HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

The King
Appellant

and

Cem Batak
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The issues that arise in this appeal are:

   a. whether principles of accessorial liability are excluded from application to constructive murder for the purposes of s 18(1)(a) of the *Crimes Act 1900*;

   b. the necessary state of mind of an accessory before the fact to constructive murder.

Part III: Notice of constitutional matter

3. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903*. No notice should be given.

Part IV Citation

4. *Batak v R* (2024) 114 NSWLR 313; [2024] NSWCCA 66 (**J**) (CAB 148 – 246)

Part V: Facts

5. In the early hours of 2 April 2019, John Odisho (**deceased**) was fatally shot in the head in the **apartment** where he lived, in Five Dock, New South Wales in the course of an attempted robbery armed with a dangerous weapon perpetrated by co-offender Cengiz **Coskun** and an unknown male (J[1], [15]-[16]; CAB 158, 161-162). The target of the attempted armed robbery was the deceased's flatmate, Sargon Odisho, who was at the time in possession of a large quantity of prohibited drugs and cash that was being stored at the apartment (J[1], [40]; CAB 158, 170-171).

6. Attempted robbery armed with a dangerous weapon attracts a maximum penalty of 25 years' imprisonment and constitutes a foundational offence for constructive murder under s 18(1)(a) ***Crimes Act*** *1900* (NSW) (J[32]; CAB 167-168).[1]

7. In the early hours of that morning, before the commission of the offences, the respondent and Coskun met at the respondent's unit (J[10], CAB 160). At that meeting, the respondent supplied Coskun with at least one high visibility (high vis) work shirt, and a loaded handgun which the respondent would later describe in a recorded phone conversation as a mini Glock with an "extended clip" (J[2], [12]; CAB 158, 161; AFM 9, 11). During the meeting they discussed details of the intended armed robbery (J[21]; CAB 162-164; AFM 8-12).

8. After the meeting, Coskun went to the Odishos' apartment (J[12] CAB 161). He and an unknown male entered via the balcony (J[12]; CAB 161). They wore gloves and face coverings, and Coskun wore the high vis shirt provided by the respondent (J[12]; CAB 161). Each was armed with a handgun (J[1]; [19]; CAB 158, 162).

9. The deceased and his girlfriend, Larissa Mitchell-Wiszniewski, were asleep in the master bedroom. They were woken by a noise in the hallway. Ms Mitchell-Wiszniewski heard Sargon Odisho say words to the effect of "I don't have" and "I don't know" in a distressed manner (J[13]; CAB 161). As the deceased went to investigate, Ms Mitchell-Wiszniewski saw a gun, which "looked like a black handgun" through the doorway (J[13]; CAB 161). An intruder who was wearing all black (therefore likely not Coskun) entered Ms Mitchell-Wiszniewski's room and confronted her with a silver "decent sized handgun" which he pointed at her head (J[14]; CAB 161). A short time later, the intruder left the bedroom and Ms Mitchell-Wiszniewski immediately heard several shots fired (J[14]; CAB 161).

10. Evidence established that one of the intruders fired ten rounds from a single .40 calibre weapon into Sargon Odisho's bedroom from the hallway, while the deceased and Sargon Odisho were inside it (J[15], [19]; CAB 161-162). A bullet struck the deceased in the head. Two bullets struck Sargon Odisho (J[15]; CAB 161-162). Expert ballistics evidence on the .40 calibre cartridge cases recovered from the scene included that impressions on the cartridges were consistent with them having been discharged by a "Glock-type" self-loading pistol, that is, of the type that the respondent supplied to Coskun. That, and other evidence led at the respondent's trial established that it was Coskun (not the unknown male)

[1] Section 97(2) of the *Crimes Act.*

who fired the fatal shot (J[19]; CAB 162; *R v Batak (No 5)* [2022] NSWSC 1217 at [29]-[31]; CAB 116). Sargon Odisho possessed a .38 calibre Smith & Wesson handgun, which he discharged six times towards the hallway, striking Coskun in the left flank (J[16]; CAB 162). The two intruders left (J[17]; CAB 162).

11. In a conversation between the respondent and two males on 28 June 2019, recorded by a listening device, the respondent was asked if he knew what happened to Coskun. He said "[d]id you know I was going to go with him?... I'll tell you exactly what happened", that Coskun came to his house and at the time the respondent was "dead broke. I need money, and he knew it, so he came… I had two at home. Yeah, he asked please can I take one" (J[21]; CAB 162-163; AFM 8-9). He continued (J[21]; CAB 163-164; AFM 9-11) (emphasis added):

> You know **the one I gave him, extended clip**… He comes cuz, we're at my garage, it's like one in the morning. He's telling me **exactly the scenario, like the scene**. He went there, **his mate was there**… Cause his mate was there, his mate was there. Yeah, **at the house and he goes everyone was smacking out**. Like, they're just crashing. So, there's two of them **explained everything** cuz. I go, 'Alright'. He goes, 'Let's go together' and he goes, 'It's easy'. Please explain. He goes, 'We just go up the balcony, on the ground floor', and he goes, 'The doors open we'll go straight in', yeah, 'In and out nice and quick'. I promise to God, I was there for about 10 minutes, in my garage, cause he asked me for fluro's as well. I gave him my work shirt. He's wearing my work shirt, huh?... Cuz, I'll tell you **exactly what happened**. I stood there with him about 10 minutes, just **thinking about everything just explained to me**, and I'm like brother, if this pulls off, that money, I need that now, yeah. I promise to God I kept thinking and thinking and I was actually persuading to go with him. Last minute, you know what happened, cuz **my stomach turned**, yeah, I had to chuck a shit. Like, I, bro I could not hold it too, huh. … He goes 'I have to go now'. I go, 'Cuz, I gotta go poo, yeah.' **I go, 'ok you go then', I full got turned off from it**, I go, 'I'm gonna go upstairs, I'm gonna shit', yeah. **Then and there he was calling someone else and he goes, 'Don't worry, I've got someone else.' He goes, 'I'll get something out of it and I'll bring it to ya.' He left.** Next morning cuz, ask me what I hear on the radio. Five Dock shooting. Everything. And he called me in the morning too, cause he got shot.

12. The respondent also said, "I gave him a Glock… It was a mini Glock too… I was gonna go, yeah. I was this close, literally this close. I was getting ready, we were gonna go we loaded it up, I got my clothes, everything, we were gonna go…" (J[21]; CAB 164; AFM 11-12).

13. In another conversation after the incident, the respondent told his wife that the gun had been "wiped down completely" in the days preceding the robbery (J[23]; CAB 164; AFM 53). He told an acquaintance, "… I already know what to say. He called me just before he went and done the job… he saw me, I gave him the gun, he took my gun… You know how they can get me? That I gave it? About two three days before I gave it to him, my dad cleaned the shit out of that gun" (J[24]; CAB 164-165; AFM 56, 60).

14. The respondent declined to be interviewed by police. He did not give evidence at trial or call any witnesses (J[25]; CAB 165). His case was that he had not given Coskun one of his (the respondent's) own guns, but rather that he was storing guns belonging to Coskun in his garage and that Coskun had retrieved his own gun on the night of 2 April 2019. He sought to dismiss the recorded conversations as merely big-noting himself (J[26]; CAB 165).

15. The respondent was charged with attempting to rob Sargon Odisho of drugs and money whilst armed with a dangerous weapon, contrary to s 97(2) of the *Crimes Act* (Count 2) and with the murder of John Odisho (Count 1) (J[2], CAB 5, 158). Coskun was tried separately and convicted of the same two offences, as a principal (J[3]; CAB 158-159).

16. At the respondent's trial, the Crown initially relied on three alternative pathways to establish the respondent's liability for murder,[2] but ultimately confined its case to liability as an accessory before the fact to constructive murder under the second limb of s 18(1)(a) of the *Crimes Act* (J[35]-[36]; [231]; CAB 168-169, 243-244). The indictment invoked s 346 of the *Crimes Act* in relation to both counts (J[2]; [29]; [33]; CAB 5, 158, 166-168). Under s 346, every accessory before the fact to a serious indictable offence may be indicted, convicted, and sentenced as a principal in the offence whether or not the principal has been tried.

17. The Crown alleged that the respondent was liable as an accessory before the fact, as the deceased was fatally shot during the attempted robbery armed with a dangerous weapon (the foundational offence) and the respondent intentionally assisted Coskun to commit the robbery by giving him the loaded gun and the shirt, knowing that Coskun (together with another person) intended to rob someone of property by threat or force using that weapon (J[40]; CAB 170-171).

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[2] As a participant in a Joint Criminal Enterprise; or as a participant in an Extended Joint Criminal Enterprise; or an accessory before the fact to constructive murder: (J[35]; CAB 168-169).

18. Following a trial before RA Hulme J sitting with a jury, the respondent was convicted on both counts. He appealed to the CCA on four grounds. Ground 1 concerned the murder conviction. The CCA upheld that ground, finding that it was an error of law for the trial judge to permit constructive murder to be left to the jury on the basis of accessorial liability (J[196]; CAB 223). The CCA dismissed grounds 2, 3 and 4.

19. In relation to ground 1, the CCA found that, as an act or omission causing death is a distinct element of the offence of (constructive) murder, it is an 'essential fact' knowledge of which must be proved in the accessory before the fact, together with knowledge by the accessory of an intention in the principal to do such an act (J[183]; CAB 229). However, since constructive murder does not require that intent or recklessness to cause death or grievous bodily harm be established on the part of the principal, the CCA reasoned that to require foresight of this act is inconsistent with the notion of constructive murder (J[183]; CAB 229). On this basis, the CCA concluded that liability as an accessory before the fact cannot work coherently with liability for constructive murder and that accessorial liability for constructive murder is excluded by s 18(1)(a) of the *Crimes Act* (J[183]; CAB 229).

Part VI: Argument

20. Common law accessorial principles and s 346 of the *Crimes Act* apply to an offence unless they are excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created (*Mallan v Lee* (1949) 80 CLR 198, 216 (Dixon J); ***Giorgianni*** *v The Queen* (1985) 156 CLR 473, 477 (Gibbs CJ)).[3]

21. To be held liable, an accessory must know or believe the essential matters that constitute the crime, and intentionally assist or encourage the principal (*Giorgianni*, 506 (Wilson, Deane and Dawson JJ); ***Johnson v Youden*** [1950] 1 KB 544, 546; ***Productivity Partners*** *Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021, [82] (Gageler CJ and Jagot J)). It is well recognized that the moral culpability of the accessory may equal or surpass that of the principal (*GAS v The Queen* (2004) 217 CLR 198, [23] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *Johns v The Queen* (1980) 143 CLR 108, 117 (Stephen J) (***Johns HC***); *R v Franklin* (2001) 3 VR 9, [33] (Brooking JA)).

22. Before recognition joint of criminal enterprise as a discrete basis of liability, the doctrine of common purpose was used to evaluate the liability of an accessory who aided, abetted, counselled or procured the principal (for example, *R v Betts and Ridley* (1930) 22 Cr App

[3] See also, ss 345 and 347 of the *Crimes Act 1900* (NSW).

R 148). With recognition of joint criminal enterprise as a *sui generis* basis of liability of the secondary party, arising from agreement to commit a crime and mutual embarkation on that agreement, the liability of each participant was established as primary and the acts of each party could be attributed to the other participants in the joint enterprise (***Osland** v The Queen* (1998) 197 CLR 316, [72] (McHugh J); ***Clayton** v The Queen* (2006) 81 ALJR 439, [20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); ***IL** v The Queen* (2017) 262 CLR 268, [30], [40] (Kiefel CJ, Keane and Edelman JJ), [66], [74] (Bell and Nettle JJ), [103] (Gageler J, as his Honour then was), [146] (Gordon J); ***Mitchell** v The King* (2023) 276 CLR 299, [55], [61] (Gordon, Edelman and Steward JJ)).

23. As recognised in ***Clayton*** at [20], in some cases there may be an overlap in practice between joint criminal enterprise and accessorial liability, such as where agreement provides encouragement. However, there remains a class of case consisting of those who have intentionally assisted in or encouraged the commission of a crime but have not formed an agreement with the principal to commit the crime. Examples are readily contemplated - for instance, the facts in *Giorgianni*. The derivative liability of the accessory is founded in their aiding, abetting, counselling or procuring another to commit a crime, and so contributing to the other's crime, with a link in purpose but with no requirement for agreement (*Osland*, [71] (McHugh J); *IL*, [30] (Kiefel CJ, Keane and Edelman JJ)).

24. A distinction between the two doctrines also arises with respect to the question of withdrawal. Whereas a participant in a joint criminal enterprise can withdraw from the agreement and so avoid liability, an accessory must countermand or withdraw their assistance or encouragement (*White v Ridley* (1978) 140 CLR 342, 348-351; *Tietie v The Queen* (1988) 34 A Crim R 438).

25. The long-standing position at common law was that an accessory may be liable for felony murder, the common law predecessor to constructive murder under s18(1)(a) of the *Crimes Act* (see paragraphs [36]-[40] below).

26. The effect of the Judgment is to abolish the liability for accessories to constructive murder. Its impact extends beyond the question of liability of accessories before the fact to constructive murder under s 18(1)(a), as it necessarily excludes from liability accessories before and at the scene of the commission of a foundational offence. The Judgment also excludes from liability accessories to strict liability offences and to civil contraventions where the liability is similarly framed (J[70], [93], [96], [165], [168], [169], [183]; CAB 181-182, 191-193, 221-224, 229). Further, the Judgment elides knowledge of an act

with knowledge of intention to do an act, and elides acts constituting a crime with the legal elements of an offence (J[165], 169], [183]; CAB 221-224, 229). As a result, where accessorial liability does continue to apply, the Judgment blurs the correct elements required by *Giorgianni* to establish that liability.

27. Accessorial liability operates coherently with constructive murder under s 18(1)(a) of the *Crimes Act* and is an offence known to law (cf J[183]; CAB 229). The policy of constructive murder in s 18(1)(a), which reflects the rationale for the common law felony murder rule, supports this outcome.

28. Where the crime the accessory has assisted is constructive murder under s 18(1)(a) of the *Crimes Act*, one of the essential matters that the accessory must know or believe at the time of giving assistance or encouragement is that the principal would do the act causing death, as a means of effecting the venture, should the occasion arise, and with this knowledge the accessory must intentionally assist or encourage the principal. Reference to "venture" in this context does not signify agreement, rather, it refers to the "link in purpose" between the principal and the accessory (*Giorgianni*, 479-480 (Gibbs CJ)). This state of mind of the accessory reflects what is referred to in ***Miller*** *v The Queen* (2016) 259 CLR 380 as 'contingent', or 'conditional' intention, citing the paradigm example of parties complicit in the armed robbery of a bank including a driver, where they "need only have intended that the gunman would shoot to kill or cause grievous bodily harm as a possible means of carrying out the plan – if worst came to worst" (*Miller*, [10] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), [89] (Gageler J)).

Constructive murder under s 18(1)(a) of the *Crimes Act*

29. Section 18(1)(a) of the *Crimes Act*, insofar as it provides for constructive murder committed by act rather than by omission, provides that:

> Murder shall be taken to have been committed where the act of the accused… causing the death charged, was … done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

30. Construing s 18(1)(a) requires appreciation of the felony murder rule at common law, as the statutory expression in s 18(1)(a) covers, in a modified form, the common law rule (***IL*** [7] (Kiefel CJ, Keane and Edelman JJ); ***Ryan*** *v The Queen* (1967) 121 CLR 205, 220 (Barwick CJ)). Other than its identification of the foundational crime as a crime punishable by imprisonment for life or for 25 years, constructive murder in s 18(1)(a) replicates the

felony murder rule as understood at the time of its enactment in 1883 (*IL*, [94] (Gageler J); Stephen and Oliver, ***Criminal Law Manual*** (1883); *Ryan*, 241 (Windeyer J); see also the history of s 18(1)(a) in *IL* [7] (Kiefel CJ, Keane and Edelman JJ), [92]-[94] (Gageler J), [130]-[131] (Gordon J); *R v* ***Jacobs*** (2004) 151 A Crim R 452, [197]-[203] (Wood CJ at CL)).

31. The policy of the felony murder rule is that a person who uses violent measures in the commission of a felony involving personal violence does so at their own risk and is guilty of murder if those violent measures result even inadvertently in the death of the victim (*R v* ***Jarmain*** [1946] 1 KB 74, 80-81 (Wrottesley J); *Ryan*, 230-231 (Taylor and Owen JJ), 235; *R v Solomon* [1959] Qd R 123, 126-127 (Philp J, Mansfield CJ agreeing)).[4]

32. In the thirteenth century, homicide was culpable if death was occasioned during the commission of any unlawful act (*Jacobs*, [193] (Wood CJ at CL)). Over the ensuing centuries, the harshness of the operation of the rule was mitigated by the narrowing of the class of unlawful act that would give rise to liability for murder. By 1762, when Sir Michael Foster wrote his *Discourse of Homicide*, the felony murder rule was confined to a killing in the course of an act with intent to commit a felony (*Jacobs*, [193]). Although the rule still attracted judicial criticism (*Jacobs*, [193], [195], [196], [201], [206] (Wood CJ at CL); *Ryan*, 240 (Windeyer J); *R v* ***Serné*** (1887) 16 Cox CC 311; *R v* ***Brown & Brian*** [1949] VLR 177), in 1883, when the predecessor to s 18(1)(a) was enacted, the threshold for liability by the common law rule remained an act done in the commission of a felony (*Ryan*, 241).[5] The purpose of the 1883 enactment was to raise the threshold further and the enacted definition of murder altered the common law in only one substantial way, to provide that felony murder would not result unless the felony was a capital one or punishable by penal servitude for life (see *Ryan*, 241 (Windeyer J)).[6]

33. The state of mind of a principal offender necessary to establish constructive murder under s 18(1)(a) is that which is necessary to prove a foundational offence (*Ryan; Sio v The Queen* (2016) 259 CLR 47; *Mraz v The Queen* (1955) 93 CLR 493). There is no requirement for the act causing death to be accompanied by an intention to kill or inflict grievous bodily harm, or reckless indifference to human life (*Ryan*, 213 (Barwick CJ), 231 (Taylor and

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[4] The use of a loaded firearm to frighten the victim into submission is a violent measure for the purposes of the felony murder rule (*Jarmain*, 80-81).
[5] s 9, *Criminal Law Amendment Act 1883* (NSW)
[6] The New South Wales Act also banished the expression "malice afterthought": see *Ryan* at 241.

Owen JJ), 235 (Menzies J) ,244 (Windeyer J); ***Ross*** *v The King* (1922) 30 CLR 246, 252 (Knox CJ, Gavan Duffy and Starke JJ)). Whilst the act causing death must be voluntary and willed, its consequences may be unintended (*Ryan*, 213 (Barwick CJ); *Ross*, 252 (Knox CJ, Gavan Duffy and Starke JJ)).

34. The enactment of s 18(1)(a) was not intended to limit the common law rules of complicity (*IL*, [60], (Bell and Nettle JJ), [138]-[139], [142], [149], [162] (Gordon J); *Jacobs*, [206], [215]; *R v Downs* (1985) 3 NSWLR 312, 318; *R v Grand* (1903) 3 SR (NSW) 216, 223-224). Neither the mention of 'an accomplice' in the constructive murder limb of s 18(1)(a) or the words "act of the accused… causing the death charged" alter the operation of common law complicity rules (*R v Surridge* (1942) SR (NSW) 278, 282-283; *Jacobs*, [189]-[192], [200], [203] (Wood CJ at CL); *IL*, [99] (Gageler J).

Accessory to felony murder at common law

35. The common law liability of an accessory for the crime of a principal is ancient and was operative in New South Wales when the predecessor to s 18(1)(a) was enacted in 1883. The same enactment legislated the predecessors to ss 345 and 346 of the *Crimes Act*, enabling accessories to be indicted, tried and convicted as if they were principals and rendering them subject to the same punishment as a principal (Sir Alfred Stephen and Alexander Oliver, *Criminal Law Manual* (1883), Part VII, *Abettors and Accessories*).[7]

36. The common law as at 1883 recognised accessory before the fact to felony murder. At that stage, the state of mind of an accessory was measured objectively. Following ***Woolmington*** *v Director of Public Prosecutions* [1935] AC 462 the subjective formulation was described in *Johns CCA* as that "an 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"(*Johns CCA*, 289F quoting JW Cecil Turner MC LLD, *Russell on Crime* (Stevens & Sons London, 12th ed, 1964, p162). The liability of an accessory before the fact to felony murder remained coherent in principle.

37. The historical liability of an accessory for felony murder at common law was surveyed by this Court in *Miller*, [6]-[16] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), and by Street CJ in *R v Johns* [1978] 1 NSWLR 282, 287-289 (***Johns CCA***). As those judgments demonstrate, the recognised compatibility of the doctrine of accessorial liability with felony murder is well illustrated where the foundational offence is robbery. The common

[7] ss 302-303, *Criminal Law Amendment Act 1883* (NSW)

law has long held an accessory to be liable for death caused during the commission of an offence of robbery or attempted robbery (*R v Saunders* (1573) 2 Plowd 473, 475; 75 ER 706, 709; see *Johns CCA*, 288B). In 1619, Michael Dalton wrote that if "A commandeth B to rob one, and in attempting this, another is killed, A shall be accessory to this murder", because it follows from commanding an evil or unlawful act that one is accessory to all that ensues upon that evil act (*Johns CCA* 287-288G citing *Countrey Justice* (1619); Sir William Blackstone, *Commentaries on the Laws of* England (21st ed, 1844) vol 4 pp 36-37).

38. It was in the line of authority leading to *Osland*, *Clayton* and *Miller* that joint criminal enterprise came to be identified clearly as a *sui generis* form of liability for complicity in crime. Earlier, the liability of accessories particularly for collateral offences was accepted as able to be evaluated by application of common purpose (see, for example, KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991) pp209-212; *Betts & Ridley*). This Court in *Clayton* clarified the distinct bases of liability between the aider and abettor and the joint criminal enterprise participant and emphasized the separate utility of each doctrine, notwithstanding the potential in many cases for factual intersection (at [20]; see also, *Miller*, [34] (French CJ, Kiefel, Bell, Nettle and Gordon JJ)).

39. Whilst the issues in *Johns* were largely focused on what was described then as 'common purpose', this was not because of any concern that the mental state of an accessory before the fact to constructive murder under s 18(1)(a) could not be articulated coherently by reference to the doctrine of accessorial liability. It does not diminish the significance of the recognition, at common law, of the compatibility between accessorial liability and felony murder prior to and at the time of the enactment of the progenitor of s 18(1)(a) (cf J[192]; CAB 232).

40. Although the majority of early felony murder cases involved a violent crime, historically, secondary participants to non-violent offences were also held liable. In *R v Radalyski* (1899) 24 VLR 687, the accessory was held liable for murder after he procured an abortion during which the victim died when the principal suffocated her to stifle her screams (see also *Johns CCA*, 297G). *Brown & Brian* also concerned the procuring of an abortion. In *Appleby v R* (1943) 28 Cr App R 1, an accessory was liable for the constructive murder of an officer of justice. *Appleby* emphasised that this form of liability in either the principal or the accessory is constructive.

41. The liability of accessories for offences committed in the course of committing a foundational offence has been described as almost as old as the law of aiding and abetting itself (*Miller*, [5]-[8] (French CJ, Kiefel, Bell, Nettle and Gordon JJ)). Given that long-standing position, it is of significance that extrinsic materials to the 1883 enactment do not reveal any intention to exclude an accessory from liability for constructive murder (Stephens, Oliver; *Criminal Law Manual*, cf *Mitchell* [45] (Gageler, Gleeson and Jagot JJ)).

42. Here, the CCA failed to properly to take into account the long-standing position at common law that an accessory may be liable for felony murder. The CCA wrongly dismissed these authorities, and their recognition of the liability of an accessory for felony murder at common law, on the basis that that some of the cases mentioned did not grapple (directly) with the "sorts of issues raised" in the present case or that they were decided "long before clear distinctions have been drawn between accessorial liability, [joint criminal enterprise] and [extended joint criminal enterprise] in the way that has occurred in this country in the last 45 years" (J[192]; CAB 232). That approach overlooked that accessorial liability for felony murder was properly available and imposed in those cases. In so doing, the CCA overturned a long-accepted understanding of the law (cf J[192]; CAB 232).

Accessorial liability

43. The liability of an accessory requires that the accessory knows or believes the 'essential matters' that constitute the crime (be they facts, circumstances or states of mind), and with that knowledge, intentionally assists or encourages the principal (*Giorgianni*, 506 (Wilson, Deane and Dawson JJ); *Johnson v Youden*, 546-547; *Productivity Partners*, [82] (Gageler CJ and Jagot J). In this way, the accessory intentionally participates in the crime. The liability of an accessory reflects fundamental principles of the criminal law that a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it (***McAuliffe** v The Queen* (1995) 183 CLR 108, 118 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Miller*, [109] (Gageler J)).

44. The required knowledge and intent of the accessory are interlinked, as intent must be based upon knowledge or belief of the necessary facts (*Giorgianni*, 503-505, 507 (Wilson, Deane and Dawson JJ); *Productivity Partners* [75] (Gageler CJ and Jagot J), [201], [261], [266] (Edelman J)). Conversely, the necessary intent is absent if the secondary participant lacks knowledge of the essential matters (*Giorgianni*, 505-506 (Wilson, Deane and Dawson JJ); ***Yorke** v Lucas* (1985) 158 CLR 661, 667-668 (Mason ACJ, Wilson, Dean and Dawson JJ).

45. The requirement of knowledge of essential matters at the time of giving assistance or encouragement does not equate to a requirement of knowledge that a future event or future conduct of the principal will certainly take place. The law accepts that an accessory can never know, in an absolute sense, whether what has been encouraged will in fact eventuate (*Miller*, [89] (Gageler J); *R v Rich and* ***Hynes*** (1997) 93 A Crim R 483, 497 (Cox J), 520-521 (Bleby J, Williams J agreeing); *Maxwell v Director of Public Prosecutions for Northern Ireland* (1979) 68 Cr App R 128, 140-141). The knowledge required of the accessory concerns "the relevant nature, character and circumstances of the principal's unlawful act, but does not necessarily extend to knowledge of an element of the contravention that is a consequence of that act" (*Productivity Partners*, [351] (Beech-Jones J); see also [89] (Gageler CJ and Jagot J). The definitions that describe the conduct of an accessory, namely aid, abet, counsel and procure, "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct" (*Giorgianni*, 479-480 (Gibbs CJ) citing *United States v Peoni* (1938 100F (2d) 401, 402). In *Giorgianni*, the accessory did not need to have knowledge or intention concerning the impact of the vehicle or the occasioning of death or grievous bodily harm or that the driver would brake in a certain way or in a place where other vehicles would be impacted (*Productivity Partners*, [351] (Beech-Jones J); *Giorgianni*, 479 (Gibbs CJ), 495 (Mason J), 502-503 (Wilson, Deane and Dawson JJ)).

46. Similarly, the accessory's knowledge of the essential matters that constitute the offence does not extend to knowledge that those matters constitute an offence (*Giorgianni*, 494 (Mason J), 500 (Wilson, Deane and Dawson JJ) citing *Johnson v Youden*, 546-547; see also *Yorke*, 667; *Productivity Partners*, [339], [352] (Beech-Jones J)). In the present context, the requirement is not that the accessory intentionally assist in a constructive murder, it is that he or she intentionally assist the acts that made what was done a crime of constructive murder (cf J[169]; CAB 223-224).

Application of accessorial liability to constructive murder under s 18(1)(a) of the *Crimes Act*

47. Having regard to the text of s 18(1)(a) of the *Crimes Act* and in light of its purpose and context, including its influential historical context, neither the nature of the substantive offence nor the general tenor or policy of the provision excludes the application of accessorial liability to constructive murder as a method by which the offence of murder is committed. The two operate coherently (cf J[183]; CAB 229).

48. As already stated, accessorial liability requires that the accessory knows or believes the essential matters that make what was done by the principal a crime and, with that knowledge or belief, intentionally assists or encourages the principal. Where that crime is constructive murder under s 18(1)(a), one of the essential matters which the accessory must know or believe at the time of giving assistance or encouragement is that the principal would do the act causing death, as a means of effecting the venture, should the occasion arise. Whether the accessory had such knowledge is a question of fact in every case.

49. As a factual matter, the act causing death in constructive murder may in some cases be distinct from the commission of the acts that comprise the foundational offence. Cases of robbery armed with a dangerous weapon (s 97(2) of the *Crimes Act*) may have this characteristic, because the act of wounding or discharging a firearm is not the act that comprises the physical elements of the foundational offence. In other cases, the act causing death may coincide with the acts that also comprise the physical element of the foundational offence, for example, in an armed robbery with wounding where the death charged ensues upon the wounding (the s 98 scenario).

50. In a case where the act that causes the death coincides with the act that comprises the physical elements of the foundational offence, the knowledge and intentional assistance by the accessory of the acts of the principal which comprise the foundational offence may be sufficient to found liability of the accessory for constructive murder.

51. The CCA recognised that there may be cases where the act causing death coincides with the physical elements of the foundational offence (J[165]; CAB 221-222) but overlooked that in such cases, proof of the accessory's knowledge of the essential matters that constitute the foundational offence (and with that knowledge, their intentional assistance) will be sufficient to fix the accessory with liability for constructive murder. Instead, the CCA analysed the availability of the whole of accessorial liability for constructive murder by reference (only) to the possibility that in some cases the act causing death may be distinct from the foundational offence.

52. That flaw in the CCA's analysis is material to its interpretation of s 18(1)(a) of the *Crimes Act*. The fact that in some instances of constructive murder committed by a principal, it may not be possible to prove that the accessory to the relevant foundational offence knew that the principal would do the act causing death should the occasion arise, does not deny the coherence of the interaction of the two doctrines.

53. A number of further matters are essential to a proper understanding of the interaction between accessorial principles and liability based on constructive murder under s 18(1)(a).

54. *First*, as noted above at [45], the requirement that an accessory's intention be based on knowledge must cede to logic and common sense. When some or all of the acts of the principal which the accessory intends to assist are future acts, the accessory cannot know, and cannot sensibly be required to know, in an absolute sense, whether what they intend to assist or encourage will in fact eventuate. What is required in such a context is that the accessory know that the principal would do the act causing death as a means of effecting the venture if the occasion arose. This reflects what is stated in *Miller* as 'contingent', or 'conditional' intention. The paradigm example of such intention, and one not far removed from the facts and circumstances of the present case, concerns parties complicit in the armed robbery of a bank including a driver who it is observed "might in earlier times have been described as an accessory before the fact". As Gageler J explained in *Miller* (in the context of joint criminal enterprise) at [89],

> Their intention need not have been absolute; it need only have been contingent. They may have hoped to get away with robbing the bank without anyone getting hurt. They need only have intended that the gunman would shoot to kill as a possible means of carrying out the plan – if worst came to worst.

55. While his Honour was there speaking of intentional murder, the "plan" in question concerned not a plan to murder, but the planned armed robbery of a bank. Where liability depends on constructive murder, knowledge of death as a consequence of the relevant act is not required either in the principal or in the accessory. We return to this issue below.

56. *Giorgianni* was not directly concerned with knowledge of an accessory of the future acts of the principal. The plurality noted that there are "cases which hold that the requisite knowledge need not extend to the precise crime which is in fact committed" but that this question did not arise and was not necessary to resolve (*Giorgianni*, 505-506; see also at 481). That said, the requirement that the accessory must know or believe at the time of giving assistance or encouragement that, *inter alia*, the principal would do the act causing death, as a means of effecting the venture, if the occasion arose, is consistent with the requirement in *Giorgianni* of intent based on knowledge of the essential matters. While 'conditional' or 'contingent' intention has been referred to and applied in the context of liability based on common purpose, there is no reason in principle for its operation to be so confined.

57. *Second*, knowledge in the accessory that the principal would do the act causing death as a means of effecting the venture if the occasion arose, cannot be elided with knowledge in the accessory of the principal's intention to commit such an act. Where the offence in question is constructive murder, the former is required; the latter is not. A critical flaw in the reasoning of the CCA was the elision of the two (J[165], [169], [183]; CAB 221-224, 229). The CCA erroneously reasoned that because an accessory must know that the principal intended to commit the act which caused the death, but intention to commit that act is not required by constructive murder, s 18(1)(a) of the *Crimes Act* implicitly excludes accessorial liability for constructive murder. However, *Giorgianni* establishes that a person who intentionally assists the acts of the principal can be liable as an accessory to an offence which has no mental element. The CCA's distortion of this issue is directly contradictory of *Giorgianni*.

58. *Third*, in a case such the present, where the act causing death is distinct from the acts that comprise the foundational offence, the requirement that the accessory must know that the principal would commit the act causing death if the occasion arose means that the knowledge and intention that is required of an accessory will be greater than for the principal. That result is not anomalous (cf J[187]; CAB 230). To the contrary, it is orthodox to the law of accessorial liability that the requisite knowledge and intention of an accessory may in some cases be greater than that required of the principal (*Productivity Partners*, [365], [368] (Beech-Jones J). *Yorke* and *Giorgianni* are each an example of this.

59. *Fourth*, the knowledge required of an accessory to constructive murder under s 18(1)(a) does not extend to knowledge of the consequence of the act causing death – that is, the consequence of death. On the facts of this case, he must know that the principal would discharge a firearm as a means of effecting the robbery should the occupants of the apartment resist. However, the accessory is not required to know that death would result. The conclusion in *Giorgianni* that an accessory to an offence under s 52A was not required to have any knowledge or intention concerning the impact of the vehicle or the occasioning of death or grievous bodily harm applies to this case by parity of reasoning (*Giorgianni*, 479 (Gibbs CJ), 495 (Mason J), 502-503 (Wilson, Deane and Dawson JJ)) (see also above at [45]).

60. The statement of the CCA that death is not "merely" a consequence of the foundational offence, but is the "result of an act or omission causing death, where that is not necessarily inherent in the foundational offence" misapprehends this possibility as material to

discerning whether 18(1)(a) excludes application of accessorial liability (J[181], [183]; CAB 228, 229). As set out above, whether the act causing death does so coincide is a simply a matter of fact. A "distinct act" may require proof of knowledge of matters beyond the essential matters that make up the foundational offence. However, the possibility of the act being "distinct" as a matter of fact in a particular case does not signify an intention to exclude accessorial liability as a matter of law. In any event, once it is appreciated that to be liable for murder on the basis of constructive murder, the accessory must know that the principal would commit the act causing death should the occasion arise, the observation that "[f]or constructive murder, death is not merely a consequence, let alone a natural and probable consequence, of the foundational offence" (J[181]; CAB 228) is of no moment. The requirement that the accessory must know that the principal would commit the act causing death if the occasion arose means that death ensues upon an act of which the accessory has knowledge and, with that knowledge, intentionally assisted or encouraged.

61. A subjective state of mind at the time of the commission of a crime is rarely proved by direct evidence. The Crown will typically rely upon proof of facts and circumstances which support the drawing of inferences about an accused's state of mind. Inferences which are available in a case of robbery armed with a dangerous weapon may readily arise on the evidence, because "a common intent to threaten violence is equivalent to a common intent to use violence, for the one so easily leads to the other" (*Johns HC*, 119 (Stephen J) citing Glanville Williams, *Criminal Law, The General Part (*2nd ed., 1961), pp 397-398; see also ***Rich*** *v The Queen* (2014) 43 VR 558, [286]). Thus, in *Arulthilakan v R* (2003) 78 ALJR 257, which also involved a planned armed robbery, this Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) stated (at [29]):

> … [t]he plan… involved robbery, accompanied, if necessary, by force. Perhaps there was a theoretical possibility that Hillam would hand over the telephone without resistance, but the three intending robbers had, between them, two knives and a cosh (a type of baton). They were not intending to rely on their powers of verbal persuasion. They had equipped themselves to deal with resistance.

62. Courts are quite willing to infer from the knowledge of an accused that his or her companion was carrying a weapon, that the accused also knew it might be used, its use in fact being regarded "as within the ambit or consequence of the common purpose of the original disturbance" (*R v Vandine* [1970] 1 NSWR 252, 257 (Herron CJ), affirmed in *Johns HC*, 119; see also *Brown v R* [2006] NSWCCA 395, [11]; *Rich*, [290]). The conviction in *Vandine* of an accessory to constructive murder under s 18(1)(a) of the

Crimes Act with a foundational offence under s 98 was upheld on appeal. It was sufficient that the accessory had assisted the principal knowing that the principal would effect the robbery while in possession of an iron bar, giving rise to an implication of preparedness to use it against the victim or any person interfering. The readiness of the courts to infer the requisite state of mind in the secondary party where the crime encouraged or assisted is violent robbery is also demonstrated by the seminal case of *Betts & Ridley*[8] and *R v Grant* (1954) 38 Cr App R 107; see also *R v Smith* [1963] 1 WLR 1200, [1963] 3 All ER 597.

63. Contrary to the conclusion of the CCA (J[183]; CAB 229), liability as an accessory before the fact can work together coherently with liability for constructive murder and the doctrine of accessorial liability is not excluded from application to the second limb of s 18(1)(a) of the *Crimes Act*.

Application to the present case

64. It follows that the respondent could properly be convicted of murder by the application of accessorial principles to constructive murder under s 18(1)(a) of the *Crimes Act*. The respondent knew the loaded firearm was to be used by Coskun to effect the robbery of an apartment known or expected to be occupied by people who were in possession of drugs and money and who were likely to resist their theft. He intentionally assisted by providing a loaded firearm intending that it be used in the event of resistance by occupants of the apartment.

65. It can readily be inferred that the respondent intended that use of the loaded firearm would involve an act discharging it in order to effect the robbery if the occasion arose. Coskun acted in conformity with the respondent's assent and encouragement. Knowledge of these essential matters coupled with his intentional assistance and encouragement of Coskun rendered the respondent liable for murder for the death that ensued in the attempt to effect the robbery.

66. It was not necessary that the respondent know that the acts he encouraged or assisted were capable of constituting constructive murder if someone was shot and killed in the attempt to commit or the course of the intended robbery (*Giorgianni*, 506 (Wilson, Deane and

[8] The United Kingdom abolished felony murder in 1957: *Homicide Act* 1957 (UK), s 1. Subsequently, it is essential that the accessory should have contemplated that his companion was prepared to inflict grievous bodily harm at least upon a person during the course of committing the foundational crime, should this be necessary (see *R v Lovesey* [1970] 1 QB 352).

Dawson JJ); *Productivity Partners* [339], [352] (Beech-Jones J)) cf J[67], [70], [96], [167], [169]; CAB 181-182, 192-193, 212-224).

67. The CCA failed to differentiate between the voluntary commission of the acts that comprise the physical elements of an offence and the characterisation of those acts as a crime (J[70], [96], [167], [169]; CAB 181-182, 192-193, 222-224). The distinction is important because, as *Giorgianni* makes clear, it is sufficient that the accessory aids and abets with knowledge of the essential matters that made what was done a crime, namely "what [the principal] was doing", but the accessory need not recognise that those acts constitute a criminal offence (*Giorgianni* at 505 (Wilson, Deane and Dawson JJ); *Productivity Partners*, [339], [352] (Beech-Jones J). The distinction may be fine, but in the present context, the requirement is not that the accessory intentionally assists a constructive murder, it is that he or she intentionally assist the acts that made what was done constructive murder.

Legal policy considerations

68. Contrary to the conclusion of the CCA, there are no "open legal questions" the resolution of which fell to policy nor "extension" of constructive liability involved in this case (cf J[190], [192]; CAB 213, 232). A jury can coherently be directed that the accused accessory must have knowledge of the essential matters that make what was done by the principal a crime including that the principal would commit the act causing death (here, the discharge of the firearm) as a means of carrying out the venture should the occasion arise, and with that knowledge, intentionally assisted or encouraged the principal. Where such matters are proven as a matter of evidence, there is a strong correlation between the criminal liability of the accessory and their moral culpability. The present case represents a clear example of the point.

69. The CCA refers to the "great majority of cases dealing with the type of issue that arises here" as being "cases best characterised as involving JCE" (J[192]; CAB 231). This statement is problematic in two respects. *First*, it fails to acknowledge that liability for joint enterprise and as an accessory is not binary and in many cases liability may be established upon both doctrines, even if the doctrines fix upon different aspects of conduct to found liability (*Miller*, [34]; *Clayton*, [20]).

70. *Second*, and with unacceptable adverse consequences for the law, it acknowledges that there are cases in which the evidence does not support a finding of an "agreement" with the principal or mutual embarkation on a crime. In such a case, liability is properly

derivative. In each case, liability will depend on the knowledge and intention of the accessory. The Judgment has the effect that the culpability of a secondary party in these circumstances is no longer recognised in law. Yet, in such cases, as noted in paragraph [21] above, the moral culpability of the accessory may be equivalent to or even greater than that of the principal.

71. The liability of an accessory to constructive murder works no damage to the policy of the law that the scope of constructive crime should be confined to what is truly unavoidable (*Mitchell* [46] (Gageler, Gleeson and Jagot JJ); cf J[191; CAB 232]). The criminal liability of the accessory depends upon what is known and intended, in conformant alignment with the general policy of criminal complicity in the common law (for example, per *Miller*, [84]-[89] (Gageler J).

72. As noted above, the CCA suggested that it would be anomalous if an accessory was required to have a higher mens rea than the principal (J[166], J[187]; CAB 222, 230). To the contrary, *Giorgianni* is clear authority that this may be both acceptable and justifiable (*Giorgianni* 483 (Gibbs CJ); *Yorke*; *Productivity Partners* [349]; *R v Rohan (a pseudonym)* (2024) 98 ALJR 429, [38] (Gageler CJ, Gordon and Edelman JJ).

73. The felony murder rule operates upon the accused acting at his or her peril, to deter those who are minded to resort to force in their commission of violent crime upon encountering resistance (see above at [31]). The same policy applies to those who would direct or procure others to undertake serious violent crime on their behalf. As described in *Miller* at [36] citing *R v Powell* [1999] 1 AC 1, 14 (Lord Steyn):

> … [t]he criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed.

74. The violence inherent in robbery, particularly involving a dangerous weapon, has long informed the willingness of the law to hold accessories criminally responsible for felony murder committed by the principal. There is no apparent over-criminalisation of accessories for constructive murder (cf *Miller*, [128] (Gageler J); cf J[192]; CAB 232).

Conclusion

75. The nature of constructive murder in s 18(1)(a) of the *Crimes Act* operates coherently with principles of accessorial liability. Enactment of constructive murder in s 18(1)(a) was

intended to relevantly replicate felony murder at common law and it was no policy of the legislation or of the common law to exclude accessorial liability for murder by that method. The terms of the statute do not suggest to the contrary. Section 18(1)(a) does not exclude the application of accessorial principles to constructive murder.

76. The liability of an accessory for constructive murder does not dislocate principles of accessorial liability which were settled in *Giorgianni*. This is because it is one of the essential matters that the accessory must know or believe at the time of giving assistance or encouragement is that the principal would do the act causing death, as a means of effecting the venture, should the occasion arise. This state of mind of the accessory, comprising knowledge and intention, is conformably aligned with the *Giorgianni* principles.

Part VII: Orders sought

1. Appeal allowed.
2. Orders 3, 4 and 5 of the CCA made on 10 May 2024 on the respondent's appeal against conviction be set aside and, in their place, order that the appeal against conviction be dismissed.

Part VIII: Estimate of time

77. The appellant would seek up to 3 hours for oral argument, including reply.

Dated: 6 February 2025

Sally Dowling SC
Director of Public Prosecutions

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No.	Statute	Version	Provisions	Reason for providing version
1.	Crimes Act 1900 (NSW)	No 40 (as in force from 28 February 2019 to 30 June 2019)	s 18 s 97 s 98 ss 345, 346, 347	Act in force on the date of the offence: 2 April 2019
2.	Criminal Law Amendment Act 1883 (NSW)	No 9a (as made)	s 9 ss 302-303	Original predecessor legislation