HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 27 Feb 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S148/2024
File Title:	The King v. Batak
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	27 Feb 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

CEM BATAK

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The primary issue arising on the appeal is whether the principles of accessorial liability for an accessory before the fact (**ABF liability**) are excluded from application to "second limb" murder, also known as "constructive" murder, in s 18(1)(a) of the ***Crimes Act*** *1900* (NSW) (see AS [2(a)]).

3. In determining that issue, the Court will need to consider – as did the Court of Criminal Appeal (**CCA**) (J [161]-[183] CAB 219-229) – a subsidiary issue, namely, what state of mind would be required for ABF liability for constructive murder under s 18(1)(a), if that basis for liability were to be available (see AS [2(b)]).

4. Depending on this Court's resolution of the primary issue, a further issue may arise as to whether to dismiss the conviction appeal or to affirm the order for a new trial. That issue as to orders concerns whether the trial conducted actually incorporated the necessary state of mind direction to the jury that this Court determines was required. Alternatively, insofar as may be necessary, the Respondent seeks leave to raise the issue as to whether the trial judge directed the jury in accordance with the requisite state of mind by way of a notice of contention.

Part III: Notice of constitutional matter

5. The Respondent does not consider a s 78B notice to be necessary.

Part IV: Facts

Basis for liability

6. As the Appellant notes (AS [16]), the indictment relied on s 346 of the *Crimes Act* in relation to both counts (CAB 5, 98). The Respondent was not alleged to be party to a joint criminal enterprise (**JCE**) to engage in the s 97(2) *Crimes Act* offence (Count 2), much less murder (Count 1). His alleged encouragement of Coskun to commit the aggravated attempted robbery of Sargon Odisho was said to found his liability as an accessory before the fact to constructive murder of John Odisho (Count 1).

7. The jury was directed that it was unnecessary for the Crown to prove who fired the fatal shot, Coskun or the unknown male (CAB 35, 65). As the case was left to the jury, it was open to convict the Respondent of murder even if the act causing death was done not by the person he allegedly counselled or procured (Coskun) but "perhaps" by the unknown male (J [40] CAB 171, CAB 35, 65; cf. AS [17]). The trial directions on constructive murder did not require any knowledge of the act causing death at the time of assistance nor an intention to assist the unknown male to commit an attempted robbery. Nor was there any direction as to a JCE between Coskun and the unknown male in the knowledge direction on constructive murder (see MFI 66 RBFM 5-6, J [41] CAB 171-172). It was "common ground" that there was no evidence that the Respondent knew the unknown male (CAB 69).

8. It is correct that the Crown alleged to the jury that the Respondent intentionally assisted Coskun by providing him with both a high-visibility shirt and a handgun (AS [17]). However, the jury was told that "The Crown does not have to prove both forms of assistance. It has to prove intentional assistance was provided by the accused *by one means or the other*." (Emphasis added) (MFI 66, element 2, RBFM 5; J [41] CAB 171, CAB 32-33) This was confirmed in written directions to the jury as to unanimity being required as to provision of either "a shirt" or "a gun" or both (MFI 71 RBFM 10, MFI 72 RBFM 12, CAB 63-65, J [43] CAB 172–3). The shirt was emphasised orally as an independent and sufficient form of assistance (CAB 34).

The directions on the Respondent's state of mind

9. In an "elements document" provided to the jury, the jury was instructed that the state of mind the Crown had to prove to establish the Respondent's liability for constructive murder, in addition to the state of mind for the foundational offence, was:

> **5. The discharge of a gun during the attempted armed robbery with a dangerous weapon was a possibility which the accused was aware of when he provided the assistance to Cengiz Coskun (providing the shirt and/or gun).**
>
> Put another way, the accused realised or contemplated, at the time of assisting Mr Coskun, that it was possible a gun could be discharged during the attempt to commit the armed robbery.
>
> (J [41] CAB 172, bold in original, see also oral direction at CAB 35)

10. The trial judge also summarised, without criticism, the prosecutor's closing address that the Respondent contemplated the possibility that the gun might be discharged (CAB 75).

Other matters

11. It was not disputed that the Respondent gave his high visibility vest and a gun to Coskun. However, intentional assistance was denied: CAB 76. The Respondent's case was that (a) he did not know what the high visibility vest was for; and (b) that the gun used in the robbery was Coskun's and he had been storing it for him: CAB 77-78.

12. There was an issue at trial over whether the gun provided was the gun used in the robbery: CAB 79. The ballistics evidence rose no higher than that a "Glock-type" pistol similar to that given to Coskun was fired by an intruder at the scene, as was another silver handgun. There were also issues raised by the Respondent over whether the provided gun was used by Coskun, and the reliability of descriptions given by those at the scene: see CAB 79 cf. AS [10], [14]. It was not accepted that Coskun had fired the fatal shot: CAB 80. It was also argued that the Respondent's state of mind could not have been informed by any knowledge about the unknown male who may have fired the shot: CAB 80.

13. To the extent that the recorded conversation after the event was evidence of what was anticipated and what later occurred at the scene, the Respondent was told prior by Coskun "It's easy" and he would go "straight in and out". The Respondent was told that what actually happened was that the occupants fired, shot Coskun and that Coskun's "mate" then fired at the occupants, including firing the shot causing death (ABFM 10): cf. AS [10]-[11].

14. The statement at AS [19] as to what was held by the CCA does not address the judgment as a whole or engage with core reasoning of the CCA as to the various bases for upholding Ground One below.

Part V: Argument

15. While ABF liability applies to "first limb"/intentional murder, and JCE principles apply to "second limb"/constructive murder, the doctrine of ABF liability is excluded from application to constructive murder in s 18(1)(a) of the *Crimes Act*.

16. The application of the common law as to ABF liability is in tension with the statutory scheme for constructive murder and must yield to ensure coherence, having regard to the general tenor and policy by which "second limb" murder was created: ***Mallan v Lee*** (1949) 80 CLR 198 at 216 (Dixon J), quoted with approval in ***Giorgianni*** *v The Queen* (1985) 156 CLR 473 at 491 (Mason J); ***Mitchell*** *v The King* (2023) 276 CLR 299 at [35], [46] (Gageler, Gleeson and Jagot JJ). This Court would uphold the conclusion of the CCA, who having undertaken a detailed analysis of the statutory scheme, text, context and purpose, the common law as to complicity and requirements of ABF liability, concluded that it is implicitly excluded from constructive murder: CCA [183].

17. The impact of the CCA's judgment does not extend to accessorial liability for strict liability and civil contraventions: cf. AS [26]. The impact of the CCA's judgment is confined to the availability of ABF liability as a pathway of guilt for s 18(1)(a) "second limb" murder. It has no wider implications.

A. The distinct strands of complicity at common law

18. The only basis of complicity relied upon by the Appellant at trial was ABF liability to constructive murder. To be an accessory before the fact to a crime, a person must (a) intentionally participate in that crime by lending assistance or encouragement, procuring or counselling it, with attendant knowledge; and (b) in so participating, intend the commission of the acts constituting the crime: *Giorgianni* at 506-507. The intention must be grounded in actual knowledge or belief in the necessary matters constituting the crime. Constructive or imputed knowledge does not suffice: *Giorgianni* at 504-5. Nor does foresight of probable consequences, which may be equated with recklessness, neither of which suffice: *Giorgianni* at 506, 508. The knowledge must be of the essential facts, elements or matters of the contravention, which can extend to essential circumstances and states of mind: ***Yorke*** *v Lucas* (1985) 158 CLR 661 at 667, 670

(Mason ACJ, Wilson, Deane and Dawson JJ) and 677 (Brennan J); ***Productivity Partners*** *Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021 at [82] (Gageler CJ and Jagot J), [149], [153] (Gordon J, Steward J agreeing), [258]-[272] (Edelman J), [347], [349] (Beech-Jones J, Gleeson J agreeing at [311]); *DPP v Gebregiorgis and Another* (2023) 71 VR 361 at [48]-[51], quoting *R v* ***Stokes*** *& Difford* (1990) 51 A Crim R 25 at 37-39.

19. Moreover, "It is not sufficient if his knowledge or belief only extends to the possibility or even probability that the acts which he is assisting or encouraging are such, whether he realises or not, as to constitute the factual ingredients of a crime. If that were sufficient, a person might be guilty of aiding, abetting, counselling or procuring the commission of an offence which formed no part of his design … Intent is required": *Giorgianni* at 506-507 (emphasis added). "Design" was used here to mean intent, confirming that knowledge of the possibility of an act or acts being committed by the principal is not sufficient to constitute the knowledge of an accessory before the fact: J [166] CAB 222; cf. AS [28]. There must be knowledge of the (future) act/s, not knowledge of the possibility of a (future) act/s, and it is with that knowledge that the accessory before the fact must intentionally assist or encourage the principal. "[F]oresight of … probable consequences" is not "sufficient intent in law" for "offences of aiding and abetting": *Giorgianni* at 506. *Giorgianni* has been consistently adhered to by this Court. The Appellant has not sought leave to reopen it but nonetheless suggests that the knowledge requirement should "cede to logic and common sense": cf. AS [54]. This Court would reject that submission.

20. Contrary to AS [57], the CCA did not elide knowledge and intention at J [165], [169], [183]: CAB 221-222, 223, 229. Reading the CCA's reasons as a whole, it is evident that these references to knowledge of the "intention" of the principal relate to knowledge of the essential facts (constituting the crime), in particular knowledge of what would be done by the principal, including the act causing death, along with any attendant necessary state of mind. This language is first used at J [66]-[67] CAB 180-181.

21. Where essential matters constituting the offence have not already occurred, it has been explained that the knowledge required is of what the principal will do, that is knowledge of the principal's intention to commit the act(s) constituting the offence, and not mere suspicion that they would do so: cf. *R v Rich* (1997) 93 A Crim R 483 at 521 (Bleby J, Williams J agreeing at 504); see also *Stokes* at 37-39. In that way, the lawful vendor of

a knife is not derivatively liable for the criminal use to which that knife is put, unless the vendor had the relevant knowledge of the intended use and him or herself intended – in providing the knife – that the knife be used in that way. This accords with the necessity for the accessory's knowledge to include "the relevant nature, character and circumstances of the principal's unlawful act…", rather than the characterisation at law of those acts: *Productivity Partners* at [82] (Gageler CJ and Jagot J), [148] (Gordon J, Steward J agreeing), [308] (Edelman J), [311] (Gleeson J), [351]-[351] (Beech-Jones J). The requirement for actual knowledge is strict: *Yorke* at 667; *Productivity Partners* at [83] (Gageler CJ and Jagot J), [146] (Gordon J, Steward J agreeing), [201], [261] (Edelman J) and [360] (Beech-Jones J, Gleeson J agreeing) approving *Anchorage Capital Master Offshore Ltd v Sparkes* (2023) 111 NSWLR 304.

22. Accessorial liability forms just part of the tapestry of complicity principles that operate in Australian jurisdictions that continue to apply the common law. After decades of work by this Court to refine, clarify and demarcate these principles, it is now established that JCE and extended joint criminal enterprise (**EJCE**) operate as legally distinct bases of complicity with separate utility to accessorial liability: ***Clayton*** *v The Queen* (2006) 81 ALJR 439 at [20] and ***Miller*** *v The Queen* (2016) 259 CLR 380 at [34]. The unanimous decision of this Court in ***McAuliffe*** *v The Queen* (1995) 183 CLR 108 (which the Court has declined to reopen on multiple occasions in *Gillard v The Queen* (2003) 219 CLR 1, *Clayton* and *Miller*) confirmed the doctrines of JCE and EJCE, as did *Miller* at [4], namely that:

(a) A JCE arises when two or more persons agree to commit a crime. If the crime that is the object of the enterprise is committed while the agreement remains on foot, all parties to the agreement are equally guilty, regardless of the part that each has played in the conduct constituting the actus reus. 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. An incidental crime is within the scope of the agreement if the parties (mutually) contemplate or have foresight of its commission as a possible incident of the execution of their agreement.

(b) EJCE liability arises where a party to a JCE foresees/contemplates, 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. The person who foresees the possible commission of that incidental crime is liable for it.

23. JCE and EJCE spring from the common law doctrine of common purpose: *Miller* at [3]. The distinct gradations of murder and manslaughter in joint criminal enterprise cases on first limb murder were recognised in *Markby v The Queen* (1978) 140 CLR 108. To the contrary of the Appellant's submission, common purpose is, and always has been, a distinct doctrine of complicity to the alternate rules governing ABF liability, the former having a distinctive normative character and each requiring different mens rea: cf. AS at [22], [28]. There are also distinctions as to the issue of withdrawal: AS [24]. The wrong in an accessory is grounded in their contribution to the principal's crime, whereas the wrong in the case of a party to a JCE "lies in their mutual embarkation on a crime with the awareness that the incidental crime may be committed in executing their agreement": *Clayton* at [20]; *Miller* at [34]. *R v* ***Betts and Ridley*** (1930) 22 Cr App R 148, relied on by the Appellant, was a case concerning parties to a "common design" being responsible for the acts of the other, recognised in *Mitchell* at [65] as a case of joint criminal enterprise (Gordon, Edelman and Steward JJ): cf. AS [22].

24. That common purpose (and its progeny) was a distinct basis of complicity is confirmed by the separate treatment they are given in Articles 38 and 41 of Sir James Stephen's *Digest of the Criminal Law* 1877 (**1877 *Digest***), and in his draft Penal Code – extracted in *O'Dea v State of Western Australia* (2022) 273 CLR 315 at [58]; acknowledged by Gordon, Edelman and Steward JJ as the closest England came to achieving a codified criminal law. The distinct requirements to establish ABF liability as opposed to common purpose, including knowledge and intentional encouragement, were recognised in Article 39 of the 1877 *Digest*.

25. It is where two or more persons are acting in concert to effect a common criminal purpose, in the nature of a JCE, that the acts of each in carrying out that venture are attributed to the others: *IL v The Queen* (2017) 262 CLR 268 at [2], [26], [28]-[29] (Kiefel CJ, Keane and Edelman JJ (obiter)), [103] (Gageler J), [146], [148] (Gordon J).

26. Unlike JCE, ABF liability is a complicity principle which imposes derivative liability for the principal's particular offence where it is shown to be intentionally encouraged or assisted, with knowledge in the accessory of the essential matters of the principal's crime. The law does not recognise the combination or layering of the two distinct doctrines; they are independent pathways of liability. Common purpose applies where a person before the fact joins in an enterprise, as explained in *Johns v The Queen* (1980) 143 CLR 108 (***Johns HC***). The CCA was, with respect, correct in its analysis of the

variations and distinctions of the doctrines: CCA at [71]-[96], CAB 182-193. This appeal is concerned with the distinct basis of ABF liability.

B. Liability for second limb murder as an accessory before the fact

Constructive murder

27. Constructive murder in s 18 (1)(a) is the only pathway to murder that does not require the perpetrator to have a state of mind of intending to kill or inflict grievous bodily harm, or at least expecting the probable result of death or grievous bodily harm being caused by the accused's act or omission. Rather it criminalises any act or omission causing the death "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" (**the foundational offence**).

28. Constructive murder has always encompassed circumstances where there was a common purpose or JCE afoot in the foundational offence and the cause of death was an act (including an unplanned act) done by the other co-venturer/s: *R v Surridge* (1942) 42 SR (NSW) 278. There is no issue that JCE operates harmoniously with constructive murder: J [45] CAB 173.

29. The purpose of the felony murder rule was to require a felon to assume the risk of his/her own criminal acts or those done in a JCE: AS [31]. *R v* ***Jogee*** [2017] AC 387 at [23]-[24] explained by reference to *R v Skeet* (1866) 4 F & F 931 at 936-937, that the constructive murder rule was by that time, limited in application to cases of common purpose encompassing all hazards and consequences. The fact that the common law rules of complicity as to common purpose were imported on the enactment of s 18(1)(a) so as to encompass liability in a co-venturer for an act causing death committed in the course of carrying out a joint criminal enterprise (cf. AS [34] and the authorities quoted therein), says nothing about whether the principles of ABF liability were operative for constructive murder at the time of enactment of s 18, let alone whether they now operate to render an accessory before the fact derivatively liable for constructive murder.

30. The CCA correctly recognised that for an accessory before the fact charged with murder, there must be knowledge of all of the essential facts, including knowledge of a distinct essential fact, namely, knowledge that the principal intended to do the act causing death, which is incongruous where constructive murder is alleged: J [169] CAB 223. This is underscored by the fact that when it was made a statutory offence in NSW, the drafters

considered that this limb of murder was directed to "The accidental taking of life": Stephen and Oliver, *Criminal Law Manual* (1883) at 201. This description of common law second limb murder, used in the sense of killing by an unintentional voluntary act, was confirmed as "right" by Windeyer J in ***Ryan*** *v The Queen* 121 CLR 205 at 241 (see also Barwick CJ at 213 and Menzies J at 234-235).

The common law has never recognised ABF liability for constructive murder

31. The Appellant's contentions start from the false premise that the common law has always recognised ABF liability for constructive murder (AS [25], [42], referring to AS [36]-[40]). None of the cases there cited supports such a proposition. Citation of cases applying the principles of complicity by common purpose, or the doctrine of "innocent" or non-responsible agency (see *Osland v The Queen* (1998) 197 CLR 316 at [85]-[92]), does not address the issue at hand. It is well established that constructive murder incorporates "the common law rules of attribution of acts embodied in joint criminal enterprise": *Mitchell* at [64]-[65] (Gordon, Edelman and Steward JJ), see also [37] and [40] (Gageler, Gleeson and Jagot JJ).

32. No case has been cited where the coherence of ABF liability with constructive murder has been determined, or such mode of liability correctly applied. Nor has any case been cited which suggested ABF liability can be combined with constructive murder where the act causing death is attributed to the principal by reason of an underlying JCE. Contrary to the Appellant's submission, the issue considered by the CCA clearly raised "open legal questions", and consideration of a proposed "extension" of constructive liability: cf. AS [68].

33. This Court has consistently held both *R v Johns* [1978] 1 NSWLR 282 (***Johns CCA***) and *Johns HC* to be cases of "common purpose" or "joint criminal enterprise": *Miller* at [10], [17]-[20]; *McAuliffe* at 114-115. The CCA correctly recognised that the references to *Johns* being "an accessory before the fact are best understood as describing his role and not the legal basis of his liability": J [79] CAB 185, J [160] CAB 219.

34. The survey of historical cases in *Miller* at [6]-[16] (AS [37]) also does not disclose any case reliant on the principles of ABF liability (either as ABF liability was understood at the time of Stephen's 1877 *Digest* Art 39; or as it is understood today) for felony or constructive murder. The cases referred to are again common purpose cases. The CCA accurately held that the majority of cases relied on by the Appellant were best

characterised as involving JCE: cf. AS [69]. Moreover, the references to Foster's *Discourses on Crown Law* relied on by the Appellant concern statements of principle now replaced by a subjective element, reflected in what is now known as joint criminal enterprise: *Miller* at [18]; citing *Johns CCA* at 289. Foster needs to be read "cautiously" in that light: *Miller* at [87] (Gageler J).

35. When Foster wrote of an accessory to a robbery being liable for a murder committed in the course of it (see *Miller* at [7]), that was not because the accessory could accurately be said to have known of the act causing death or intended to assist with that knowledge, but rather because it was the objectively likely outcome of the scenario described. That approach was not only reworked to state the principles of JCE found in *Johns HC* and *Johns CCA* (see also *McAuliffe* at 114-115) but has been rejected as forming any part of accessorial liability (*Giorgianni* at 506-7) or EJCE (*McAuliffe* at 117-118).

36. Finally, the survey in *Miller* reveals the "division of judicial opinion" as to responsibility for accessories and that "no tolerably clear authoritative principle emerges from the case law": *Miller* at [12]. The CCA reviewed all of these developments of the law in detail: J [50]-[110] CAB 175-199: cf. AS [42]. It was understandable that the Appellant did not argue below that there was any long standing settled understanding of the law in relation to s 18 on the issue in question: J [192]. Contrary to AS [41] and [69], as with extended joint criminal enterprise, a common law doctrine for an accessory before the fact affixing to second limb murder, cannot taken to have been established (or so well established) at the time of the 1883 enactment as to have been in legislative contemplation at that time: cf. *Mitchell* at [45] (Gageler, Gleeson and Jagot JJ) and [97] (Gordon, Edelman and Steward JJ).

37. As to the cases referred to in AS [40]:

    (a) *R v Radalyski* (1899) 24 VLR 67 is properly understood as an early expression of common purpose, relying on "ordinary" (and probable) consequences and the expression of joint contemplation of an incidental act. So much was acknowledged by the plurality in *Johns HC* at 130-131; see also *Johns CCA* at 298B-C;

    (b) *R v Brown and Brian* [1949] VLR 177 (cf. CWS [71]) was not a case of felony murder. While there was some discussion of liability in the actor and the reasonable "probable consequences" of resulting death or grievous bodily harm being applicable if felony murder was to be established, the act causing death was non-felonious, and

was an act after the felony, rendering the rule otiose. The convictions were quashed and in obiter it was said that the only case to be left to the jury was one of manslaughter: J [118] CAB 202.

(c) *Appleby v The King* (1943) 28 Cr App R 1 was not a case of felony murder and was a case of common purpose. As the report itself identifies, it was a case involving the unique form of murder at common law where the necessary intent was "to oppose by force any officer or justice on his way to, in, or returning from the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed": *Appleby* at 4. It does not bear on the issue before the Court.

38. The CCA did not fail to take into account any "long-standing position at common law that an accessory may be liable for felony murder" or overturn any "long-accepted understanding of the law": cf. AS [42]. The CCA also correctly recognised the need for caution in fixing upon particular descriptions of the basis for liability in the older authorities on complicity (J [80], [123] CAB 186, 204) and regarded the cases relied on before it as not determinative (J [115]-[119] CAB 201-202, [192] CAB 232).

39. In any case, even if the Appellant could establish coherence between accessorial liability for an accessory before the fact and felony murder in 1883, it does not follow that there is coherence between the two doctrines today. The objective doctrine of ABF liability which obtained in 1883 did not survive *Giorgianni*. Whether ABF liability may have once been coherent with felony murder does not answer whether ABF liability, as articulated by uncontroverted judgments of this Court, is coherent with constructive murder in s 18(1)(a) of the *Crimes Act*.

C. The Appellant's approach is incoherent

Accessorial liability does not cohere with constructive murder.

40. The incoherence between ABF liability and constructive murder is apparent in at least eight ways.

41. *First,* for the reasons outlined in paragraphs 31-39 above, while the liability of a person not present at the scene for constructive/felony murder was recognised at common law through the principles of common purpose, there was no such well-established common law doctrine extending liability to an accessory before the fact (in the sense described in

Article 39 of Stephen's 1877 *Digest*). To that end, the common law doctrine cannot be taken to have presumptive application to *second limb* murder: cf. *Mitchell* at [45] (Gageler, Gleeson and Jagot JJ) and [97] (Gordon, Edelman and Steward JJ). This is especially so as "the background of the common law of felony murder was understood to make the liability for murder of every participant in a foundational felony *independent of any intention or foresight of any of them that the act* which in fact caused death *would or might be done*": *Mitchell* at [44] (emphasis added). Yet knowledge that the act – potentially unintended or unforeseen by the principal – will be done is required in relation to an accessory before the fact: J [166]-[168] CAB 222-223.

42. *Second,* ABF liability sits uncomfortably with the rationale for constructive murder, which is that it can largely be committed in a spontaneous and unforeseen (if not unforeseeable) fashion. The intention (and therefore knowledge) of an accessory before the fact is fixed at the time that they provide encouragement or assistance to the crime. This is necessarily at a time anterior to – and potentially well before and physically far removed from – the actual commission of the crime. ABF liability does not lend itself naturally to "unplanned contingencies". Unlike the accessory at the fact, the accessory before the fact lacks the opportunity afforded by presence to agree on changes in, and development of, their purpose to meet the changing needs of the situation as it confronts them from moment to moment: *Johns HC* at 116. Accordingly, the common law's response to this problem was the doctrine of common purpose/joint criminal enterprise: *HKSAR v* ***Chan Kam Shin*** [2016] HKCFA 87 at [31]-[32]. As Professor Simester observes, "joint criminal enterprises are dynamic and often escalate. Unlike aiding/abetting scenarios, S signs up to that dynamic character on an ongoing basis. As such, common unlawful purpose doctrine responds to contingencies of scope, which is what really matters here… It allows the common law to accommodate fast-moving developments, provided they occur in the pursuance and within the foreseen scope of the criminal enterprise …": Simester, 'Accessory liability and common unlawful purposes' (2017) 133 LQR 73 at 90 (**Simester 2017**).

43. The idea that an accessory whose knowledge is fixed at a time temporally and physically removed from the relevant crime could intentionally assist, with knowledge, the commission of an unintentional voluntary or spontaneous act or "accident" is plainly incoherent. The CCA was thus correct to say that "[t]o require foresight of the act causing death is inconsistent with the notion of constructive murder": J [183] CAB 229.

44. *Third*, the policy rationale as it pertains to those who join with others in violent joint criminal enterprises referred to as the "justification for the doctrine" of extended joint criminal enterprise in *Miller* at [35]-[36], citing *R v Powell* [1999] 1 AC 1, cannot be said to be equally applicable to an accessory before the fact to a principal's crime of constructive murder. See also *Mitchell* at [103] in relation to common law constructive murder and acts not within the scope of an agreement. This is especially so when s 18 second limb murder foundational offences stretch well beyond violent offences and the act causing death may be distinct: cf. AS [73]-[74]. The CCA addressed this policy rationale and the different rationale for constructive murder at J [188]-[193] CAB 230-232. The CCA recognised that while the distinctions between the different bases for liability could be fine, "the scope of constructive crime 'should be confined to what is truly unavoidable'": ***Wilson*** *v The Queen* (1992) 174 CLR 313 at 327, 332-334 (Mason CJ, Toohey, Gaudron and McHugh JJ), quoting *R v Wilson* (1991) 55 SASR 565 at 570.

45. *Fourth,* while it may be accepted that an accessory before the fact need not know every detail, the act causing death is an essential act, not merely a detail: cf. AS at [45]-[46]. It was no part of the CCA's reasoning that an accessory before the fact was required to know "in an absolute sense" a future event: cf. AS [45], [54]. There must, nonetheless, be certainty in the accessory before the fact as to the acts constituting the crime that they are assisting and, therefore, the essential matters, facts or circumstances (including, here, the act causing death) that make up that crime. Moreover, the reliance on contingent/conditional intention, referenced at AS [28] from statements on joint criminal enterprise, is misplaced in ABF liability and fraught for the reasons set out in paragraphs 60-63 below.

46. *Fifth*, constructive murder "constructs" liability. ABF liability is derivative liability. Accessorial liability for constructive murder thus involves a layering of *derivative* and *constructed* liability to render someone liable for the most serious crime in the criminal calendar by virtue of another's act. That is to create something similar to the "constructive, constructive murder" that this Court set its face against in *Mitchell* at [52], [96], [101] (Gordon, Edelman and Steward JJ). It would work a kind of double deeming: *Mitchell* at [97] (Gordon, Edelman and Steward JJ).

47. *Sixth*, and relatedly, the common law should develop "towards a closer correlation between moral culpability and legal responsibility": *Wilson* at 327, 332-334; see also *Mitchell* at [30] (Kiefel CJ) and [46] (Gageler, Gleeson and Jagot JJ). Constructive

murder already does away with the need for an intent to kill or inflict grievous bodily harm in the principal, or even a disregard for human life. It imposes equivalent liability for acts which are objectively less morally culpable than intentional or reckless murder. An accessory before the fact who encourages or assists a foundational crime may well have a close correlation of moral culpability and legal responsibility vis-à-vis the foundational crime itself. The same cannot be said should ABF liability be combined with constructive murder. Such a combination would cast a very wide net capturing the large range of acts that may cause death, including on the Appellant's analysis, those attributable by way of an underlying joint criminal enterprise between another with the principal in fact assisted (e.g. lighting a bunsen burner), combined with the large range of acts that may be said to constitute encouragement or assistance (e.g. giving a shirt): cf. AS [68]. To this may be added possible acts if the occasion arises, basically contingencies, without need for the accessory to join a common purpose. This would be an extraordinary and unprecedented outcome for the constructive crime of murder that is out of keeping with the principled development of the common law (cf. AS [71]).

48. *Seventh,* there are no "unacceptable adverse consequences for the law" where a form of complicity that has not been recognised as applicable to constructive murder is found by an intermediate appellate court, following a review of the jurisprudence of complicity, to not be recognised at law (cf. AS [70]). Further, it formed no part of the CCA's concern about constructive murder's coherence with ABF liability that the accessory may be required to have higher mens rea than the principal (cf. AS [58] and [72]). The CCA had *Yorke* squarely in mind and recognised it as an illustration that in cases of accessorial liability it may be that the knowledge required of an accessory differs from that required of a principal: J [182] CAB 228-229. While recognising arguments existed, the CCA did not embrace the anomaly asserted by the Appellant at AS [58] and [72]: J [187]-[189] CAB 230-231.

49. *Finally,* there is no foundation in law or precedent for the new test articulated by the Appellant (AS [28], [48]) as applicable to felony murder, nor does it cohere with the legislative purpose of second limb constructive murder. This is particularly so in its invocation of both knowledge of an act "as a means of effecting the venture" and "contingent" intention, the heartland of each being in joint criminal enterprise, and the elision of these concepts to propose a novel test to extend liability for constructive murder. While this new proposed principle was not advanced below, it yet again

"mudd[ies] the waters" and departs from *Giorgianni*: J [165]-[170] CAB 221-224. This is addressed further below at paragraphs 56-64.

The same act/distinct act dispute is an arid one

50. The Appellant appears to proceed on the basis that if some scenarios can be hypothesised in which an accessory before the fact might know all of the essential matters of a particular constructive murder, then ABF liability must not be impliedly excluded in cases of constructive murder: see, eg, AS [60]. In support of that approach, the Appellant relies upon the possibility of "same act" scenarios where it is said that the act causing death is part of the foundational offence such that the putative accessory would have the requisite knowledge simply by reason of their being an accessory to the foundational offence. This approach misunderstands the proper approach to assessing whether accessorial liability is impliedly excluded by statute.

51. Accessorial liability may be 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* at 216 (Dixon J); *Giorgianni* at 491. Significantly, it was no part of the dispositive reasoning in *Mitchell* at [35] and [46] (Gageler, Gleeson and Jagot JJ) that EJCE could not work with constructive murder in practice. Hypothesising about cases where the knowledge requirement of ABF liability may be workable in the context of a constructive murder allegation (cf AS [50]-[52) does not materially advance the Appellant's position – especially when the "general tenor or policy" of constructive murder is to criminalise the unplanned or unintentional causing of death by some act or omission which is incidental to the planned foundational offence. The CCA applied the correct approach and reasoned extensively to the correct conclusion: J [157]-[196] CAB 218-233.

52. The Appellant's criticism of the CCA (AS [51]) is wrong. The CCA did not analyse the availability of ABF liability for constructive murder "only" by reference to "distinct" act causing death cases or fail to have regard to so called 'same' act cases (cf. AS [51]). The CCA considered each in the context of the statutory language: CCA [165], [174]-[175], [177] CAB 221-222, 226-227. The Appellant below argued that different mental states were required for ABF liability depending on what was categorised as "same act" or "distinct act", and the judgment addressed this argument: J [165] CAB 221-222; see also [176]-[178], [180]-[181] CAB 221-222, 226-227, 228.

53. The fact that the Appellant finds herself compelled to propose a bespoke knowledge test to accommodate ABF liability with constructive murder (AS [28], [48], [56], [57], [59]-[60]) simply underscores the tension that exists. More telling is that the proposed test is advanced by reference to two separate passages in *Miller* as to intention in first limb joint criminal enterprise cases: French CJ, Kiefel, Bell, Nettle and Gordon JJ at [10] and Gageler J (in dissent) at [89], with only the latter quoted. The Court declined to collapse JCE into accessorial liability in *Miller*. It should resist the Appellant's blurring of the lines between the two in this appeal, as it would for the reasons set out in paragraphs 56-64 below.

54. That the Appellant first recognises that an act causing death may be distinct and in this case was, and then through the new proposed principle or direction seeks to meld that act into the scope of the underlying foundational offence (AS [49] and [59]), belies that it is in truth an attempt at a work around of knowledge requirements through JCE principles and contingencies. It introduces a graft from JCE reasoning as to scope by introduction of the words "as a means of effecting the venture, should the occasion arise". It ignores *Giorgianni* at 506-507 and that *Giorgianni* at 502, quoting from *Blackstone's Commentaries,* 21st ed (1844), vol.4, pp. 36-37 affirmed the rule that "he who in any wise commands or counsels another to commit an unlawful act is accessory to all that ensues upon that unlawful act but is not accessory to any act distinct from the other". There is no question that murder, requiring the act causing death, is distinct from the underlying foundational offence, as the very terms of s 18(1)(a) make clear.

55. ABF liability does not work by the layering or melding of such principles, or the way that the Appellant suggests at AS [28], [48], [54], [56], [57], [59]-[60]. It is not the CCA, but the Appellant who distorts *Giorgianni*: cf. AS [57]. Nor did ABF liability work in the Respondent's trial as suggested at AS [64]-[67]. Contrary to AS [64]-[67], the purported application to this case ignores the joint criminal enterprise at play in the robbery as having any necessary bearing on what needed to be proved, conflates conditional intent with knowledge, equates an act of discharging a gun with an (intentional) shooting at Sargon Odisho (the act causing death) regardless of the actor, and also ignores that the directions at trial nowhere spoke of the requirement to prove knowledge (inferred or otherwise) of the act causing death at the time of intentional assistance being rendered.

The Appellant's proposed test is incoherent

56. The Appellant's proposed mental state for an accessory before the fact to constructive murder should be rejected as an extension of (and incoherent with) established complicity principles and an extension of the principles that apply to second "limb murder". The Appellant suggests that a before-the-fact accessory to constructive murder "must know …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" (AS [28]; emphasis added) (**the proposed test**).

57. It is a test that purports to meld the elements of second limb murder and it would require carve outs, exceptions and/or additional directions given the many and varied circumstances in which there may be a prosecution for second limb murder involving asserted ABF liability.

58. An essential problem with the Appellant's proposed test is that it is, in truth, just common purpose woven into accessorial liability. Accepting it as a correct statement of the law would have the effect of collapsing the well-recognised distinctions between modes of common law complicity that have been carefully defined by this Court. The ongoing utility of the separate doctrines was recognised by this Court in *Clayton* at [20] and *Miller* at [34]. That the proposed test is nothing more than a shoehorning of JCE into accessorial liability is evident from two features.

59. *First*, the Appellant seeks to introduce into the law of accessorial liability the notion of an accessory's participation in a criminal "venture". Such terminology has regularly been used by this Court to describe a JCE: see, in particular, *McAuliffe* at 113. The Appellant tries to ground "means of effecting the venture" as an accessorial liability concept by taking the word "venture" from a passage in *United States v* ***Peoni*** (1938) 100 F. (2d) 401 at 402 quoted by Gibbs CJ in *Giorgianni* at 480. It is clear that Gibbs CJ (writing separately) did not rely on this expression in the manner that the Appellant now does, namely in the sense of "contingent" or "conditional" intention. That his Honour in no way embraced the concept of "as a means of effecting the venture", is demonstrated by his Honour's reference immediately after to "link in purpose". The "link in purpose" is established by intentional assistance with requisite knowledge of the acts constituting the offence (480, 482, 488 see also Mason J at 494). The "purposive attitude" referred to in *Peoni* is best understood in Australian terms to refer to the "the intention of the accessory

to be involved in the essence of the primary offence": *Productivity Partners* at [258] (Edelman J). Indeed, Professor Simester argues that *Peoni's* requirement of a "purposive attitude" is arguably more stringent than the knowledge requirement in *Giorgianni*: Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578 at 587-8. It in no way waters down the requirement of knowledge of the essential facts to a requirement only for foresight of a contingent possibility (i.e. a possible "means of effecting the venture" if "the occasion" arises). The essence of the offence of constructive murder is to be distinguished from the essence of a foundational offence, and lies in the distinct matter of significance, the act causing death: CCA [177]-[182], CAB 227-229.

60. *Second*, as stated above, conditional intent (as referred to by Gageler J in *Miller* at [89]) in Australian law is a notion associated with JCE – not accessorial liability. So much is evident from the example given in *Miller* at [89] and the move to the discussion of an unintended act of the principal at [90]. The Appellant presses for it to not "be so confined": AS [56]. However, application of statements on intention in joint criminal enterprise have never been and should not now be, endorsed as a mode of proof of actual knowledge for an accessory.

61. Conditional intent has been grafted onto accessorial liability by the UK Supreme Court and the Privy Council through three paragraphs in *Jogee* at [92]-[94] – a decision which this Court has already refused to follow in *Miller*. On any fair reading of *Jogee* at [93]-[95], it is clear that the concept was appropriated from JCE/EJCE cases and transplanted into accessorial liability in order to address the liability gap anticipated upon the abolition of JCE and EJCE. The relevant paragraphs are replete with references to "prior joint criminal venture", "common purpose", "common intent" (explicitly identified as the same as a "common purpose").

62. Contrary to the Appellant's suggestion that there is "no reason in principle" to confine conditional intent to JCE (AS [56]), the dangers of such transplantation are recognised: *Chan Kam Shin* at [76], [78], [92] (Ribeiro PJ, Ma CJ, Tang and Fok PJJ and Lord Hoffman NPJ agreeing). In relation to "conditional intent", Ribeiro PJ also held at [93]:

> Prof Simester convincingly argues that in the context of traditional accessorial liability, Jogee "mishandles" conditional intent since it erroneously attributes conditionality to the accessory's mental state when the only intent which might be conditional is not that of the accessory but of the principal offender. One might add that since the accessory's liability is derivative and since there must be proof that he

intended to assist or encourage the commission of the principal offence, this requirement cannot be met so long as the principal offender's intent is merely conditional and contingent.

63. Conditional intention is different to knowledge. The accessory's intention must relate to the accessory's own act. The accessory's knowledge of future acts cannot be conditional or contingent. What lies in the future is the principal's actions. Once the accessory has rendered help or encouragement there can be no question of the accessory's intention being conditional. The accessory intends the offence that they assist. An accessory, unlike a member of a joint criminal enterprise, has no ongoing involvement in the enterprise as it continues and may encounter contingencies. As Professor Simester explains: "once the help is rendered—the gun is passed to P—that help is either intended or not. It cannot be conditionally intended: it is done. Of course, there are still conditions to be met before we can say that S did actually aid P to do X. Notably, P must go on to do X. But that is an actus reus condition, not a mens rea one": Simester 2017 at 85.

64. The Appellant's suggestion that the requirement for knowledge "must cede to logic and common sense" (cf. AS [54]) appears to be little more than an invitation to put *Giorgianni* to one side because of the difficulties of proof that it creates. However, the very nature of second limb murder and the general policy of the provision by which it was created, demonstrate that ABF liability as understood at common law and clearly elucidated in *Giorgianni*, is excluded from application to that limb of the offence of murder.

Application to this case

65. The CCA correctly held that the basis of liability relied upon by the Appellant at trial was not available at law. A new trial was ordered and that order should not be disturbed.

66. The contentions at AS [64]-[67] cannot hold in the face of the way the trial was run and the directions given. If the appeal were to be allowed on the basis of the Appellant's bespoke test for ABF liability in constructive murder cases, the Appellant would not have been tried according to law. Implicit in the Appellant's proposed test is an acceptance of this. The Appellant's argument on this appeal bears no rational relationship to the directions actually given to the jury at trial. No direction was given that even approaches the Appellant's formulation (cf. AS [28]) that the Respondent knew that Mr Coskun would do the act causing death, as a means of effecting the venture, should the occasion arise: cf. J [41] CAB 172-173. The errors in the directions were such that it

could not be said that there was not a substantial miscarriage of justice. In those circumstances, the appeal should be dismissed and the Court should not disturb the orders of the CCA.

Part VI: Proposed Notice of Contention

67. An extension of time is sought to rely upon a proposed notice of contention.

68. The effect of the CCA's judgment was that no direction as to knowledge was required for the constructive murder charge. In partial resolution of Ground 2 below, the CCA held that the "fifth element" (the only element addressing knowledge for constructive murder), based on the decision in *R v Sharah* (1992) 30 NSWLR 292, was wrong (J [143]-[156] CAB 213-218). However, it held that no miscarriage of justice had been occasioned because it imposed a superadded and unnecessary requirement: J [155]-[156] CAB 218. The CCA did not then go on and determine the other aspects of Ground 2 which included *inter alia*, contentions that (a) the directions did not require the jury to be satisfied that the Respondent had knowledge or intention of all the essential acts constituting murder; and (b) that the directions as a whole were inadequate to convey to the jury the matters which the accused was required to subjectively know and intend when he assisted Coskun: J [138] CAB 211, J [197] (3) CAB 233. If ABF liability for constructive murder was available, it was necessary that the jury be directed with respect to the accused's knowledge of the act causing death, and provided intentional assistance to Coskun with that knowledge in accordance with *Giorgianni*. That there be no direction at all as to this is contrary to the Appellant's position on this appeal and below. The directions occasioned a miscarriage of justice not admitting of application of the proviso (none was argued below) warranting the order for a new trial.

Part VII: Estimate

69. The Respondent estimates that he will require 2 hours for the oral presentation of his argument.

DATED: 27 February 2025

Gabrielle Bashir SC
(02) 9390 7777
gbashir@forbes chambers.com.au

Christopher Parkin
(02) 9132 5700
chris@christopher parkin.com.au

Julian R Murphy
(03) 9225 7777
julian.murphy@ vicbar.com.au

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

CEM BATAK

Respondent

ANNEXURE TO RESPONDENT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024, the Respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in his submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	*Crimes Act 1900* (NSW)	No 40 (as in force between 28 February 2019 and 30 June 2019)	ss 18, 346	This version was applicable at the time of trial.	2 April 2019 (date of alleged offending)