it through my hand and we started fighten[sic] again on the floor, not actually throwing punches, but wrestling on the floor and I picked up the knife while we were wrestling and stabbed him in the chest ..... He came back and I pushed through the door way in the bathroom and by then I was freaking out and crying and saying to him look what's happened now, what am I gunna do, and he said your[sic] a fool, look what you've done and jumped at me again. He threw his arm around my neck and grabbed the hand that had the knife in it and started trying to put the knife into me. He cut me on the hand and I then struggled until I got the knife away from him and stabbed him again. He then fell against the shower screen and went half through the opening and was lying half in the shower recess with his legs out through the doorway where you walk into the recess" (emphasis added).

He then told how the deceased had died and how he disposed of his body (AB257). Dr Pocock, a forensic pathologist, said that there were three wounds in the body and in cross-examination agreed he could not exclude the wounds as having been caused by a "pushing away motion", a defensive type of push or thrust. A hard stabbing thrust, he said,

would have inflicted a far deeper wound. The wounds were sufficiently serious, without attention, to cause death and Dr Pocock agreed that the type of injury could have arisen when two individuals were wrestling, rolling about, one holding a knife which was in some way between the two bodies.

The applicant gave evidence upon his trial; told how he became engaged in the drug trade, purchasing marijuana for himself, and how he ended up owing money to the supplier. He told how he was threatened by the supplier and became frightened. The supplier suggested that he take part in a scheme to obtain money from the deceased which could then be used to pay the supplier (AB187-188). The applicant phoned the deceased and told him that there was "a deal on", and he wanted $2,800 or $3,800. When the deceased arrived he and the applicant sat around talking for a while about completing the transaction. The applicant told him that the person with the drugs had not arrived, and eventually told him that the fellow was not coming and that there was no deal. Then, in accordance with the arrangement made with the supplier, he told the deceased that he, the applicant, was with the police and that it was intended to "bust everyone in Darwin", but that "if he gave us the money he'd be all right". The applicant said that the deceased then attacked him and that in the course of the fight as they went past a kitchen bench he, the applicant, picked up the knife: "I thought he'd just stop fighting because I picked the knife - I just thought it'd stop. I was just saying "just - I don't want this, <u>just</u>

give me the money and go", you know". He was asked to confirm that what he had said was: "I don't want this, just give me the money and go" and he confirmed it (p192). He went on to say that the victim swiped his hand, the struggle continued and the knife ended up on the floor. He was asked: "What was your attitude about the money at this stage?". He answered: "I wasn't thinking of it. I just wanted to stop the fight. I didn't want any fights or that, I just wanted to stop it" (emphasis added). According to the applicant, the struggle and the wrestling continued partly, at least, on the floor, the deceased obtained the knife and the applicant described how he was attacked by the deceased with it. The struggle continued: ".... I'm not sure what happened. We were just struggling and we pulled apart and - Steve was stabbed". He thought he had the knife and they broke apart. The deceased kept attacking him, repeating: "I'll fix you, you fool" or something like that. The fight went into the bathroom, the victim coming at the applicant again who pushed him back. They fell down and when the applicant got up he thought the deceased had been stabbed again. The deceased died shortly thereafter. The applicant picked up the deceased's purse, took the money from it, and when the supplier arrived he threw the money at him. The body was then dismembered, hidden and subsequently disposed of.

In examination-in-chief the applicant was asked: "Once the fighting started, what interest did you have in the money?" and answered: "I didn't want to go on with that, I

just tried to stop it, I just wanted to forget about it. And once - he just kept coming, said he was going to fix me and I just - just tried to stop it" (p205). In cross-examination he accepted that he was a much bigger person than the victim and substantially heavier. He was asked: "Did you, throughout the force of the struggle that followed, did you make further demands upon Sargent that he pay you the money, give you the money?" and he answered: "Not after that, no. I don't believe so. I realised that when I was explaining to the police what happened, I could have said I did but I didn't want that afterwards. I just wanted to stop the fight" (p231). He denied that any of the wounds he inflicted upon the victim were intentional, asserting that they just came about through the struggle, that he was frightened and put in fear when Sargent had hold of the knife. Explaining the lengths gone to dispose of the body (including dismemberment) the applicant said that that was because he had panicked and not because he thought he was guilty of committing a crime. He maintained that the killing was an accident. Asked: "Whilst you were struggling with Sargent, you kept on demanding from him that he give you the money?" he replied: "At first, yes", but denied that he had made such demands throughout: " .... Once Steve kept coming at me I just wanted to stop and tried to stop, I didn't keep demanding the money, no".

Robbery is defined in s211 of the Criminal Code as follows:

"211. ROBBERY

(1) Any person who steals and immediately before or at the time of his doing so, or immediately after doing so, uses or threatens to use violence to any person in order to obtain the thing stolen, to prevent or overcome resistance to its being stolen or to prevent or hinder his pursuit, is guilty of a crime called robbery and is liable to imprisonment for 14 years.

(2) If the offender is armed with a firearm or any other dangerous or offensive weapon or is in company with one or more person or persons, or if, immediately before, at or immediately after the time of the robbery he causes bodily harm to any person, he is liable to imprisonment for life."

There was evidence from the applicant upon which it was open to the jury to find him guilty of the offence and of the circumstance of aggravation. He stole the money immediately after using violence upon the deceased to obtain the money. That he may have changed his mind at some stage during the fight is irrelevant and does not affect his guilt: see *The Queen v Trott and Nobbs* (1991) 1 NTLR 174 at 175, 176 per Asche CJ. There was evidence that he intended to steal and that he intended to use the violence offered to the deceased prior to the stealing in order to do so. He intended to steal at the time of taking the money and he took the money because of an opportunity afforded to him by reason of the violence used by him. He used his violence 'in order to' obtain the money. No complaint is made upon appeal as to his Honour's directions to the jury on this aspect of the matter. The applicant's submissions on the robbery point must fail.

The law governing the ingredients of the crime of murder in the Northern Territory is to be found exclusively

within the provisions of the Criminal Code (NT); cf *Stuart v The Queen* (1974) 134 CLR 426, 437; *The Queen v Bradley* (1986) 40 NTR 6, 12; *Pregelj v Manison* (1987) 51 NTR 1, 12; *Jabarula & Ors v Poore* (1989) 68 NTR 26, 30.

Section 161 of the Criminal Code provides:

"161. UNLAWFUL HOMICIDE

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

Section 162 relevantly provides:

"162. 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 of some other person or if the offender intends to do to the person killed or to some other person grievous harm;

(b) if death is caused by means of an act done when committing or attempting to commit an offence referred to in subsection (2) which act is of such a nature as to be likely to endanger human life;

(c) ...

(d) ...

is guilty of murder.

(2) The offences to which subsection (1) refers are -

(a) any crime for which the offender may be sentenced to imprisonment for 14 years or longer;

(b) any crime of which an assault or an intention to do or cause any injury or damage is an

element and for which the offender may be sentenced to imprisonment for 7 years or longer; and

(c) ...

(3) In the circumstances referred to in subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(4) In the circumstances referred to in subsection (1)(b) it is immaterial that the offender did not intend to hurt any person."

At the trial the Crown sought to prove the charge of murder on three alternative bases, first, that the applicant intended to kill Sargent, secondly, that the applicant intended to cause grievous harm to Sargent; and thirdly, that the applicant caused the death of Sargent by means of an act done when committing or attempting to commit the offence of robbery.

We have previously set forth s211 of the Criminal Code (NT) which defines the offence of robbery.

The main thrust of the application for leave based upon the merits of the appeal is directed to the trial judge's summing up when directing the jury in relation to the third alternative above.

It is important to examine the summing up in the context of the trial. In its final address to the jury the Crown put the Crown case in relation to the third alternative in the following terms:

"But put simply, it's this: That when, during the course of committing or attempting to commit the offence of robbery, such as we say occurred here, if in the course of the robbery the accused causes the death of the deceased, Sargent, by means of an act, the act is the stabbing, the deliberate stabbing, then provided that act is of such a nature as to be likely to endanger human life - gosh, stabbing somebody in the chest surely is such an act - then, if you are satisfied of that then - and you are satisfied beyond reasonable doubt - then the offence of murder has been made out."

We have set out above the salient factors of the applicant's evidence upon his trial. In his summing up to the jury, the trial judge accurately encapsulated the accused's case in the following terms:

"The accused says that he put up his hands to block off the blows, or fend off the blows; a struggle ensued and that in the course of that struggle he obtained a knife from the kitchen bench area in order to stop the fighting. He says that he wanted no violence and at that stage he lost interest in the money as well. But the deceased kept coming at him, and when they were rolling on the floor, the accused says he lost possession of the knife and they had struggled for the knife. They then pulled apart and he saw that Steve was stabbed.

The relevant evidence is at pages 340 to 343, and I'll read it to you. Now this is only up to the stage of the first stabbing that he speaks of; there's a second stage. The fight is broadly in two parts - the part up to the stage when they're rolling on the floor, and then the second part where they end up in the bathroom. We're talking only now of the first part:"

His Honour read to the jury extracts from the transcript of the accused's evidence in relation to the first stage, and then said to the jury:

"Well now, after that - that's the first stage - the deceased, he said, came at him again, saying: 'I'll fix you, you fool'. There was a struggle again and then they

fell through the bathroom door and drove into the shower screen and came apart again. Then the deceased came at him again, the accused pushed him back through the recess into the shower and then the accused fell on top of the deceased. When he got off him he could see that he'd been stabbed again. The accused then picked the knife up and threw it into the sink."

He then read to the jury another portion of the accused's evidence, after which he said to the jury:

"Now what the accused is saying is: 'Look, I didn't intend to either kill or do any grievous harm to the deceased. The manner in which the injuries were sustained him are as I've described; it happened in the course of the struggle; it was entirely accidental, and not caused by any intention on my part to do him grievous harm or to kill him'."

The applicant contends that the trial judge, in the passages referred to, accurately summarised the substance of his defence to the charge of murder. However, the applicant submitted that in directing the jury on the third alternative above, the trial judge fell into error where he said:

"So - if I can just go over this again - if you are not satisfied that the accused intended to cause the death of the deceased, or he intended to do grievous harm to the deceased, if you believe that the death was truly, perhaps, accidental, you still have to ask yourself the question: Was the death caused by means of an act done when committing, or attempting to commit robbery? And it need not be armed robbery. And was the act which caused the death of such a nature as to be likely to endanger human life?

Now remember what I've said about 'likely to endanger human life'; not the same things as an act which raises danger to human life as a mere possibility. It has to be more than that. The words 'likely to endanger human life' are an ordinary expression meant to convey the notion of a substantial, or real chance, as distinct from a mere possibility.

You may think that the fact that a person has a knife in his hand raises that as a real chance that human life is endangered. That's a matter for you."

Various criticisms were advanced in respect of that part of the summing up. For present purposes, it is sufficient to deal with the submission that under the third alternative means of proving the offence of murder, the Crown would not succeed merely by establishing that death was caused by means of an act done when committing or attempting to commit robbery and the act which caused the death was of such a nature as to be likely to endanger human life.

It was submitted that, given that the Crown left its case to the jury on the basis that the act which caused the death was the deliberate stabbing, a central issue for the jury was whether the stabbing was in fact deliberate, ie voluntary and non-accidental. If it was entirely accidental, then murder would not have been established even if the stabbing was an act likely to endanger human life Furthermore, the applicant relied upon the exculpatory provisions of s31 of the Code, which provide that a person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

The Crown submitted that "the offence of felony/murder in the Code may be defined as a synthesis of s162(1)(b) and (2)(a), and s211 read together." So read, it

was submitted that the offence of murder committed by the applicant could be represented by the following:

> "If death is caused by means of an act (such act being of such a nature as to be likely to endanger human life) of the offender when stealing (or attempting to steal) a sum of money and immediately before or at the time of his doing so he uses or threatens to use violence in order to obtain the thing stolen, to prevent or overcome resistance to its being stolen (whether or not armed with a dangerous or offensive weapon) then the offender is guilty of murder."

The Crown submitted that in order to prove the applicant guilty of murder in the present case it was only necessary for the Crown to prove:

1) an act causing death;

2) a stealing (or attempted stealing) with:

   a) an intention to permanently deprive

   b) an intention to use force; and

3) that the act was likely to endanger human life.

It was submitted that s31 of the Criminal Code does not apply to the circumstances of the case because once the intention to permanently deprive and to use force are proven as pre-requisites of robbery, then the robbery itself is proven without recourse to s31 and the only additional feature is the necessity to show the likelihood that the act will endanger. It was submitted that because of the provisions of s162(4), it was immaterial that the applicant did not intend to hurt the deceased and equally immaterial that the death itself could properly be described as accidental, and it was so described as a possibility by the learned trial Judge in

the course of his summing up.

These submissions cannot be accepted as consistent with the relevant provisions of the Criminal Code.

Any consideration of s162 of the Criminal Code necessarily requires consideration of s31 because murder involves an unlawful killing and the use in s162 of the word 'unlawfully', which by operation of s1 of the Code means "without authorisation, justification or excuse", requires consideration of s31 which is in Part 1 Division 4 of the Code entitled "Excuse". Furthermore, s31 expressly provides:

> "(3) This section does not apply to the offences defined by Division 2 of Part VI.",

and the crime of murder is defined by s162 which is in Division 3 of Part VI of the Code - expressio unius est exclusio alterius.

Section 31 of the Criminal Code provides:

> "31. UNWILLED ACT, &c., AND ACCIDENT
>
> (1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
>
> (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, a reasonable person similarly circumstanced and having such foresight would have proceeded with that conduct.

(3) This section does not apply to the offences defined by Division 2 of Part VI."

That section has received extensive consideration by Nader J in *R v Krosel* (1986) 41 NTR 34 and *Pregelj v Manison*, supra, at 14 ff.

Other than in respect of the offences defined in Division 2 of Part VI of the Criminal Code, s31 as portion of Part II of the Criminal Code (Criminal Responsibility), to the extent that in its terms it is operable, governs and controls the scope of the specific offences - including murder - defined elsewhere in the Criminal Code, always bearing in mind that 'it is only by specific solutions of particular difficulties raised by precise facts of given cases that the operation of' s31 'can be worked out judicially.': see *Pregelj v Manison*, supra, at 16, *Vallance* (1961) 108 CLR 56 at 61; *Kaporonovski v The Queen* (1975) 133 CLR 209 at 220; *Stuart*, supra, at 438.

It is unnecessary to reiterate the grammatical difficulties of s31(1), see *Pregelj v Manison*, supra, at 14, 15. The words 'act' and 'event' are defined in s1 of the Code. The word 'act' in relation to an accused person is defined as meaning: "... the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention;". 'Event' is defined as meaning "the result of an act or omission". Neither

'omission' nor 'conduct' is defined.

In the context of the present case, it is clear that the stabbing of the deceased is the relevant 'act' for the purposes of s31(1), and that the death of the deceased is the relevant 'event' for the purposes of the section, cf *Kaporonovski*, supra, at 231. It follows that unless the stabbing was proved by the Crown to have been intended by the applicant or the death foreseen by him as a possible consequence of his conduct, then the applicant was excused from criminal responsibility for his conduct and its consequences, cf *Kaporonovski*, supra, at 220-222. These matters were fundamental to the applicant's case in respect of the voluntary nature of his use of the knife and whether death was intended or foreseen as a possible consequence. A substantial part of his case was that the stabbing was accidental and not intended and that the death was not intended or foreseen as a possible consequence of his conduct.

Counsel for the Crown relied on s162(4) as demonstrating the inapplicability of s31, but s162(4) addresses the question of an offender's intention to bring about an event, that is, "hurt". The section does not address the questions of the voluntariness or otherwise of an offender's "act" or of an offender's foresight of possible consequences (the "event") which are addressed by s31(1), nor with the question as to whether a reasonable person with such foresight would nevertheless have proceeded, which is

addressed by s31(2), cf *Stuart*, supra, at 438. Section 162(4) does not exclude the applicability of s31 to the crime of murder as defined by s162(1).

It was properly conceded by the Crown that in the event that this Court was of the view that s31 of the Criminal Code was applicable to the crime of murder as defined by s162(1)(b) and (2)(a) of the Criminal Code, the appeal should be allowed and a retrial should be ordered, since the matter was never adverted to at the trial and, inter alia, the jury was never asked to consider the questions whether the death of the deceased was foreseen by the applicant as a possible consequence of his conduct, and whether in all the circumstances a reasonable person in similar circumstances to the applicant, even if he had such foresight, would nevertheless have proceeded to conduct himself as did the applicant, see s31(2).

As we have demonstrated in the above extracts from the summing up, the trial judge did not direct the jury in relation to s31 and the question of voluntariness. We are of the opinion that in the context of the trial his Honour was obliged to do so.

In respect of the conviction for murder, the application for extension of time within which to apply for leave to appeal should be granted, leave to appeal should be granted, the appeal should be allowed, the conviction should

be quashed and a retrial ordered. In respect of the conviction for robbery, the applications should be refused.
