The Hon. Justice Natalie Adams

Accessorial Liability

The principal offender (P1) is the person (or one of the persons) who physically does the act that amounts to the crime.

A principal in the second degree (P2) is a person who assisted P1 either before the crime was committed or at the scene by intentionally aiding or giving encouragement to P1.

Accessorial Liability

For P2 to be guilty as an accessory either before the fact or at the scene the prosecution must prove BRD:

- that P1 committed the offence; and
- that P2 knew of all the facts and circumstances (both of a physical and mental nature) which make up that offence (recklessness is not sufficient but wilful blindness might be – you must know of the P1's necessary state of mind), and;
- that with that knowledge P2 intentionally provided assistance to P1 (either before or at the scene)

Giorgianni v R (1985) 156 CLR 473; [1985] HCA 29

There were two issues before the High Court:

1. Could a person be liable as an accessory before the fact to the strict liability offence of dangerous driving occasioning death?
2. Is recklessness (as opposed to actual knowledge) as to the existence of facts and circumstances which would render the driving dangerous sufficient to constitute criminal liability?

Giorgianni v R (1985) 156 CLR 473; [1985] HCA 29

Gibbs CJ observed at 479:

> "The very words used in s.351, and the synonyms which express their meanings – eg. help, encourage, advise, persuade, induce, bring about by effort – indicate that a particular state of mind is essential before a person can become liable as a secondary party for the commission of the offence, even if the offence is one of strict liability."

Giorgianni v R (1985) 156 CLR 473; [1985] HCA 29

Gibbs CJ at 480:

> "…the person charged must have intended to help, encourage or induce the principal offender to bring about the forbidden result. In other words, both knowledge of the circumstances and intention to aid, abet, counsel or procure are necessary to render a person liable as a secondary party…"

(citations and footnotes omitted)

Giorgianni v R (1985) 156 CLR 473; [1985] HCA 29

Gibbs CJ at 487-8:

> "My view of the law may be summed up very shortly. No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness, in the sense that I have described, is treated as equivalent to knowledge but neither negligence nor recklessness is sufficient."

Blundell v R [2019] NSWCCA 3

Jaghbir v R [2023] NSWCCA 175

R v Rohan [2024] HCA 3

Crimes Act 1900 Part 9 "Abettors and Accessories"

345 Principals in the second degree—how tried and punished

Every principal in the second degree in any serious indictable offence shall be liable to the same punishment to which the person would have been liable had the person been the principal in the first degree.

346 Accessories before the fact—how tried and punished

Every accessory before the fact to a serious indictable offence may be indicted, convicted, and sentenced, either before or after the trial of the principal offender, or together with the principal offender, or indicted, convicted, and sentenced, as a principal in the offence, and shall be liable in either case to the same punishment to which the person would have been liable had the person been the principal offender, whether the principal offender has been tried or not, or is amenable to justice or not.

Crimes Act 1900 Part 9 "Abettors and Accessories"

351 Trial and punishment of abettors of minor indictable offences

Any person who aids, abets, counsels, or procures, the commission of a minor indictable offence, whether the same is an offence at Common Law or by any statute, may be proceeded against and convicted together with or before or after the conviction of the principal offender and may be indicted, convicted, and punished as a principal offender.

Crimes Act 1900 Part 9 "Abettors and Accessories"

351B Aiders and abettors punishable as principals

(1) Every person who aids, abets, counsels or procures the commission of any offence punishable on summary conviction may be proceeded against and convicted together with or before or after the conviction of the principal offender.

(2) On conviction any such person is liable to the penalty and punishment to which the person would have been liable had the person been the principal offender.

(3) This section applies to offences committed before or after the commencement of this section.

(4) This section applies to an indictable offence that is being dealt with summarily.

Accessory after the fact

Elements:

- that the crime of *X* was committed by P1
- that the accused intentionally assisted P1
- that at the time of that assistance, the accused was aware of all the essential facts and circumstances that give rise to the precise offence committed by P1
- that the accused with that knowledge, intentionally assisted P1 by committing specified acts
- that the accused gave that assistance so that P1 could escape arrest, trial or punishment for the offence committed

Section 347 of the *Crimes Act*:

“[e]very accessory after the fact to a serious indictable offence may be indicted, convicted, and sentenced as such accessory, either before, or together with, or after the trial of the principal offender, whether the principal offender has been previously tried or not, or is amenable to justice or not”

Crimes Act 1900 Part 9 "Abettors and Accessories"

349 Punishment of accessories after the fact to murder etc

(1) Every accessory after the fact to murder shall be liable to imprisonment for 25 years.

(2) Every accessory after the fact to the crime of robbery with arms or in company with one or more person or persons, or the crime of kidnapping referred to in section 86, shall be liable to imprisonment for fourteen years.

Crimes Act 1900 Part 9 "Abettors and Accessories"

350 Punishment of accessories after the fact to other serious indictable offences

An accessory after the fact to any other serious indictable offence is liable to imprisonment for 5 years, except where otherwise specifically enacted.

Quinn v R [2023] NSWCCA 229

Joint Criminal Enterprise

1. Straightforward JCE

The principle of JCE provides that where two or more persons carry out an agreement to commit a crime each is held to be criminally responsible for the acts of another participant in carrying out that enterprise or activity. This is so regardless of the particular role played in that enterprise by any particular participant.

Straightforward JCE

Elements

1. The existence of a joint criminal enterprise to commit the specified crime, and;
2. The participation in that specified crime by the accused, and;
3. The commission of the specified crime.

Straightforward JCE

Issues

1. Identifying the evidence from which an agreement can be inferred BRD;
2. Isolating what evidence is admissible against each offender in a joint trial;
3. The application of JCE in a murder trial which also relies upon the doctrine of constructive murder

Extended JCE

An extended JCE arises when the participants all agree to commit crime A and do acts in furtherance of that agreement but one or more of the offenders commits crime B either instead of Crime A or in addition to it. These offenders will be liable if either:

a) The crime fell within the scope of the JCE as a possible incident, or;
b) If they foresaw the possibility that crime B might be committed and went ahead anyway.

Johns v The Queen (1980) 143 CLR 108; [1980] HCA 3

R v Johns [1978] 1 NSWLR 282

In the CCA, Street CJ at 289 quoted from JW Cecil Turner, *Russell on Crime* (12th ed, 1964):

> "Nowadays, it is submitted, the test should be subjective and the person charged as accessory should not be held liable for anything but what he either expressly commanded or realised might be involved in the performance of the project agreed upon. It would, on this principle, therefore be a question of evidence to satisfy the jury that the accused did contemplate the prospect of what the principal has in fact done."

Johns v The Queen (1980) 143 CLR 108; [1980] HCA 3

Mason, Murphy and Wilson JJ at 131-2:

> "In our opinion these decisions support the conclusion reached by Street C.J., namely, 'that an accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was *within the contemplation of <u>both himself and the principal</u> in the first degree as an act which might be done in the course of carrying out the primary criminal intention - an act contemplated as a possible incident of the originally planned particular venture*'. Such an act is one which falls within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise."
>
> (emphasis added)

Johns v The Queen (1980) 143 CLR 108; [1980] HCA 3

Mason, Murphy and Wilson JJ at 131-2:

> "In the present case there was ample evidence from which the jury could infer that the applicant gave his assent to a criminal enterprise which involved the use, that is the discharge, of a loaded gun, in the event that [the victim] resisted or sought to summon assistance….The jury could therefore conclude that the common purpose involved resorting to violence of this kind, should the occasion arise, and that the violence contemplated amounted to grievous bodily harm or homicide."

McAuliffe v The Queen (1995) 183 CLR 108; [1995] HCA 37

Brennan CJ, Deane, Dawson, Toohey and Gummow JJ at 113:

> "The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime."

McAuliffe v The Queen (1995) 183 CLR 108; [1995] HCA 37

Brennan CJ, Deane, Dawson, Toohey and Gummow JJ at 113-4:

> "The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission."

McAuliffe v The Queen (1995) 183 CLR 108; [1995] HCA 37

Brennan CJ, Deane, Dawson, Toohey and Gummow JJ at 114:

> "*But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others.* Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime…If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission."

McAuliffe v The Queen (1995) 183 CLR 108; [1995] HCA 37

Brennan CJ, Deane, Dawson, Toohey and Gummow JJ at 114:

> "Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose."

McAuliffe v The Queen (1995) 183 CLR 108; [1995] HCA 37

Brennan CJ, Deane, Dawson, Toohey and Gummow JJ at 117-8:

> "….However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned <u>foresaw that the incidental crime might be committed</u> and cannot rely upon the existence of the common purpose as establishing that state of mind."

R v Tangye (1997) 92 A Crim R 545

Per Hunt CJ at CL:

> "The Crown needs to rely on straightforward joint criminal enterprise only where·- as in the present case - it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been making this point for years, and it is a pity that in may trials no heed is taken to what has been said."

Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75

P1

McHugh J at 341:

> "At common law, a person who commits the acts which form the whole or part of the actus reus of the crime is known as a 'principal in the first degree'. There can be more than one principal in the first degree. However, a person may incur criminal liability not only for his or her own acts that constitute the whole or part of the actus reus of a crime but also for the acts of others that do so. The liability may be primary or derivative…"

Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75

P2

McHugh J at 341-2:

> "Those who aided the commission of a crime but were not present at the scene of the crime were regarded as accessories before the fact or principals in the third degree. Their liability was purely derivative and was dependent upon the guilt of the person who had been aided and abetted in committing the crime. Those who were merely present, encouraging but not participating physically, or whose acts were not a substantial cause of death, were regarded as principals in the second degree. They could only be convicted of the crime of which the principal offender was found guilty. If that person was not guilty, the principal in the second degree could not be guilty. Their liability was, accordingly, also derivative."

Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75

JCE

McHugh J at 342:

> "However, there is a third category where a person was not only present at the scene with the person who committed the acts alleged to constitute the crime but was there by reason of a pre-concert or agreement with that person to commit the crime. In that category, the liability of each person present as the result of the concert is <u>not derivative but primary</u>. He or she is a principal in the first degree. In that category each of the persons acting in concert is equally responsible for the acts of the other or others."

1. *Gillard v R* (2003) 219 CLR 1; [2003] HCA 64
2. *Clayton v The Queen* (2006) 168 A Crim R 174; [2006] HCA 58
3. *R v Taufehema* (2007) 228 CLR 232; [2007] HCA 11
4. *Likiardopoulos v R* (2012) 247 CLR 265; [2012] HCA 37
5. *Huynh v R; Duong v R; Sem v R* (2013) 295 ALR 624; [2013] HCA 6

Miller v The Queen (2016) 259 CLR 380; [2016] HCA 30

French CJ, Kiefel, Bell, Nettle and Gordon JJ at [4]:

> "Each party is also guilty of any other crime ("the incidental crime") committed by a co-venturer that is within the scope of the agreement ("joint criminal enterprise" liability). An incidental crime is within the scope of the agreement if the parties contemplate its commission as a possible incident of the execution of their agreement. Moreover, a party to a joint criminal enterprise who foresees, but does not agree to, the commission of the incidental crime in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence ("extended joint criminal enterprise" liability)."

Miller v The Queen (2016) 259 CLR 380; [2016] HCA 30

Gageler J at [85]:

> "There is a real question as to whether accessorial liability and joint criminal enterprise liability are distinct in concept, and in particular as to whether joint criminal enterprise liability is anything more than a subcategory of accessorial liability. The question has been debated academically and conflicting answers have been suggested judicially. The question has not previously arisen for definitive resolution in this Court and does not arise for definitive resolution now."

Judicial Commission Criminal Trials Benchbook

3 types of JCE:

a) where the crime charged is the very crime that each of the participants agreed to commit: *Gillard v The Queen* (2003) 219 CLR 1 at [109]–[110]

(b) where the crime committed fell within the scope of the joint criminal enterprise agreed upon as a possible incident in carrying out the offence the subject of the joint criminal enterprise: see *McAuliffe v The Queen* (1995) 183 CLR 108 at 114–115 affirmed in *Miller v The Queen* (2016) 259 CLR 380 at [29]; *Clayton v The Queen* [2006] HCA 58 at [17]

Judicial Commission Criminal Trials Benchbook

3 types of JCE:

(c) where the crime committed was one that the accused foresaw might have been committed during the commission of the joint criminal enterprise although that crime was outside the scope of the joint criminal enterprise: see *McAuliffe v The Queen* at 115–118 affirmed in *Miller v The Queen* at [10], [51], [135], [148].

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

JCE

Kiefel CJ at [14]:

> "Each party is also guilty of any other offence ("the incidental offence") which is committed by a co-venturer that is within the scope of the agreement. The incidental offence will be within the **scope** of the agreement to commit the first-mentioned crime if the parties contemplate its commission as a possible incident of the execution of their agreement."

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

EJCE

Kiefel CJ at [15]:

> "The principle of extended joint criminal enterprise liability arises where a party to a joint criminal enterprise <u>foresees, but does not agree to</u>, the commission of an <u>incidental crime</u> in the course of carrying out the agreement. That is to say, the principle applies where the commission of an incidental offence lies <u>outside the scope</u> of the common purpose but is nevertheless contemplated as a possibility."

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

Gageler, Gleeson, and Jagot JJ at [33]:

> "Pursuant to the common law doctrine of EJCE, criminal liability is imposed on a secondary party for an additional offence committed by a primary party where the secondary party has participated with the primary party in the execution of an agreement to commit another offence with <u>foresight of the possibility</u> that the primary party might commit the additional offence <u>as an incident of executing their agreement</u>."

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

JCE

Gordon, Edelman, and Steward JJ at [54] :

> “Each party to an agreement to commit a crime will be guilty of the agreed crime and any crime "within the scope of the agreement“
>
> …
>
> In this respect, "it is essential to identify what the parties did agree upon and what it was that each contemplated might occur", which requires consideration of whether each party contemplated the criminal acts "as a possible incident of the execution of their agreement““

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

EJCE

Gordon, Edelman, and Steward JJ at [56] :

> “The doctrine of "extended joint criminal enterprise", as the name suggests, involves an extension, <u>beyond the scope of the agreement</u>, of responsibility for a joint criminal enterprise. In *Miller*, the doctrine of extended joint criminal enterprise was expressed to apply where a party to a joint criminal enterprise has not agreed to the commission of a crime but has instead <u>foreseen</u> the commission of that crime in the course of carrying out the agreement and continues to participate in the enterprise. What is to be <u>foreseen</u> is that an <u>incidental crime</u> might be committed, being all elements of that crime.”

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

EJCE

Gordon, Edelman, and Steward JJ at [61] :

> "The rationale for extended joint criminal enterprise must be different from the rationale for joint criminal enterprise since extended joint criminal enterprise may render a participant in a criminal enterprise liable for a crime committed during that criminal enterprise which was <u>foreseen but which fell outside the scope of the agreement</u>. In this way, rather than being a principle of primary liability stemming from the agreement, extended joint criminal enterprise is a principle of derivative (or "secondary") liability."

NSW SC Cases regarding Mitchell

- Decision restricted [2023] NSWSC 202 per Button J
- *R v Hamdach* [2023] NSWSC 298 per Campbell J
- *R v DJD and Murdoch* [2023] NSWSC 222 per Wright J

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

Gordon, Edelman, and Steward JJ at [58]:

> "Consistently with liability for murder being imposed upon a primary offender who intends only to cause the consequence of grievous bodily harm, the foresight required of the secondary offender is that "death *or* really serious bodily injury might be occasioned" by a co-venturer acting with the intention to cause death or really serious bodily injury."

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

Gordon, Edelman, and Steward JJ at [86]:

> "[D]id the accused contemplate that in carrying out the joint enterprise to break into the house and steal the cannabis that one or more of the accused, if they came across someone in the house, might inflict violence on that person and inflict violence accompanied with that specific intention of causing death, trying to kill Mr Gjabri, or causing him really serious bodily harm.”

Mitchell v The King (2023) 407 ALR 587; [2023] HCA 5

Further at [86]:

> "At no time did the trial judge direct that, in addition to foresight of the possibility of violence with an intention to cause death or really serious bodily harm, the accused must also <u>contemplate the result of death or really serious bodily harm</u>."