SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2019 0164

ABDULLAH CHAARANI — Applicant
v
THE QUEEN — Respondent

S APCR 2019 0182

AHMED MOHAMED — Applicant
v
THE QUEEN — Respondent

S EAPCR 2019 0198

HATIM MOUKHAIBER — Applicant
v
THE QUEEN — Respondent

JUDGES:	PRIEST, KAYE and T FORREST JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	19 & 20 March 2020
DATE OF JUDGMENT:	17 April 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 88
JUDGMENT APPEALED FROM:	*R v Chaarani & Ors* (Unreported, 9 May 2019, Supreme Court of Victoria, Justice Tinney (Conviction))

CRIMINAL LAW — Appeal — Conviction — Offences of engaging in and attempting to engage in a terrorist act under *Criminal Code* (Cth) — Whether permissible for uncharged State offence to be alternative to charged Commonwealth offence — Whether State offences of arson and attempted arson should have been left to the jury as alternatives — Whether trail judge should have stayed the trial until State offences added to indictment — Arson and attempted arson not alternatives to engaging in and attempting to engage in a terrorist act — Appeals dismissed.

APPEARANCES:	Counsel	Solicitors
For the Applicant A Chaarani	Mr P Tehan QC with Mr L Richter	James Dowsley & Associates
For the Applicant A Mohamed	Mr J Kelly SC with Ms G Connelly	Leanne Warren & Associates

For the Applicant H Moukhaiber	Ms F Gerry QC with Mr J Anderson	Stary Norton Halphen
For the Respondent	Mr N Robinson QC with Mr A Sim	Commonwealth Director of Public Prosecutions

PRIEST JA
KAYE JA
T FORREST JA:

Introduction and overview

1 An indictment filed in the Supreme Court charged Ahmed Mohamed ('Mohamed') and Abdullah Chaarani ('Chaarani') with attempting to engage in a terrorist act (charge 1);[1] and charged Mohamed, Chaarani and Hatim Moukhaiber ('Moukhaiber') with engaging in a terrorist act (charge 2).[2]

2 A jury, empanelled on 1 April 2019, returned verdicts of guilty against the three on the charges laid against them on 9 May 2019; and, on 24 July 2019, the judge sentenced them to lengthy periods of imprisonment.[3]

3 The 'terrorist act' the subject of both charges involved attacks upon a Shia Islamic community prayer and religious centre, the Imam Ali Islamic Centre ('the mosque'), located in Fawkner. Mohamed and Chaarani set fire to the mosque in the early hours of 25 November 2016, intending to destroy it, but failed in that attempt (charge 1). In the early hours of 11 December 2016, however, Mohamed, Chaarani and Moukhaiber once more set fire to the mosque, leading to its substantial destruction (charge 2).

4 Evidence led by the prosecution at trial tended to establish that Mohamed, Chaarani and Moukhaiber (collectively, 'the applicants') supported, and adhered to the ideology of, the militarist terrorist organisation Islamic State ('IS'). The ideology of IS is based on an extreme version of Sunni Islam, the aim of which is to establish a caliphate to rule over all Muslims. Prosecution evidence also demonstrated that,

---

1 *Criminal Code (Cth)*, ss 101.1(1), 11.1(1) and 11.2A. The maximum penalty is life imprisonment.

2 *Criminal Code (Cth)*, ss 101.1(1) and 11.2A. The maximum penalty is life imprisonment.

3 On 24 July 2019, the trial judge sentenced Mohamed and Chaarani each to total effective sentences of 22 years' imprisonment (representing eight years' imprisonment on charge 1, and 18 years' imprisonment on charge 2, with effective cumulation of four years), and fixed a non-parole period of 17 years; and Moukhaiber to 16 years' imprisonment with a non-parole period of 12 years. See *R v Mohamed, Chaarani & Moukhaiber* [2019] VSC 498.

from the time of the establishment of the caliphate in 2014, IS promoted 'anti-Western' and sectarian violence. Those who did not agree with the IS interpretation of Islam were the targets of that violence. IS supporters considered Shia Muslims to be apostates, deserving particular attention. On the prosecution case, the terrorist acts which were the foundation of the two charges were perpetrated by the applicants because of their hatred of Shia Muslims, and their desire to intimidate them as part of their desire to advance the IS cause.

5 At the close of the prosecution case on 29 April 2019, counsel for Chaarani submitted that attempted arson and arson (under State law) should be left to the jury as an alternative verdict to the two offences (under Commonwealth law) charged on the indictment. Counsel for Mohamed joined in that submission, and counsel for Moukhaiber also submitted that an alternative verdict of arson be left on the single charge that he faced. The judge's refusal to leave arson to the jury as an alternative verdict[4] lies at the heart of the applicants' cases in this Court.

6 Each applicant relies on a ground which contends that the judge erred in ruling that the State offence of arson — and, in Chaarani's and Mohamed's case, attempted arson — not be left as possible alternative verdicts.

7 Chaarani and Moukhaiber also seek to rely on a ground contending that the

> unavailability of arson as an alternative verdict to the charge of engaging in a terrorist act occasioned a substantial miscarriage of justice.

8 In our view, for the reasons that follow, neither ground can be upheld.

Legislative provisions: engaging in a terrorist act and arson

9 By virtue of s 101.1(1) of the *Criminal Code (Cth)* ('the Code'), a person commits an offence 'if the person engages in a terrorist act', the prescribed maximum penalty for which is imprisonment for life.

---

4 *R v Mohamed, Chaarani & Moukhaiber (Ruling 9)* [2019] VSC 520 ('Ruling').

10 Section 100.1(1) of the Code defines *terrorist act* as follows:

> ***terrorist act*** means an action or threat of action where:
>
> (a) the action falls within subsection (2) and does not fall within subsection (3); and
>
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
>
> (c) the action is done or the threat is made with the intention of:
>
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
>
> (ii) intimidating the public or a section of the public.

11 And subsections (2) and (3) provide:

> (2) Action falls within this subsection if it:
>
> (a) causes serious harm that is physical harm to a person; or
>
> (b) causes serious damage to property; or
>
> (c) causes a person's death; or
>
> (d) endangers a person's life, other than the life of the person taking the action; or
>
> (e) creates a serious risk to the health or safety of the public or a section of the public; or
>
> (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
>
> (i) an information system; or
>
> (ii) a telecommunications system; or
>
> (iii) a financial system; or
>
> (iv) a system used for the delivery of essential government services; or
>
> (v) a system used for, or by, an essential public utility; or
>
> (vi) a system used for, or by, a transport system.
>
> (3) Action falls within this subsection if it:
>
> (a) is advocacy, protest, dissent or industrial action; and
>
> (b) is not intended:
>
> (i) to cause serious harm that is physical harm to a person; or
>
> (ii) to cause a person's death; or
>
> (iii) to endanger the life of a person, other than the person taking the action; or
>
> (iv) to create a serious risk to the health or safety of the public or a section of the public.

12 For practical purposes, therefore, the action of setting fire to the mosque, causing serious damage to it, might qualify as engaging in a 'terrorist act', if the action was done with the intention of advancing a political, religious or ideological cause of IS, and with the intention of intimidating Shia Muslims. (Correspondingly, attempting to cause serious damage to the mosque by fire, done with the relevant intention, might qualify as an attempt to engage in a terrorist act.) The criteria in subsections (2) and (3) would then be determinative.

13 Self-evidently, by their verdict on charge 2, the jury must have been satisfied beyond reasonable doubt that the applicants were complicit in setting fire to the mosque, causing it serious damage, and that they did so intending to advance a political, religious or ideological cause and to intimidate the public or a section of the public, in circumstances where the act was not advocacy, protest, dissent or industrial action (or if it may reasonably have been advocacy, protest, dissent or industrial action, was intended to cause death or serious physical harm to a person; or to endanger the life of a person, other than the person taking the action; or to create a serious risk to the health or safety of the public or a section of the public). Correspondingly, the jury's verdict on charge 1 demonstrates that they must have been satisfied that Chaarani and Mohamed attempted to cause serious damage to the mosque by setting fire to it, and that they did so with the relevant intent.

14 Arson is an offence under State law. By virtue of ss 197(1), (6) and (7) of the *Crimes Act 1958* (Vic), any person who by fire intentionally and without lawful excuse destroys or damages any property belonging to another commits the offence of arson, attracting a maximum penalty of 15 years' imprisonment.

15 In the present case, conviction for engaging, or attempting to engage, in a terrorist act, exposed the applicants to life imprisonment, whereas conviction for arson would have exposed them to a maximum penalty of 15 years' imprisonment.[5]

---

[5] Attempted arson attracts a maximum penalty of 10 years' imprisonment. See *Crimes Act 1958*, ss 197(7) and 321P(1).

Summary of the offending

16 At trial, the prosecution relied on a body of evidence demonstrating the applicants' support for IS, including a significant number of photographs, videos, documents and other items found on the their mobile telephones (and telephones of others connected to them); their involvement in various 'WhatsApp' group chats; and text messages that they sent and received. The prosecution also relied on the applicants' presence in Chaarani's motor vehicle on 22 December 2016 when an IS propaganda video was played; and attempts by Mohamed and Chaarani to leave Australia in mid-2015 (and the subsequent cancellation of their passports).

17 With respect to the first charge, Mohamed messaged Chaarani at 2.10 pm on 24 November 2016, informing him that he had a big surprise for him which he would love, and telling him to make no plans for that night. CCTV footage from the mosque at about 1.30 am the next morning, 25 November 2016, showed Mohamed and Chaarani within the mosque property. It appears that they had driven to the area, then scaled the fence on the property's eastern border. The footage showed Mohamed walking along a corridor to the north of the foyer to the male prayer room. Wearing a long-sleeved hooded jumper with the hood over his head to conceal his face, Mohamed entered the foyer carrying a hammer (or similar). He spent a short time in the foyer, before leaving the room and disappearing from view. Mohamed reappeared after a couple of minutes in the company of Chaarani, who was also wearing a hooded jumper concealing his face. Chaarani was carrying a container that held petrol (or other accelerant).

18 The two proceeded to the foyer and gained access to the male prayer room. They took steps to disable a video camera on a wall, and removed a decorative flag from the wall and placed it on the floor. Accelerant was then spread over the flag (and an underlying rug), which they then ignited. They also spread accelerant on another area of rug and ignited it, then left the prayer room. Shortly afterwards, Mohamed and Chaarani left the mosque, having in the meantime smashed two external glass windows of the foyer. Their attempt at destroying the mosque was,

however, unsuccessful, because the fires lit in the male prayer room extinguished themselves, causing only limited damage.

19 As to the second charge, at some time after the failed attempt by Mohamed and Chaarani to destroy the mosque, they recruited Moukhaiber. Evidence in the prosecution case revealed that the three men were in close contact in the days leading up to 11 December 2016, when the mosque ultimately was destroyed by fire. They arrived at the mosque shortly before 2.28 am on 11 December 2016. Using a spray can, Chaarani wrote some graffiti in Arabic on the external wall of a demountable building adjacent to the glass-windowed foyer of the male prayer room. The uppermost of two lines translated as 'The State of Islam' — Chaarani having inadvertently omitted the suffix which would have rendered the meaning, 'The Islamic State' — and the lower line translated to 'Remaining', part of the IS motto, 'Remaining and Expanding'.

20 Chaarani then walked to the western wall of the mosque, and, using the spray can, painted two lines of text. The uppermost line, in Arabic, translated into English, read, 'The State of Islam'; and the lower line, in English, read, 'The Islamic State'.

21 Chaarani having spray-painted the graffiti on the western wall, he, Mohamed and Moukhaiber went towards the entrance to the foyer of the female prayer room on the southern side of the building. Mohamed was carrying a car tyre and a 20 litre plastic container full of petrol. Moukhaiber was carrying a car tyre. The three gained access to the female prayer room. They then proceeded to the male prayer room, where they placed the two car tyres on the rugs on the floor of the room, near a large timber lectern. Petrol from the container was poured on the car tyres and surrounding floor and then set alight. They then ran from the mosque, and fled the area in Chaarani's motor vehicle. CCTV footage showed smoke on the outside of the mosque at about 2.31 am. At about 2.42 am, nearby residents saw smoke and flames emanating from the mosque and calls to emergency services were made. As a result of the fire, the internal areas of the mosque sustained very severe and widespread damage, requiring demolition. An insurance assessment of the value of the loss put

it at $1,590,352.30.

The defence cases

22 In responding to the prosecution's opening to the jury, senior counsel for Chaarani — much to the surprise of the prosecution and the trial judge — told the jury that Chaarani admitted 'that he attempted to burn down the mosque on 25 November 2016 and did substantially succeed in doing so on 11 December 2016', but that 'he did so with the intention of advancing a political religious or ideological cause, namely the advancement of Sunni Islam'. Senior counsel told the jury that 'the issue' between the prosecution and his client was 'the last element common to both charges' (that is, 'was the action done as advocacy, protest, dissent or industrial action?').

23 By way of contrast, senior counsel for Mohamed — who had responded to the prosecution opening prior to the address by Chaarani's senior counsel — informed the jury that

> Mr Mohamed denies trying to burn down the Imam Ali Islamic Centre in Fawkner on 25 November 2016. He denies being there, denies planning to destroy it by fire, denies participating. He denies attending the mosque and burning it down on 11 December 2016. Again, denies planning for it, denies driving there, denies attending, denies going inside, denies lighting anything or helping anybody to do such.

24 And after the response of Chaarani's senior counsel, senior counsel for Moukhaiber told the jury that

> Hatim Moukhaiber had nothing to do with the events on 25 November 2016 … [and] he had nothing to do with the events of 11 December 2016.

25 At no time prior to the close of the prosecution case did any of the counsel for the applicants suggest that arson (and attempted arson) might be an alternative verdict available on a charge of engaging in a terrorist act (or attempting to engage in a terrorist act), notwithstanding that the prosecution had specifically informed the judge pre-empanelment that arson was not regarded as an alternative, and would not be included on the indictment alongside the charged offences.

Trial judge refuses to leave arson and attempted arson as alternatives

26 Once the prosecution case closed, and counsel for each applicant indicated that they did not intend to call any evidence, the judge and counsel embarked on the exercise contemplated by s 11 of the *Jury Directions Act 2015*.[6]

27 In the course of discussion, senior counsel for Chaarani submitted that attempted arson and arson respectively should be left to the jury as an alternative on charges 1 and 2 on the indictment. Senior counsel for Mohamed made a similar submission, and senior counsel for Moukhaiber submitted that the alternative verdict of arson should be left on the charge that he faced.

28 The prosecution opposed leaving the suggested alternatives to the jury.

29 We need not set out in any detail the judge's reason for refusing to leave the suggested alternatives to the jury, but they included: first, the constituent elements of arson are not 'necessarily included' in the elements of the offence of engaging in a terrorist act, so that s 239 of the *Criminal Procedure Act 2009* ('CPA') had no application;[7] secondly, the late raising of the suggested alternatives was unsatisfactory, and would tell strongly against the alternatives being left;[8] and, thirdly, no unfairness would flow to the defence if the alternatives were not left.[9] His Honour expressly concluded that

> even had I decided that it would be permissible as a matter of law to leave the offences of arson and attempted arson as alternatives under s 239 of the [CPA], I would have considered it to be in the interests of justice that such alternatives not be left for the consideration of the jury under s 240.

The applicants' submissions in this Court

Chaarani's submissions

30 In oral submissions, senior counsel for Chaarani opened his case in this Court

---

6 See below at [60].

7 Ruling [51]–[56].

8 Ibid [59]–[72].

9 Ibid [73]–[7].

in the following way:

> The applicant Chaarani's trial was rendered unfair in a fundamental way. The failure of the trial judge to leave the offence of arson in one way or another rendered his trial fundamentally unfair. That unfairness arose because it was his defence. … That he was guilty of arson.

31 Chaarani's counsel submitted orally that 'arson should have been left either … as a statutory alternative, or as a practical alternative'. Counsel submitted (orally and in writing) that whether an alternative is available depends upon whether the elements of the alternative offence are expressly or impliedly included in the allegations contained in the indictment: not the 'theoretical' elements of the charged offence, but within the actual terms within which the particular offence has been charged. So much, it was submitted, reflects the plain terms of s 239 of the CPA. Section 239 reflects the former s 421(2) of the *Crimes Act 1958*, which in turn reflected the common law.[10] It was submitted that whether an alternative is available does not depend on whether the alternative is open on the evidence in the trial.[11]

32 Counsel for Chaarani contended that *Salisbury* does not stand for the proposition that the availability of an alternative depends on the elements of the alternative offence being included or subsumed within the elements of the charged offence.[12] Instead, so it was submitted, *Salisbury* stands for the proposition that an alternative offence is available to an accused if it is a 'lesser felony that is necessarily included in the *offence* with which he is charged'.[13] Neither *Salisbury* nor *Lillis*,[14] counsel argued, require that the elements of the alternative be included in the elements of the offence charged, but simply that they are included in the offence charged. On a plain reading, Chaarani's counsel submitted, s 239 of the CPA requires that the allegations in the putative alternative offence be included within the allegations of the charged offence, but not its elements (or ingredients).

---

10 *Pollard v The Queen* (2011) 31 VR 416, 423 [33] ('*Pollard*').

11 *R v Salisbury* [1976] VR 452, 454 ('*Salisbury*').

12 See *Reid v The Queen* (2010) 29 VR 446, 450 [15] ('*Reid*').

13 *Salisbury*, 454.

14 *R v Lillis* [1972] 2 QB 236 ('*Lillis*').

33 With respect to charge 2, Chaarani's counsel submitted, the allegations in the indictment were of engaging in a terrorist act, but doing so by lighting a fire which resulted in serious property damage. Since causing destruction of property by fire would also found the offence of arson pursuant to ss 197(1), (6) and (7) of the *Crimes Act 1958*, the alternative verdict of arson (and of attempted arson on charge 1), was available under s 239 of the CPA.

34 Chaarani's counsel argued that s 239 applied notwithstanding that the indictment charged Commonwealth offences and that arson and attempted arson were offences against State law. Commonwealth and State offences, it was submitted, are often included on the same indictment.[15] The mere fact that was not done here does not preclude Commonwealth and State charges being tried in the one trial.[16] Section 239 of the CPA is applicable to the trial of Commonwealth offences by ss 68 and 79 of the *Judiciary Act 1903* (Cth). The effect of those provisions is, with respect to trial on indictment for a Commonwealth offence, to pick up the criminal procedure provided for in State legislation.[17] Further, counsel submitted, there is no conflicting Commonwealth law that would oust the operation of s 239 of the CPA upon a trial for a Commonwealth offence. Nor is there any inconsistency between the operation of a federal and State law that would engage s 109 of the *Constitution*. Observations in *Fattal*[18] are obiter dicta, and are not authority for the proposition that a State offence cannot be an alternative on a trial for a Commonwealth offence.

35 Counsel for Chaarani submitted that, on the assumption that a State offence could be left as an alternative on the trial of a charge for a Commonwealth offence, several factors dictated that the trial judge should have exercised his discretion in favour of leaving the alternative of arson (and attempted arson): first, the applicant had conceded that the elements of arson were made out; secondly, the evidence

---

15 See *R v Nicola* [1987] VR 1040.

16 Cf *Dickson v The Queen* (2010) 241 CLR 491.

17 See *R v LK* (2010) 241 CLR 177, [13] (French CJ).

18 *DPP (Cth) v Fattal* [2013] VSCA 276, [122] (Buchanan AP, Nettle and Tate JJA) ('*Fattal*').

included a large amount of material showing that the applicant may have held extremist or radicalised views, which inevitably would leave the jury with the impression that the applicant may be a dangerous individual; thirdly, the evidence also showed that — setting aside the question of terrorism — the applicant had committed a serious and dangerous criminal offence; fourthly, in circumstances in which the jury were exposed to evidence that showed that the applicant held dangerous extremist views, and had committed a serious and dangerous offence, it was unfair to require the jury to make an 'all-or-nothing decision'; and, fifthly, if the jury were narrowly split (or even tending towards finding that the evidence fell short of establishing the charged offence), they would be placed on the horns of a dilemma with no alternative verdict available.

36 It was submitted by Chaarani's counsel that even if the jury were not satisfied of the applicant's guilt on the charged offence, they would be subject to the pressure of the imperative of keeping a dangerous criminal imprisoned. Their choice would be between two unconscionable alternatives: first, endangering society and the community by releasing at large a dangerous arsonist with extremist views; or, secondly, convicting in order to protect the community, such a verdict being based on evidence which had a limited purpose in the proceeding. A jury should not, if it can be avoided, be placed in an artificial 'all or nothing' position. But that is precisely what the refusal to leave the alternative of arson (and attempted arson) did.

37 Counsel for Chaarani contended that, although considerable prejudice flowed to the applicant as a result of the jury being placed in that position, there was no prejudice that could have flowed to the prosecution by reason of the failure to leave an alternative. The applicant was, in effect, conceding certain elements of the charged offence by conceding all of the elements of the desired alternative. In a situation where, by concession, the applicant removed from the prosecution the obligation to prove various matters, it is an absurdity to suggest that any prejudice might flow to the prosecution by permitting the jury to return a verdict of guilty on a charge on which the applicant admitted guilt. The prosecution, so counsel

submitted, would not have altered (or had to have altered) their case in any respect. There was no need to. The applicant was admitting guilt of the alternative in a way which did not detract from the evidence on the charged offence. As to the suggestion that the availability of an alternative had not previously been raised, it was submitted that the matter had been alluded to in the response to the prosecution opening. Thus, so it was submitted, any suggestion that the Court or the prosecution were not on notice is technical in the extreme.

38 The timing of the formal request for the alternative to be left was in complete accordance with the requirements of the *Jury Directions Act 2015*. If, however, it could legitimately be said that any prejudice flowed from the point at which, or the manner in which, the leaving of the alternative was requested, such prejudice would merely be technical in nature, and would pale in comparison to the substantial prejudicial effect flowing from the failure to leave to the jury a viable alternative.

Moukhaiber's submissions

39 To a large extent, the submissions of Moukhaiber's counsel echoed those made on Chaarani's behalf, so that it is unnecessary to recapitulate a deal of what was advanced. Counsel did, however, submit that *Reid* was 'incorrectly decided or ought to be revisited given the issues that arise in this case'. The proper approach to the interpretation of 'allegations' in s 239 of the CPA is to consider whether the elements in the proposed alternative offence are entirely subsumed by the principal offence, or, alternatively, whether the elements in the proposed alternative offence are capable of being implied from the allegations in the indictment. Insofar as the decision in *Reid* places sole emphasis on the offence charged and its elements it is inconsistent with the plain words of s 239. It was submitted that the position now adopted in England following *Wilson*[19] was to be preferred.

40 As to the power to leave a State offence as an alternative to a Commonwealth

---

19 *R v Wilson* [1984] AC 242 ('*Wilson*').

charge, Moukhaiber's counsel submitted that there was no binding precedent on the point. Counsel contended that the relevant observations in *Fattal*[20] are mere dicta, unsupported by authority or principle.

41 Under cover of ground 2, Moukhaiber's counsel submitted that, in the face of the prosecution's refusal to charge arson as an alternative, it had been open to avoid a miscarriage of justice by permitting the filing over of a new indictment (under s 164 of the CPA), or by ordering the amendment of the indictment to add a charge (under s 165 of the CPA), to add a charge of arson. Insofar as the consent or cooperation of the prosecution was required to adopt either of these steps, the judge could have ordered a temporary stay until the prosecution complied.

42 Notwithstanding the submissions advanced that the judge should have stayed the indictment, senior counsel for Moukhaiber had to concede that the trial judge was neither asked to stay the indictment until a charge of arson was left as an alternative, nor to discharge the jury when it became clear that it would not be. Senior counsel also conceded that, prior to the response of Moukhaiber's counsel to the prosecution opening, it had never been suggested to the trial judge on her client's behalf that arson should be left as an alternative to the charged offence.

Mohamed's submissions

43 Mohamed's counsel reprised many of the submissions of other counsel. On its plain reading, counsel submitted, s 239 of the CPA does not exclude an alternative simply because the elements of the alternative offence are not expressly included with the main offence. An alternative is also available if it is impliedly within the main offence. It is the 'allegations' which must be included, not necessarily the elements. The alternative verdict of arson (and attempted arson) was available on a charge of committing a terrorist act (and attempting to do so) where the allegations were of a terrorist offence committed by destroying something with fire. So much is

---

20 *Fattal*, [122].

consistent with destruction (or damage) of property by fire, which would found allegations within ss 197(1), (6) and (7) of the *Crimes Act 1958*.

44 Counsel for Mohamed submitted that Commonwealth and State offences are often included on the same indictment. The mere fact that was not done here does not preclude State and Commonwealth charges being tried in the one trial. Section 68 of the *Judiciary Act 1903* (Cth) picks up the relevant provisions of the CPA. The remarks in *Fattal* that suggest that a State offence cannot be an alternative to a charged Commonwealth offence are obiter.

45 In oral submissions, senior counsel for Mohamed submitted that the Supreme Court was exercising federal jurisdiction in the applicants' trial. Counsel submitted that *Rizeq*[21] provided a 'pathway for the laying of a State charge and if that's right, then arson could be left'. Relying on *Rizeq*,[22] senior counsel submitted that State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction in the same way, and for the same reason, as they form part of the same single composite body of law that is applicable to cases determined in the exercise of State jurisdiction — because they are laws. *Rizeq*, counsel submitted, supports the proposition that a State offence may be left as an alternative to a charged Commonwealth offence.

Summary of the applicants' submissions

46 In summary, the following principal contentions may be distilled from the arguments advanced on behalf of the applicants:

- The failure to leave arson (and attempted arson) as possible alternative verdicts on the charge of engaging in a terrorist act (and attempting to engage in a terrorist act) rendered the applicants' trial fundamentally unfair (Chaarani's counsel going so far as to suggest that arson, and attempted arson, was

---

21 *Rizeq v Western Australia* (2017) 262 CLR 1, 19–20 [38]–[40] (Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Rizeq*').

22 Ibid 24 [56]. Counsel also referred ibid 41 [103].

Chaarani's 'defence').

- Arson (and attempted arson) should have been left either as a 'statutory alternative' or as a 'practical alternative'.
- Section 239 of the CPA is picked up by ss 68 and 79 of the *Judiciary Act 1903* (Cth).
- Arson (and attempted arson) are alternatives to the Commonwealth offence of engaging in a terrorist act (and attempting to engage in a terrorist act). Observations in *Fattal* that might suggest the contrary are obiter dicta.
- No conflicting Commonwealth law ousts the operation of s 239 of the CPA on the trial of a Commonwealth offence; and no inconsistency between the operation of a federal and State law engages s 109 of the *Constitution*.
- Given the use of the term 'allegations' in s 239 of the CPA, the proper approach is to consider whether the elements in the proposed alternative offence are entirely subsumed within the principal offence, or, alternatively, whether the elements in the proposed alternative offence are capable of being implied from the allegations in the indictment. (Allied to this submission were the contentions that: first, *Salisbury* does not stand for the proposition that the availability of an alternative depends on the elements of the alternative offence being included or subsumed within the elements of the charged offence; secondly, *Reid* was wrongly decided and should not be followed; and, thirdly, *Wilson* represents the preferred position.)
- In this case, the allegations in the indictment were of engaging (or attempting to engage) in a terrorist act, by lighting a fire which resulted in serious property damage. Given that causing destruction of property by fire would also found the offence of arson pursuant to ss 197(1), (6) and (7) of the *Crimes Act 1958*, the alternative verdict of arson (and of attempted arson on charge 1), was available under s 239 of the CPA.
- The Supreme Court was exercising federal jurisdiction in the applicants' trial. *Rizeq* provided a 'pathway' for the laying of a State charge of arson (and

attempted arson) — since State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction — and supports the proposition that a State offence may be left as an alternative to a charged Commonwealth offence.

- In the face of the prosecution's refusal to include arson (and attempted arson) as a charged alternative, it had been open to the trial judge to avoid a miscarriage of justice by staying the proceeding until the prosecution filed over a new indictment under s 164 of the CPA, or amended the indictment under s 165 of the CPA, to add an alternative charge (or charges).
- On the assumption that a State offence could be left as an alternative on the trial of a charge for a Commonwealth offence, several identified factors dictated that the trial judge should have exercised his discretion in favour of leaving the alternative of arson (and attempted arson).
- Although considerable prejudice flowed to the applicant as a result of the jury being deprived of the opportunity of considering an alternative, no prejudice could have flowed to the prosecution by the leaving of an alternative.
- The timing of the request for the alternative to be left was in accordance with the requirements of the *Jury Directions Act 2015*.

The respondents' submissions in this Court

47 The respondent's counsel submitted that there is no statutory path by which the State offence of arson (or attempted arson) could be left as an alternative to a charged Commonwealth offence of engaging in a terrorist act (or attempting to engage in a terrorist act).

48 Counsel for the respondent submitted that the applicants' trial was conducted in the Supreme Court exercising federal jurisdiction invested by s 68(1) of the *Judiciary Act 1903* (Cth). The exercise of federal jurisdiction was pursuant to s 68(2)

of the *Judiciary Act*,[23] which provides that a Court of a State or Territory exercising jurisdiction with respect to the trial and conviction on indictment 'of offenders or persons charged with offences against the laws of the State … shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth'.

49 Further, it was submitted that s 79(1) of the *Judiciary Act* picks up the text of a State law governing the exercise of State jurisdiction and applies that text as a Commonwealth law to govern the manner of exercise of federal jurisdiction.[24] But s 79(1) 'is not directed to, and it does not add to or subtract from, laws which are determinative of the rights and duties of persons as opposed to the manner of exercise of jurisdiction'.[25] Section 79(1) picks up State laws directed to the manner of exercising jurisdiction, but does not pick up the substantive provisions of State legislation.[26] Thus, s 79(1) of the *Judiciary Act* could not 'pick up' the offence of arson in s 197 of the *Crimes Act 1958*.

50 Counsel for the respondent accepted that, by virtue of ss 68 and 79 of the *Judiciary Act*, s 239 of the CPA was picked up and was applicable to the applicants' trial. It needed to be understood, however, that the reference in s 239 to 'another offence that is within the jurisdiction of the court' must be read in the context of a State court exercising federal jurisdiction. Counsel submitted that s 239 of the CPA operates as a surrogate federal law, and must be read as referring only to an offence that is within federal jurisdiction (that is, an offence against the law of the Commonwealth). Hence, although s 239 might permit an alternative verdict for a Commonwealth offence on an indictment charging another Commonwealth offence, it did not permit an alternative verdict for a State offence on an indictment charging a Commonwealth offence. This approach, counsel submitted, was in accordance

---

23 *Solomons v District Court of New South Wales and Ors* (2002) 211 CLR 119, 128 [3] ('*Solomons*').

24 Ibid 26 [63].

25 *Masson v Parsons and Others* (2019) 368 ALR 583, 593 [3] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Masson*'), citing *Rizeq*, 41 [105].

26 *Rizeq*, 41 [103]–[105].

with *Fattal*,[27] which should be followed and applied.

51 Counsel for the respondent submitted that the institution of charges for both State and Commonwealth offences in a joint indictment is an executive decision, the laying of State charges by an authorised member being permitted by statute.[28] On a trial of such a joint indictment, the State charges are dealt with pursuant to State jurisdiction, and the Commonwealth charges pursuant to federal jurisdiction.

52 Furthermore, counsel for the respondent submitted that, even were s 239 of the CPA considered theoretically to have been applicable in the applicants' trial, arson could not be considered to be an alternative to engaging in a terrorist act, since the elements of arson are not necessarily included in the offence of engaging in a terrorist act. As was observed in *Reid*, 'an offence is not an included offence unless one can say of it that the elements of every instance of the charged offence necessarily include all the elements of the included offence'.[29]

53 The respondent's counsel submitted that the applicants' submissions concerning *Reid* and *Salisbury* should not be accepted. Indeed, the Court recently had considered the issue of alternative verdicts in *Mareangareu*,[30] where it was made clear that an accused might be convicted of a lesser offence than that charged, provided that the definition of the more serious offence necessarily included the definition of the lesser offence.

54 Moreover, counsel for the respondent submitted that, even were arson to be considered an alternative to engaging in a terrorist act, the judge was correct not to leave it. Among other things, the respondent's counsel relied on the timing of the defence application that the alternative be left, and the suggested unavoidable prejudice that would be caused to the prosecution case.

---

27 *Fattal*, [120]–[123].

28 See *Director of Public Prosecutions Act 1983* (Cth), ss 9 and 17.

29 *Reid*, 450 [15].

30 *Mareangareu v The Queen* [2019] VSCA 101 (Priest, Hargrave and Emerton JJA) ('*Mareangareu*').

55 Finally, counsel for the respondent submitted that no substantial miscarriage of justice was occasioned by the failure of the prosecution to lay a State charge of arson concurrently with the Commonwealth offence of engaging in a terrorist act, or by the failure of the trial judge by some other means to ensure that the alternative was available to the jury. Subject to considerations of abuse of process, it is for the prosecution, not the court, to decide the charges upon which to proceed.[31]

Analysis

The decision to charge

56 In *McCready*,[32] Young CJ (with whom McGarvie and Ormiston JJ agreed) made it plain that

> it is for the Crown to decide upon what offences an accused person is brought to trial by way of presentment or indictment, and, although the Court unquestionably has power to prevent an abuse of its process, it is not for the Court to decide, speaking generally, upon what offence the Crown should proceed.

57 And in *Maxwell*, Gaudron and Gummow JJ observed:[33]

> It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute,[34] to enter a nolle prosequi,[35] to proceed ex officio,[36] whether or not to present evidence[37] and, which is usually an aspect of one or other of those decisions, *decisions as to the particular charge to be laid or prosecuted*.[38] *The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be*

---

31 *R v McCready* (1985) 20 A Crim R 32, 39 ('*McCready*'); *Maxwell v The Queen* (1996) 184 CLR 501, 534 ('*Maxwell*'). See also *DPP (SA) v B* (1998) 194 CLR 566, 580 [21]; *Likiardopoulos v The Queen* (2012) 247 CLR 265; *James v The Queen* (2014) 253 CLR 475, 490 [37].

32 *McCready*, 39.

33 *Maxwell*, 534 (citations as in original; emphasis added).

34 See *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1277; *R v Humphrys* [1977] AC 1 at 46: *Barton v The Queen* (1980) 147 CLR 75 at 94–95, 110.

35 See *R v Allen* (1862) 1 B & S 850 [121 ER 929]; *Barton v The Queen* (1980) 147 CLR 75 at 90–91.

36 See *Barton v The Queen* (1980) 147 CLR 75 at 92–93, 104, 107, 109.

37 See, eg, *R v Apostilides* (1984) 154 CLR 563 at 575.

38 See *R v McCready* (1985) 20 A Crim R 32 at 39; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 604–605.

compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.[39]

58 In the present case, the Commonwealth Director of Public Prosecutions ('DPP') chose to prosecute the applicants on indictment[40] for the indictable offences[41] of attempting to engage in, and engaging in, a terrorist act. Although, quite plainly, the DPP could have included charges for the State offences of arson and attempted arson on the indictment[42] alongside the charges for the two Commonwealth offences,[43] the DPP chose not to do so. As a matter of principle, and as a general rule, the failure of the DPP to include charges on an indictment cannot be susceptible of judicial intervention or control.

59 That general rule must, of course, be considered in the light of the Supreme Court's power to control an abuse of its processes (a matter to which we will return when we consider the submission by Moukhaiber's counsel that the trial judge ought to have stayed the proceeding at the conclusion of the prosecution case until by some mechanism the prosecution added charges of arson and attempted arson to the indictment).[44] As we followed their arguments, however, none of the applicants' counsel contended that — at least up to the point that the prosecution closed its case — it was an abuse of process for the DPP to prosecute, and the applicants' trial to proceed, on the indictment as initially framed.

Section 239 of the Criminal Procedure Act 2009

60 As we have mentioned, throughout the trial none of the applicants' counsel

---

39 *Barton v The Queen* (1980) 147 CLR 75 at 94–95; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 38-39, 54, per Brennan J; at 77–78, per Gaudron J; *Williams v Spautz* (1992) 174 CLR 509 at 548, per Deane J; *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75, per Gaudron J.

40 See *Director of Public Prosecutions Act 1983*, ss 9(1) and 9(2). See also *Judiciary Act 1903* (Cth), s 69.

41 Section 4G of the *Crimes Act 1914* (Cth) provides: 'Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears'.

42 *Director of Public Prosecutions Act 1983* (Cth), s 17.

43 *R v Nicola* [1987] VR 1040.

44 See [0]–[86] below.

had suggested that the State offences of arson or attempted arson could or should be left to the jury as possible alternative verdicts available on the Commonwealth offences specifically charged. That possibility was first distinctly floated by Chaarani's counsel at the conclusion of the prosecution case, in the context of the exercise contemplated by s 11 of the *Jury Directions Act 2015*. So far as relevant, s 11 provides:

> **11 Counsel to assist in identification of matters in issue**
>
> After the close of all evidence and before the closing address of the prosecution—
>
> (a) the prosecution must inform the trial judge whether it considers that the following matters are open on the evidence and, if so, whether it relies on them—
>
> (i) any alternative offence, including an element of any alternative offence;
>
> (ii) any alternative basis of complicity in the commission of the offence charged and any alternative offence; and
>
> (b) defence counsel must then inform the trial judge whether he or she considers that the following matters are or are not in issue—
>
> …
>
> (iii) any alternative offence, including an element of any alternative offence; …

61 Counsel for the applicants submitted to the trial judge and to this Court, that s 239 of the CPA permitted arson and attempted arson to be left as alternatives to the charged offences. Section 239 provides:[45]

> **239 Alternative verdicts on charges other than treason or murder**
>
> (1) On a trial on indictment for an offence other than treason or murder, if the jury finds the accused not guilty of the offence charged but *the allegations* in the indictment amount to or include, whether *expressly or impliedly*, *an allegation of another offence that is within the jurisdiction of the court*, the jury may find the accused guilty of that other offence.
>
> (2) For the purposes of subsection (1), an allegation of an offence includes an allegation of an attempt to commit the offence.

Is a State offence a statutory alternative to a Commonwealth offence?

62 It is common ground that in the applicants' trial the Supreme Court was

---

[45] Emphasis added.

exercising federal jurisdiction. So much is plain from a consideration of ss 68(1) and (2) of the *Judiciary Act 1903* (Cth), which provide (so far as relevant):

> **68 Jurisdiction of State and Territory courts in criminal cases**
>
> (1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, *and the procedure for*:
>
> …
>
> (c) *their trial and conviction on indictment*;
>
> …
>
> … shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.
>
> (2) The several Courts of a State or Territory exercising jurisdiction with respect to:
>
> …
>
> (c) the trial and conviction on indictment;
>
> of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution,[46] have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

63 When a State (or Territory) court is exercising federal jurisdiction in a trial such as the applicants', s 79(1) of the *Judiciary Act* operates so as to apply State laws governing criminal procedure (among other things). It provides:

> **79 State or Territory laws to govern where applicable**
>
> (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

64 The raison d'être for s 79 was explained in *Rizeq*. Having observed that State

---

46 Section 80 of the *Constitution* provides:

> **80 Trial by jury**
>
> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Parliaments have been recognised to have no power to add to or detract from federal jurisdiction;[47] and that, just as State Parliaments have no power to add to or detract from federal jurisdiction, State Parliaments have no power to command a court as to the manner of exercise of federal jurisdiction conferred on or invested in that court,[48] Bell, Gageler, Keane, Nettle and Gordon JJ observed:[49]

> The incapacity of a State Parliament to enact a law which governs the exercise of federal jurisdiction by a court, whether it be a federal court or a State court, explains the necessity for s 79 of the *Judiciary Act* and is the key to understanding the nature and extent of its operation. Section 79 is a law, enacted under s 51(xxxix) of the *Constitution*, which serves to ensure that the exercise of federal jurisdiction is effective. The section fills a gap in the law governing the actual exercise of federal jurisdiction which exists by reason of the absence of State legislative power. *The section fills that gap by picking up the text of a State law governing the exercise of State jurisdiction and applying that text as a Commonwealth law to govern the manner of exercise of federal jurisdiction. The section has no broader operation*.

65 In *Rizeq*, the appellant was a resident of New South Wales. He faced an indictment in the District Court of Western Australia for offences under the *Misuse of Drugs Act 1981* (WA). Since he was a resident of another State, his trial was conducted in the exercise of federal 'diversity jurisdiction' under s 75(iv) of the *Constitution*. Section 114(2) of the *Criminal Procedure Act 2004* (WA) regulated the exercise of State jurisdiction. It provided that, in the case of offences such as those with which the appellant was charged, a majority verdict of guilty by no less than 11 jurors could sustain a conviction. Since the Parliament of Western Australia lacks legislative power to command a State court exercising federal jurisdiction as to the manner of exercise of its jurisdiction, s 114(2) of the *Criminal Procedure Act* was incapable of applying of its own force. There was thus a gap in the laws that regulated the trial. As a result, s 79(1) of the *Judiciary Act* operated to pick up the text of s 114(2) of the *Criminal Procedure Act*, and apply it as a law of the Commonwealth governing the conduct of the trial. On the other hand, s 6(1)(a) of the *Misuse of Drugs*

---

47 *Rizeq*, 25 [60].

48 Ibid 26 [61].

49 Ibid 26 [61] (emphasis added). See also *Masson*, 593 [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

Act was a law addressed to the conduct of individuals, making them liable to be prosecuted for offences against that Act. The Act was determinative of the rights and duties of persons, as opposed to the manner in which jurisdiction was exercised. Section 6(1)(a) was therefore beyond the operation of s 79(1) of the *Judiciary Act*, and applied of its own force as a law of the State of Western Australia under which the accused was charged. It was observed:[50]

> Within the limits of State legislative capacity, State laws apply in federal jurisdiction as valid State laws unless and to the extent that they are rendered invalid by reason of inconsistency with Commonwealth laws. What State laws relevantly cannot do within the limits of State legislative capacity is govern the exercise by a court of federal jurisdiction. A State law can determine neither the powers that a court has in the exercise of federal jurisdiction nor how or in what circumstances those powers are to be exercised. A State law cannot in that sense 'bind' a court in the exercise of federal jurisdiction, and that is the sense in which that word is used in s 79 of the *Judiciary Act*. The operation of s 79 is limited to making the text of the State laws of that nature apply as Commonwealth law to bind a court in the exercise of federal jurisdiction.
>
> Section 114(2) of the *Criminal Procedure Act*, governing what is to be taken to be the verdict of a jury, is a useful illustration. Its application to a Western Australian court exercising federal jurisdiction is beyond the competence of the Parliament of Western Australia. Consistently with the prescription in s 7 of the *Interpretation Act 1984* (WA) that every written law of Western Australia is to be construed 'subject to the limits of the legislative power of the State', s 114(2) is properly interpreted as applying to a Western Australian court only when exercising Western Australian jurisdiction. The text of s 114(2) is applied, as Commonwealth law, to a Western Australian court when exercising federal jurisdiction through the operation of s 79 of the *Judiciary Act*, except as otherwise provided by the *Constitution* or by some other Commonwealth law. That is what occurred in the trial of Mr Rizeq, there being no provision of the *Constitution* or of other Commonwealth law preventing it.
>
> Section 6(1)(a) of the *Misuse of Drugs Act*, in contrast, is a law having application independently of anything done by a court. It is squarely within State legislative competence and outside the operation of s 79 of the *Judiciary Act*. It applied in the trial of Mr Rizeq as Western Australian law just as it applied to him before any court was called upon to exercise jurisdiction in relation to the charges brought against him.[51]

66 Since s 239 of the CPA is a State law governing the exercise of State jurisdiction, s 79 of the *Judiciary Act* is capable of picking it up and applying its text

---

50 *Rizeq*, 41 [103]–[105] (Bell, Gageler, Keane, Nettle and Gordon JJ) (citation as in original).

51 cf *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [23].

as a Commonwealth law to govern the manner of exercise of federal jurisdiction.[52] But, should it apply, s 239 'does not add to or subtract from, laws which are determinative of the rights and duties of persons as opposed to the manner of exercise of jurisdiction'.[53] Thus, although s 79(1) might pick up s 239 as a law which is directed to the manner in which jurisdiction is exercised, it cannot pick up the substantive provisions of State legislation which determine rights and duties. Quite clearly, s 79(1) of the *Judiciary Act* could not pick up the State statutory offences of arson and attempted arson for the purposes of the applicants' trial. Hence, since s 239 of the CPA is limited in its operation to 'another offence that is within the jurisdiction of the court', although it might in theory operate to permit an alternative verdict of one Commonwealth offence for another Commonwealth offence, it could not operate so as to make the State offences of arson and attempted arson possible alternatives to the Commonwealth offences charged.

67 Our view is fortified by *Fattal*. In that case, following the trial of a number of individuals, Nayef El Sayed was convicted of the Commonwealth offence of conspiring to do acts in preparation for, or planning, a terrorist act, contrary to ss 11.5(1) and 101.6(1) of the Code. One of El Sayed's grounds of appeal against conviction contended that a substantial miscarriage of justice had been occasioned by reason of the fact that the jury were not given the option of determining the alternative State offence of providing documents or information facilitating terrorists acts, under s 4B of the *Terrorism (Community Protection) Act 2003* (Vic). Rejecting that ground, the Court (Buchanan AP, Nettle and Tate JJA) observed:[54]

> That submission … faces difficulties at several levels. In the first place, the authorities which deal with the obligation of a trial judge to leave a lesser alterative count to a jury are confined to lesser included offences; meaning offences of which all of the elements are necessarily included in the offence charged.[55] The State offence created by s 4B of the *Terrorism (Community*

---

52 *Rizeq*, 26 [63].

53 *Masson*, 593 [30].

54 *Fattal*, [120]–[123] (citations as in original).

55 *R v Kane* (2001) 3 VR 542, 565–573; *R v Doan* (2001) 3 VR 349, 45 [26]-[27]; *R v Saad* (2005) 156 A Crim R 533, 563 [100].

> *Protection) Act 2003* is not a lesser included offence of the offence of conspiracy to commit an act in preparation for a terrorist act contrary to s 11 of the Criminal Code**.**
>
> In the second place, there is a body of authority that, apart from the obligation of a trial judge to leave manslaughter to a jury as an alternative to murder (where the circumstances allow),[56] there is no obligation on a judge to leave the possibility of a lesser alternative verdict to a jury unless defence counsel has applied for that to be done or at least where, as here, it may fairly be supposed that counsel's failure to request that the alternative count be left to the jury was the result of a considered decision.[57]
>
> In the third place, there is no authority for the idea, and still less in principle to commend it, that the obligation of a trial judge to leave a lesser included alternative offence to a jury operates as between Commonwealth offences and State offences or vice versa.
>
> In the fourth place, there is significant body of sentencing authority which implicitly supports the conclusion that there can be no such obligation as between Commonwealth and State offences.[58]

68 The applicants' counsel argued that the third observation above (in particular) is obiter dicta. We do not consider that it is, since it forms part of the reasoning which was dispositive of the ground of appeal. But even should the Court's remarks be thought to be obiter, we consider them to be highly persuasive.

69 For these reasons, s 239 of the CPA did not permit the State offences of arson and attempted arson to be left to the jury as uncharged alternatives to the charged Commonwealth offences.

The effect of s 239: Salisbury and Wilson

70 Even were a State offence capable of being left to the jury as a possible alternative verdict on a charged Commonwealth offence, however, in our view arson and attempted arson could not have been considered to be viable alternatives to engaging in a terrorist act or attempting to do so.

71 Recently, in *Mareangareu*, the Court examined the circumstances in which a

---

56 *Nguyen v The Queen* (2010) 242 CLR 491, 505 [50].

57 *James v R* [2013] VSCA 55, [13] (Maxwell P) and the cases there cited.

58 The leading decisions are analysed in the judgment of Redlich JA in *Pantazis v R* [2012] VSCA 160, [27]-[57]; affirmed on appeal, *Elias v The Queen* [2013] HCA 31.

verdict for an uncharged offence might be left to a jury as an alternative for a charged offence. In that case, in which the principal authorities in this area of discourse were discussed or adverted to, the Court ultimately held that common assault was not an uncharged alternative verdict available on a charge of intentionally causing serious injury. The Court observed:[59]

> At common law, an accused might be convicted of a lesser offence than that charged, provided that the definition of the more serious offence necessarily included the definition of the lesser offence and that both offences were of the same degree, that is to say, were either felonies or misdemeanours.[60]
>
> *Salisbury*[61] provides an example of the application of the common law rule. In that case, the applicant had been convicted of one count of maliciously inflicting grievous bodily harm. On appeal, the applicant contended that the trial judge ought to have directed the jury that they were entitled to find the applicant guilty of the lesser offences of assault occasioning actual bodily harm or common assault. It was submitted that the judge's failure to do so vitiated the verdict. Refusing leave to appeal against conviction, the Court said:[62]
>
> > The first question raised by the applicant's contention is: In what circumstances may a jury convict an accused of an offence not laid in the presentment? In some cases provision is made by statute for a jury to return what is sometimes for convenience called an 'alternative verdict'. See e.g. *Crimes Act 1958* s 423. It was not suggested that any such statutory provision applied in this case but it was said that at common law the alternatives suggested were open to the jury.
> >
> > The common law position with respect to alternative verdicts was stated by the Court of Appeal in *R v Lillis* [1972] 2 QB 236, at p 240; [1972] 2 All ER 1209; in these words: 'On an indictment charging felony the accused could be convicted of a less aggravated felony of which the ingredients were included in the felony charged and, similarly, as regards misdemeanours; but except under statute a conviction for a misdemeanour was not allowed on a charge of felony.' See also: *R v Taylor* (1869) LR 1 CCR 194; *R v O'Brien* (1911) 6 Cr App R 108; 22 Cox CC 374; *Smith v Desmond* [1965] AC 960, at p 970; [1964] 3 All ER 587; *R v Nisbett* [1953] VLR 298; *R v Williamson* [1969] VR 696.
> >
> > That is to say, where an accused is indicted for a felony the jury may find him guilty of any lesser felony that is necessarily included in the offence with which he is charged and where an accused is indicted for a misdemeanour the jury may find him guilty of any lesser misdemeanour that is necessarily included in the offence with which he is charged.
> >
> > Whether the lesser offence is necessarily included in the offence charged is a matter which has to be determined upon a consideration of the terms in which the offence is laid. It is not a matter which depends upon the evidence led at the trial, except to the extent that an accused cannot be found guilty of a lesser charge unless the evidence led supports a conviction on that charge.

---

59 *Mareangareu*, [37]–[38] (Priest, Hargrave and Emerton JJA) (citations as in original).

60 *Saraswati v The Queen* (1990) 172 CLR 1, 13 (Dawson J).

61 *R v Salisbury* [1976] VR 452 (Young CJ, Nelson and Harris JJ) ('*Salisbury*').

62 *Salisbury*, 454. See also *Reid v The Queen* (2010) 29 VR 446, 450 [15].

72 Having referred to the terms of s 239 of the CPA, the Court in *Mareangareu* went on to say:[63]

> In *LLW*, the Court explained the two principal kinds of case in which a jury may return an alternative verdict:[64]
>
> > There are two principal classes of case in which a jury may deliver an alternative verdict. The first is where allegations in the indictment 'amount to or include' the allegation of another offence. That is the position at common law and it is now reflected in a specific statutory provision.[65] For example, where the accused is charged with intentionally causing serious injury, the allegations include the allegation of intentionally causing injury, which is therefore an available alternative.[66]
> >
> > The second class of case is where the *Crimes Act 1958* ('the Act') creates a statutory alternative to the principal count. An example of the latter is s 425(1), which applies where a person is on trial for rape. If the jury are not satisfied that the defendant is guilty of rape or attempted rape, they may find the defendant guilty of one or other of several sexual offences specified in the subsection.
>
> As counsel for the applicant in this Court submitted, the question of whether an alternative offence is expressly or impliedly included in the indictment is answered by the application of what is often described as the 'red pencil test'. The red pencil test involves the deletion of words from the particulars of an offence contained in the indictment, thus leaving the particulars of an appropriate alternative offence.
>
> In *Lillis*,[67] which was applied in *Salisbury*, the Court discussed the application of the red pencil test.[68] Dealing with s 6(3) of the *Criminal Law Act 1967* (UK)[69] – which bears some similarity to s 239 of the *Criminal Procedure Act 2009* – the Court said:[70]
>
> > The problem in this case is whether the Criminal Law Act 1967, in seeking to put the common law rule and the provisions of certain statutes into the statutory form, has used words which prevent courts from taking a course which might

---

63 Ibid [43]–[45].

64 *LLW v The Queen* (2012) 35 VR 372, 374 [2]–[3] (Maxwell P, Weinberg JA and Williams AJA) ('*LLW*') (citations as in reported version).

65 *Criminal Procedure Act 2009* s 239(1): see *Pollard v R* (2011) 31 VR 416 at 423, [33] ('*Pollard'*).

66 *R v Kane* (2001) 3 VR 542 at 584–5, [105].

67 *R v Lillis* [1972] 2 QB 236 (Lord Widgery CJ, Edmund Davies and Lawton LJJ, and Shaw and Wien JJ) ('*Lillis*').

68 See also *R v Wilson* [1984] 1 AC 242.

69 Section 6(3) provided (emphasis added):

> Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment *amount to or include (expressly or by implication)* an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

70 *Lillis*, 241.

> have been open to them before the passing of that Act. In the judgment of this court s 6(3) has had no such effect. The allegation in the indictment included expressly an allegation of another offence falling within the jurisdiction of the court of trial. This can be shown by striking out of the indictment all the averments which had not been proved — the red pencil test as it was referred to in the course of the argument. …

And also:[71]

> [W]hen, as in this case, the court has to decide what was included expressly in the indictment, the proper course is to look at the words of the indictment and to apply the red pencil rest. To do otherwise would be to ignore the word 'expressly'. If what is left after striking out all the averments which have not been proved leaves particulars of another offence within the jurisdiction of the court of trial which the accused can then and there defend, the judge can and should ask the jury to consider whether that other offence has been proved. ...

73 In *Mareangareu*, the Court treated *Salisbury* as authoritative, and referred to *Reid*[72] with apparent approval. *Wilson* was mentioned in passing.[73] As we have mentioned, however, counsel for Chaarani submitted that *Salisbury* is not authority for the proposition for which it is cited; and counsel for Moukhaiber submitted specifically that *Reid* was wrongly decided, and that *Wilson* was to be preferred. We do not accept these submissions.

74 *Wilson* involved two appeals to the House of Lords. In the first appeal, the defendant was tried on an indictment for inflicting grievous bodily harm. Assault occasioning actual bodily harm was left as a lesser alternative verdict, and the jury convicted the defendant of that offence. In the second appeal, the defendants were charged with burglary, by entering a building as trespassers and there inflicting grievous bodily harm. Assault occasioning actual bodily harm was left as a lesser alternative verdict. The jury acquitted the defendants of burglary but convicted them of assault occasioning actual bodily harm. On appeal, the Court of Appeal quashed the convictions. The reason, briefly stated, was that in light of the Court of Appeal's earlier decision in *Springfield*,[74] the proper application of s 6(3) of the *Criminal Law Act 1967* (UK) did not justify conviction for assault occasioning actual

---

71 Ibid 241-2.

72 See footnote 62 above.

73 See footnote 68 above.

74 *R v Springfield* (1969) 53 Cr App R 608.

bodily harm, since the charged offence of 'inflicting grievous bodily harm' did not necessarily include the offence of 'assault occasioning actual bodily harm'.[75]

75 Appeals by the Crown to the House of Lords succeeded, and the convictions were restored. Lord Roskill, in whose opinion the other members of the House agreed,[76] noted that the two appeals necessitated consideration of the construction of s 6(3) of the *Criminal Law Act 1967* (UK),[77] which bears a degree of similarity to s 239 of the CPA.[78] His Lordship agreed with the observation in *Lillis*, that the object of s 6(3) was to provide a general rule continuing and combining the rules of common law and the provisions of most of the statutes which enabled alternative verdicts to be returned in specific cases or types of cases.[79] Lord Roskill was of the view that, insofar as the Court in *Lillis* — following *Springfield* — had held that on an indictment which had charged burglary, conviction for theft could be returned by virtue of s 6(3) (since the allegation of theft was expressly included in the charged offence), the case was correctly decided.[80] Ultimately, however, his Lordship was of the view that the reasoning in *Springfield* should be rejected.[81]

76 Lord Roskill was of the view that s 6(3) envisaged four possibilities:[82]

> First, the allegation in the indictment expressly amounts to an allegation of another offence. Secondly, the allegation in the indictment impliedly amounts to an allegation of another offence. Thirdly, the allegation in the indictment expressly includes an allegation of another offence. Fourthly, the allegation in the indictment impliedly includes an allegation of another offence.
>
> If any one of these four requirements is fulfilled, then the accused may be found guilty of that other offence. …

77 As mentioned, s 239 of the CPA — which permits conviction for an offence

---

75 *Wilson*, 254.

76 Lord Fraser of Tullybelton, Lord Elwyn-Jones, Lord Edmund-Davis and Lord Brightman.

77 *Wilson*, 254.

78 See footnote 69 above.

79 *Wilson*, 257; citing *Lillis*, 240.

80 *Wilson*, 257.

81 Ibid 257, 261.

82 Ibid 258.

not charged if the allegations in the indictment *amount to or include*, whether *expressly or impliedly*, an *allegation* of that other offence — bears a degree of similarity to s 6(3). Lord Roskill thought there to be a 'clear antithesis' in s 6(3) between 'amount to' and 'include', and considered that the word 'or' which joins them 'is clearly disjunctive and must not be ignored'.[83] The narrow point in *Wilson* was, however, whether the 'allegations' of 'assault occasioning actual bodily harm' were expressly or impliedly included in a charge of 'inflicting grievous bodily harm'.[84] Lord Roskill referred to the conclusion reached in *Salisbury* that grievous bodily harm may be inflicted without an assault,[85] and observed:[86]

> My Lords, I doubt whether any useful purpose would be served by further detailed analysis of these and other cases, since to do so would only be to repeat less felicitously what has already been done by the full court of Victoria in *Salisbury* [1976] VR 452. I am content to accept, as did the full court, that there can be an infliction of grievous bodily harm contrary to section 20 [of the *Offences against the Persons Act 1861* (UK)] without an assault being committed. The critical question is, therefore, whether it being accepted that a charge of inflicting grievous bodily harm contrary to section 20 may not necessarily involve an allegation of assault, but may nonetheless do so, and in very many cases will involve such an allegation, the allegations in a section 20 charge 'include either expressly or by implication' allegations of assault occasioning actual bodily harm. If 'inflicting' can, as the cases show, include 'inflicting by assault', then even though such a charge may not necessarily do so, I do not for myself see why on a fair reading of section 6(3) these allegations do not at least impliedly include 'inflicting by assault'. That is sufficient for present purposes though I also regard it as also a possible view that those former allegations expressly include the other allegations.

78 Although this Court will treat decisions of the House of Lords with the respect due to judgments of a tribunal of such eminence, quite plainly this Court is not bound by them. Thus, in *Parsons*, Winneke ACJ observed:[87]

> A decision of the House of Lords, although not binding on this court, has none the less always been regarded as highly persuasive. However, unless the court is persuaded that they are clearly wrong, it should be prepared to follow its own established authorities and practices even if, by doing so, it might result in a departure from a contrary position of the House of Lords:

---

83 Ibid 258.

84 Ibid 259.

85 Ibid 260. See *Salisbury*, 461.

86 Ibid 260–61.

87 *R v Parsons* [1998] 2 VR 478, 485.

Cook v Cook (1986) 162 CLR 376 at 390; *Britten v Alpogut* [1987] VR 929 at 938, per Murphy J; *R v Liberti* (1991) 55 A Crim R 120 per Kirby P (at 122).

79 Furthermore, this Court will follow a decision of the former Full Court unless exceptional circumstances compel its reconsideration.[88]

80 On the narrow point upon which it was decided, *Wilson* plainly is in conflict with *Salisbury*. That is reason enough for this Court to follow *Salisbury* in preference to *Wilson*. Moreover, for more than forty years *Salisbury* has provided authoritative guidance to the courts of this State as to the circumstances in which a possible verdict for an uncharged offence might be left as a viable alternative verdict for an offence specifically charged on the indictment. Other than that it is in conflict with *Wilson*, no exceptional circumstances requiring its consideration were advanced. Indeed, nothing submitted by the applicants' counsel raised any doubt in our mind as to the correctness of *Salisbury*. That being so, *Salisbury* – the effect of which is that an accused person might be convicted of a lesser offence than that charged, provided that the definition of the more serious offence is necessarily included the definition of the lesser offence — must continue to be followed in this State.

81 As we have said, *Reid* recently was referred to with apparent approval in *Mareangareu*. In *Reid*, the presentment had included a charge of intentionally causing injury (the other charge being manslaughter). At the conclusion of the prosecution case, the trial judge raised with counsel whether to leave the offence of recklessly causing injury to the jury as an alternative to the count of intentionally causing injury pursuant to the former s 421(2) of the *Crimes Act 1958*. The prosecutor submitted that it was an included offence and thus that it should be left as an alternative, whereas defence counsel submitted that it was not included in the pleaded allegation and so should not be left as an alternative. In the result, the judge accepted the prosecutor's submissions, and left the putative alternative of recklessly

---

88 *Farrar v Western Metropolitan College of TAFE* [1999] 1 VR 224, 230 [20] (Winneke P), 229 [14] (Charles JA). See also *R v Tait* [1996] 1 VR 662, 666 (Callaway JA); *R v Su and Ors* [1997] 1 VR 1, 14; *Avco Financial Services Ltd v Abschinski and Ors* [1994] 2 VR 659; *Nguyen v Nguyen* (1990) 169 CLR 245, 268–70.

causing injury to the jury. The Court held that, although recklessly causing injury was not a statutory alternative to intentionally causing injury, so that the judge had been wrong to leave it as an included offence, no miscarriage of justice had occurred, since ultimately the presentment had been amended to substitute it for the originally charged offence. The Court observed:[89]

> At common law, which was at relevant times embodied in s 421(2) of the *Crimes Act 1958*, it is open to a jury to convict an accused of a lesser offence than the charged offence but only if the definition of the charged offence necessarily includes the definition of the lesser offence and it is an offence of the same degree.[90] As was explained in *R v Salisbury*,[91] the question of whether a lesser offence is necessarily included in the definition of a charged offence must be determined upon a consideration of the terms in which the charged offence has been laid. It follows that, in order to be an included offence, the offence must be capable of being established by proof of the same or less than the facts required to establish the charged offence. *In the result, an offence is not an included offence unless one can say of it that the elements of every instance of the charged offence necessarily include all the elements of the included offence.*
>
> A charge of recklessly causing injury is not necessarily included in a charge of intentionally causing injury. Intention implies foresight of result either as a probability or as a possibility. Contrastingly, in the sense in which recklessness constitutes an element of the offence of recklessly causing injury, it requires foresight of result as a probability.8[92] *Consequently, one cannot say that all the elements of recklessly causing injury are necessary ingredients of the offence of intentionally causing injury* or, to put it another way, one cannot say that every instance of the offence of intentionally causing injury is constituted in part by all of the elements of the offence of recklessly causing injury.[93]
>
> In England, the position is no longer the same. In *R v Wilson*,[94] the House of Lords held that an offence can be an included offence even though it need not be proved to establish the offence charged. Their Lordships considered that it is sufficient if allegations in the indictment are capable of including an allegation of the lesser offence. Obviously, if that applied here, one could say that the offence of intentionally causing injury included the offence of recklessly causing injury. But although *Wilson* was based on s 6(3) of the *Criminal Law Act 1967* (UK), to which s 421(2) of the *Crimes Act* is similar, the

---

89 *Reid*, 450–51 [15]–[17] (Nettle, Harper and Hansen JJA) (citations as in original; emphasis added).

90 *R v Taylor* (1869) 1 LR CCR 194; *R v Salisbury* [1976] VR 452 at 454.

91 Ibid.

92 *R v Nuri* [1990] VR 641 at 643–4; *R v Campbell* [1997] 2 VR 585 at 592–3.

93 See and compare the observations of Glanville Williams in the slightly different but analogous English context, in 'Included Offences', (1991) 55 *J Cr L* 234, p 245 fn 18.

94 [1984] AC 242 at 261.

> decision has been robustly criticised[95] and thus far it has not been adopted in this country.[96] Accordingly, in our view, the judge was in error in leaving the offence of recklessly causing injury to the jury as an included offence.

82 Cognisant of the position in England post-*Wilson*, the Court in *Reid* made it clear that the law in this State is as explained in *Salisbury*. We see no reason to depart from *Reid*. In our view, the Court plainly was correct to apply *Salisbury*, and to recognise that the House of Lords' opinion in *Wilson* does not represent the law in Victoria.

83 Given the foregoing, even had we concluded that uncharged State offences hypothetically were capable as being left as alternatives to charged Commonwealth offences, the conclusion would have been inevitable that, within the meaning of s 239 of the CPA, arson and attempted arson were not included alternative offences to engaging in a terrorist act or attempting to do so. The elements of the offence of arson are not 'necessarily included' in those of engaging in a terrorist act. To borrow the language of *Mareangareu*,[97] no matter the ingenuity with which one wields a red pencil in the present case, it is impossible to produce particulars apposite to a charge of arson from those of engaging in a terrorist act.

A stay of proceedings until alternatives were added?

84 As earlier mentioned, Moukhaiber's counsel, in a somewhat adventurous submission, contended that in the face of the prosecution's refusal to charge arson as an alternative, it had been open to avoid a miscarriage of justice by permitting the filing over of a new indictment (under s 164 of the CPA), or by ordering the amendment of the indictment to add a charge (under s 165 of the CPA), to add a charge of arson.

85 Both ss 164 and 165 are permissive. Section 163 permits the filing of a fresh

---

95 See Glanville Williams, 'Alternative Elements and Included Offences', (1984) *Cambridge LJ* 290, p 297, and Included Offences, (1991) 55 *J Cr L* 234 at 243.

96 *Saraswati v R* (1991) 172 CLR 1 at 13 per Dawson J.

97 *Mareangareu*, [46].

indictment (that is, an indictment which includes a charge for the same offence as an offence charged in an indictment previously filed in court against that accused or a related offence); and s 165 permits a court to order the amendment of an indictment 'at any time' and 'in any manner that the court thinks necessary, unless the required amendment cannot be made without injustice to the accused'. Neither of these sections, however, give any power to a court to order the prosecution to file a fresh indictment, or to order of its own motion that the indictment be amended by the addition of a charge for an alternative offence.

86 Further, the contention that the trial judge could have stayed the proceeding as an abuse of process until a fresh indictment was filed with an additional alternative charge (or charges), or an amendment of the indictment was made to effect that result, cannot be accepted. As the authorities make abundantly clear, the decision whether to prosecute, and the particular charges to be laid, are not susceptible to judicial review. Were the courts to decide, or in any way be concerned, with decisions as to who is to be prosecuted and for what, the independence and impartiality of the judicial system would be compromised.[98] In the circumstances of the present case, where the charged offences clearly were capable of being supported by the evidence, and there was no suggestion that any improper purpose lay behind the bringing of the charges, there simply was no basis upon which the judge could have ordered a stay of proceedings, temporary or permanent.

The timing of the request to leave an alternative

87 What we have said so far is sufficient to dispose of the applicants' grounds. We should add that if, contrary to the foregoing, the putative State offences could have been left as possible alternative verdicts to the charged Commonwealth offences, the trial judge's exercise of discretion not to permit the alternatives to be put could not justifiably have been criticised. Despite senior counsel for Chaarani

---

98 See [57] above.

asserting that arson and attempted arson were his client's 'defence', he saw fit not to raise the possibility of those offences being left as possible verdicts available on the charged Commonwealth offences until the prosecution case had closed. At that point, counsel for the other applicants joined in the submission that arson (and attempted arson) should be left to the jury.

88 In this Court, the applicants' counsel submitted that the timing of the request for the alternatives to be left was in accordance with the requirements of the *Jury Directions Act 2015*, and that there was no duty to raise the matter at any time prior to the time that they did. We reject that submission.

89 As has been noted, s 11 of the Act requires the prosecution to inform the judge after the close of the evidence whether it considers that an alternative offence is available; and defence counsel must then inform the trial judge whether or not the availability of any alternative offence is in issue. In the applicants' trial, however, well before the close of the evidence — indeed, at the very outset of the trial — the prosecution had informed the judge that it did not intend to prosecute any alternatives to the charges on the indictment. Hence, it was clear from the start that the prosecution rejected the notion that there were available alternative offences. In the face of that unequivocal declaration of the prosecution's stance, if counsel for the applicants had conscientiously and truly believed that the trial of their clients would miscarry if the putative alternatives were not to be left to the jury, they had an obligation immediately to raise that issue with the trial judge. They did not do so. Nor did they seek a stay of proceedings, or a discharge of the jury, when the judge determined not to leave the suggested alternatives.

90 In these circumstances, it is impossible to conclude — even if it be assumed that the suggested alternatives hypothetically were available — that justice could have miscarried.

Conclusion

91 Given the importance of the questions raised in these applications,[99] we would in each case grant leave to appeal against conviction.

92 For the foregoing reasons, however, we would dismiss the appeals.

---

[99] Having given aid to the applicants for the preparation of the written cases, very shortly before the applications for leave to appeal were to be heard in this Court, Victoria Legal Aid ('VLA') informed the solicitors for each applicant that aid had been refused for counsel to argue their cases. After two separate mentions in this Court, and after reconsideration of the decision to refuse legal aid, VLA granted aid to the applicants for counsel. Given the importance of issues to be determined, that was the proper course for VLA to adopt.