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 REPLY

Part I: Internet publication

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

Part II: Reply

2. The appellant acknowledges that in the respondent's trial, the jury were not directed in the terms contained in AS[28]. If this Court upholds the appeal and finds that the necessary state of mind of the accessory before the fact to constructive murder is as set out in AS[28], it is accepted that the order for a new trial should be affirmed (RS[4]).

Facts

3. At trial there was no dispute that Coskun and the unknown male attempted to commit a robbery together while they were armed with a dangerous weapon, and that during this attempt a firearm was discharged by one of them (RBFM p5-6; cf RS[7]). There was no dispute that this enterprise was undertaken jointly between Coskun and the unknown male or that each was liable for the murder of the deceased (cf RS[7]).

4. Both Coskun and the unknown male were armed with a handgun, only one of which was discharged. All the ten .40 calibre cartridge cases, including the bullet that killed the deceased, were discharged from a single firearm consistent with a "Glock-type" pistol, the type of gun supplied by the respondent to Coskun (AS[10]; cf RS[12]). Coskun's statement to the respondent that they would be "[i]n and out nice and quick" (ABFM 10) patently underplayed the violence inherent in the venture which the respondent knew was to be undertaken with a loaded gun (cf RS[13]).

5. The Crown case specified that the respondent intentionally *assisted*, not 'encouraged', Coskun in the commission of the attempted robbery armed with a dangerous weapon and constructive murder (cf RS[6]). The assistance alleged by the Crown was the respondent's provision of the loaded handgun and the high-visibility shirt, or one of those. Importantly, the jury were directed that the Crown was required to establish that the respondent knew that Coskun had a dangerous weapon, knowledge of his possession of a dangerous weapon being an "essential matter", and that the respondent was aware of the possibility of the discharge of a gun (RBFM pp5-6). As such, the Crown had to prove that when he assisted Coskun, the respondent knew that Coskun

was armed with a firearm when committing an attempted robbery armed with a dangerous weapon (cf RS[8]).

Argument

6. Acknowledgement of the separate utility of accessorial liability underscores the importance of preserving that separate basis of liability (RS[22], [58]). There will be cases, including cases of constructive murder, in which accessorial liability is the only basis upon which the secondary party to a crime is liable for an offence (cf RS[48]). Occupation by this Court in recent decades with the elucidation of joint criminal enterprise and extended joint criminal enterprise, forensic reliance upon those doctrines by prosecutors and the overlap of potential bases of liability in practice in some cases, does not justify and should not lead to denial of accessorial liability as an available basis of liability for constructive murder.

7. The respondent wholly overlooks that beyond the question of presence there is no distinction between a principal in the second degree and an accessory before the fact (***Giorgianni*** *v The Queen* (1985) 156 CLR 473, 480-481, 493; *Johns v The Queen* (1980) 143 CLR 108, 116 (***Johns HC***); *R v Johns* [1978] 1 NSWLR 282, 287D-E;[1] cf RS[41], [42]). Accessories before the fact and principals in the second degree are charged, tried and punished in the same way as principals in the first degree: ss 345-346 *Crimes Act 1900* (NSW). The terms "aid", "abet", "counsel" and "procure" are instances of the one premise, that the person charged as accessory or principal in the second degree is in some way linked in purpose with the person physically committing the crime and, by words or conduct, doing something to bring about, or render more likely, the commission of such an offence (*R v Russell* [1933] VLR 59, 67; *Giorgianni*, 493).

8. It follows that the impact of the CCA's judgment is not confined to the liability of an accessory before the fact as a method of proving guilt for constructive murder (cf RS[17]). Wider implications are apparent. Further, the finding, for instance, that the accessory before the fact must know of an intent to do "an act or omission… causing death" contradicts *Giorgianni*, which holds that an accessory can be liable for an offence which has no mental element (J[183]; CAB 229; cf RS[17], [20], [30]).

9. The formulation in AS[28] of the accessory's mental state reflects the accepted state of mind for secondary complicity in crime (cf RS[49]). The starting point is *Giorgianni*, that for liability the accessory must know or believe the essential matters that made what was done a crime, and with that knowledge, intentionally encourage or assist the principal. With the present facts as an example, an 'essential matter' is that the principal would discharge the firearm as a means of effecting the venture, should the occasion (such as resistance) arise. These requirements in turn are soundly grounded in the general principle of the criminal law that a person who

[1] Accessories at the fact became described as principals in the second degree as a "judicial manoeuvre designed to do away with the situation that the accessory might escape liability simply because the principal had not been convicted": ***Osland*** *v The Queen* (1998) 197 CLR 316, [208].

intentionally assists in or encourages the commission of a crime may be convicted as a party to that crime (***Miller*** *v The Queen* (2016) 259 CLR 380, [30], [108]-[109]). There is no "melding" of the elements of constructive murder, need for "carve outs" and exceptions, or "water[ing] down" of the requirements in *Giorgianni* (cf RS[57], [59]).

10. Further, complaints that such a state of mind "collapses" distinctions or that it is "just common purpose woven into accessorial liability" do not engage with the substance of what is under consideration (cf RS[58], [59]). What is under consideration is a future act which the accessory well knows the principal would commit to effect the purpose of the (usually violent or dangerous) conduct that the accessory intentionally assists or encourages. *R v Stokes & Difford* (1990) 51 A Crim R 25 at 37-39 was not directly concerned with this point (cf RS[21]).

11. The conditional or contingent intent is that of the principal, not the accessory. The intention of the accessory is to assist or encourage the principal knowing the principal would, for instance, resort to violence as a means of effecting the venture in the event of resistance (cf RS[55], [60], [62]-[63]). 'Venture' simply describes the endeavour or plan that both are pursuing (cf RS[59]). The accessory and principal are required to be linked in purpose because otherwise a person could be liable as an accessory where, through ignorance of the facts, it appears to them to be an innocent act (*Giorgianni*, 494). Self-evidently, in its plain and ordinary usage, 'venture' is not confined to joint criminal enterprise (cf RS [59]).

12. Analysis of the statute for whether it excludes accessorial liability in particular classes of case is an orthodox approach to the task at hand (cf RS[50]). Demonstrating coherence where the death is consequent upon an act that comprises part of the physical elements of the foundational offence is a powerful indication that the legislature did not intend to exclude accessorial liability (cf RS[50]-[51], [59]). *Blackstone's Commentaries*[2] do not advance the respondent's position. Where the accessory knows that the principal intends to commit unlawful acts amounting to attempted robbery armed with a dangerous weapon, which include discharge of a firearm should the occasion arise, and intentionally assists or encourages those acts, the discharge of the firearm is not 'distinct' from that which the accessory commanded or counselled (cf RS[54]).

13. Extrinsic material to the enactment of the predecessor to s 18(1)(a) of the *Crimes Act* does not indicate that the absence of a requirement of intention for the act causing death in constructive murder demonstrates incongruity with accessorial liability (cf RS[30]). The context of referring to the 'accidental' taking of life in the *Criminal Law Manual* informs what the drafters meant, namely, an act that does not require the state of mind for murder under the first limb of s 18(1)(a), but which was done in the course of intentional violent or dangerous crime with the

[2] *Blackstone's Commentaries* (21st ed, 1844), vol. 4, pp. 36-37, cited in *Giorgianni* 502.

consequence of death.[3] 'Accidental' here does not convey a happening by pure chance (cf RS[30]).

14. Accurate description of the principles is critical. The accessory must know or believe that what they are assisting or encouraging is something which *goes to make up the facts* which constitute the commission of the relevant criminal offence (*Giorgianni*, 506; cf RS[18]). Describing the necessary knowledge or belief as 'attendant' to procuring or counselling the crime elides knowledge or belief of the offence with knowledge or belief of essential matters (cf RS[18]). Assistance or encouragement is of the acts, not the criminal offence (cf RS[18]). Distinct acts are elided with the notion of distinct offences in RS[54].

15. Belief as well as knowledge (*Giorgianni*, 507) is important but is largely overlooked by the respondent.

16. The insufficiency of knowledge or belief as to "possibility or even probability" was not possibility or probability of an act being committed by the principal (cf RS[19], [54]). It was possibility or probability of whether the acts which the accessory is assisting or encouraging constitute the factual ingredients of a crime (*Giorgianni*, 506-507). An accessory can have a 'design' that acts constituting a criminal offence will be committed, even if there is uncertainty whether the principal will actually proceed to do those acts (*Giorgianni*, 507; cf RS[19]). Once this important distinction is appreciated, it is apparent that there arises no occasion to reopen *Giorgianni* (cf RS[19], [64]). Knowledge or foresight of the consequence of death is not required, as *Giorgianni* makes clear (cf RS[19]).

17. The assertion that common purpose has always been a distinct doctrine of complicity ignores that courts previously applied common purpose to those charged and convicted as accessories (cf RS[23]-[26]). *Johns HC* confirmed that common purpose extends to an accessory before the fact, in an appropriate case, to provide the measure of complicity (*Johns HC*, 118; *McAuliffe v The Queen* (1995) 183 CLR 108, 113-114; cf RS[34]). This Court has repeatedly recognised the applicability of common purpose to the liability of an accessory as one way in which the law seeks to lay down limits to accessorial liability (*Darkan v The Queen* (2006) 227 CLR 373, [76]; *Brennan v The King* (1936) 55 CLR 253, 259; *Johns HC*).

18. Recasting the previous 'probable consequences' test for a subjective state of mind does not detract from the significance that early scholars confirmed an accessory who commands a principal to commit a robbery is liable for death occasioned during that robbery (*Miller*, [6]-[16]; cf RS[35], [38]). These early writings, when case reports were relatively scarce, ground the long recognition of the law of accessorial liability for constructive murder (AS[32], [37]; cf RS[31]-[32], [39]).

19. *R v Radalyski* (1899) 24 VLR 687 was understood in *Johns HC* as a case of accessory before the fact (*Johns HC* 120, 121-122, 130; cf RS[37(a)]). In *R v Brown and Brian* [1949] VLR

[3] Stephen and Oliver, *Criminal Law Manual* (1883).

177, Brian was indicted as an accessory before the fact to felony murder. Ultimately the felony murder rule did not apply because the act causing death was not 'violent'. The reference to "the course of a non-felonious act after the felony was complete" was to *Ross v The King* (1922) 30 CLR 246 (cf RS[37(b)]). Criticism of *Appleby v The King* (1943) 28 Cr App R 1 misses the point in principle of the constructive nature of the murder offence (cf RS[37(c)]).

20. Expressions of the common law felony murder rule did not confine the liability of participants to their "own criminal acts or those done in a JCE" and *R v Jarmain* [1946] 1 K.B. 74 does not state such a limitation (AS[31], cf RS[29]). The point of *R v Skeet* (1866) 4 F & F 931, 936-937, cited in *R v* ***Jogee*** [2017] AC 387 [23], was that constructive murder was limited to cases where evidence showed that the unlawful purpose was *felonious*, because lesser unlawful purposes were insufficient (cf RS[29]). *Jogee* referred to common design and *Skeet* to common purpose, but the passages said nothing about limiting application to cases of "common purpose" and, indeed, *Jogee* [24] was at pains to clarify that "common design" in this context was simply a synonym for "shared intention" (cf RS[29]).

21. The respondent's assertions of incoherence do not withstand scrutiny (RS[40]-[49]). The accessory must know or believe that the act causing death would be done should the occasion arise (AS[28]; cf RS[41], [45]). The respondent misapprehends the rationale for constructive murder, which is not spontaneity but the dangerousness inherent in violent crime (for example, *Johns HC*; cf RS[42]). The question of whether an accessory knew of planned violence aligns with the requirement of knowledge of essential matters (*Giorgianni*). The issues in RS[42]-[44], [56] turn on facts, not principle. Characterising the essence of constructive murder primarily by the act causing death ignores its proper rationale (cf RS[59]).

22. Characterisation as 'double deeming' does not engage with the basis of the accessory's liability (cf RS[46]). The liability for murder is constructive but liability for the foundational offence is not (cf RS[46]). The liability of the accessory is derivative, not deemed (cf RS[46]). The policy and history of the law addresses intentional participation in criminal conduct with knowledge that comprehends the essential matters of the planned criminal venture. The formulation at AS[28] is consistent with both and ensures correlation between moral culpability and legal responsibility (cf RS[47]).

Dated: 6 March 2025

Sally Dowling SC
Director of Public Prosecutions

Monica Millward
Crown Chambers

Ann Bonnor
Forbes Chambers

Name: Elizabeth True
Telephone: (02) 9285 8686
Email: ETrue@odpp.nsw.gov.au