

“Joint Criminal Enterprise and Related Matters”

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1. Some theory and terminology

Peter Gillies, “*The Law of Criminal Complicity*”, p2-3 of Introduction

“To reiterate, at common law the person who physically perpetrates a crime with the required guilty mind incurs liability for this crime. And the person who instigates, encourages or assists him in this while possessing the required guilty mind is likewise inculpated. The first of these parties is usually referred to as being a “principal” and the second of them as an “accessory”. Accessories may in turn be divided into those who are present at the commission of the crime and those who, though they have instigated, encouraged or assisted the principal to commit it, are absent from this commission. In orthodox terms, the accessory present at the crime is said to “aid and abet” its commission, while the accessory absent from this is said to “counsel or procure” its commission.

Where two or more persons jointly commit a crime, either as joint principals or as principals and accessories, they may be generally referred to as “accomplices”.

Moreover, the ancient common law category of criminal liability known as accessoryship after the fact identifies as an accessory the person who assists another person to evade justice, after the latter's commission as principal of a felony. As such the accessory after the fact has been called an “accomplice” in the principal's crime, though ... given that this offender

does not become liable for the principal's crime (it might be said) an accessory after the fact is really guilty of what in substance is an independent offence analogous to ... obstruction of justice, and usually he will be regarded as being less blameworthy than a participant (i.e. principal or accessory) in the principal offence."

McHugh J in *Osland v R* [1998] HCA 75; 197 CLR 316

[69] Much of the argument for Mrs Osland in this Court was characterised by a failure to distinguish between, on the one hand, the criminal liability of a person who is present at the scene of a crime and is acting in concert with another and, on the other, the criminal liability of one who is present but not acting in concert with that person. Much of the criticism - express and implied - of the trial judge's directions, and most of the argument that was relied on to urge that the conviction and the failure to agree were inconsistent, resulted from the failure to accept the existence of that distinction. Because that is so, it is first necessary to refer briefly to the principles of criminal liability applicable when a crime is committed by persons acting in concert.

[70] At common law, a person who commits the acts which form the whole or part of the actus reus of the crime is known as a "principal in the first degree". There can be more than one principal in the first degree. However, a person may incur criminal liability not only for his or her own acts that constitute the whole or part of the actus reus of a crime but also for the acts of others that do so. The liability may be primary or derivative. In earlier times, when it was alleged that a person should be held criminally liable for the acts of another, it mattered whether the crime was a felony or a misdemeanour. In Victoria, the distinction between felonies and misdemeanours has been abolished. There is no longer any need to draw a distinction between the two categories of crime.

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

[72] However, there is a third category where a person was not only present at the scene with the person who committed the acts alleged to constitute the crime but was there by reason of a pre-concert or agreement with that person to commit the crime. In that category, the liability of each person present as the result of the concert is not derivative but primary. He or she is a principal in the first degree. In that category each of the

persons acting in concert^[90] is equally responsible for the acts of the other or others.

2. Presence a requirement?

In the joint judgment in *McAuliffe v The Queen* [1995] HCA 37; (1995) 183 CLR 108 it was said (per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ at pp113-114):

"The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission."

The joint judgment of Gaudron and Gummow JJ in *Osland* (following the quotation of the above passage from *McAuliffe*) included (at [27]):

"[P]rinciple dictates the conclusion that those who form a common purpose to commit a crime together are liable as principals if they are present when the crime, or any other crime within the scope of the common purpose, is committed by one or more of them. The crime having been committed in accordance with the continuing understanding or arrangement, all are equally guilty as principals regardless of the part played by each. That result follows from the reasoning in *McAuliffe v The Queen*. Indeed, that reasoning would appear not to require presence at the scene of all parties to the continuing common purpose if the criteria specified in that reasoning otherwise are satisfied."

In *Prochilo* [2003] NSWCCA 265, a drug supply case, Smart AJ (with Beazley JA and James J agreeing) said (at [58]-[60]):

"The evidence established that there was a joint criminal enterprise and the participation in it by the accused. It also established that actual acts of supply had occurred during the period specified in the charge. This was not a case of conspiracy.

Presence at the scene of supply is one way of proving participation in the joint criminal enterprise. It is not the only way. Participation is frequently proved by telephone intercept tapes and listening device tapes.

The judge was not in error in directing the jury that this was a case of joint enterprise.”

An application by Prochilo for special leave to appeal was refused by the High Court on 29 April 2005. The application included argument as to the apparent inconsistency between Smart JA’s position and McHugh J’s judgment in *Osland*. During the hearing of the special leave application Gummow J observed, inter alia the requirement of presence at scene “assumes there is a scene”.

The issue was considered again more recently by the CCA in *Dickson v R* [2017] NSWCCA 78 where Bathurst CJ, following a careful review of the authorities, held (Johnson and Fullerton JJ agreeing) (at [47]):

“In my opinion a person can be liable under the principle if it can be shown that he or she entered into an agreement or understanding to commit a crime and participated in some way in furthering its execution. Whilst presence at the actual commission of the crime is sufficient, it is not necessary if the person sought to be made liable participated in some other way in the furtherance of the enterprise.”

3. Joint criminal enterprise, extended joint criminal enterprise, constructive murder and the extent of liability for “the acts of others”

Osland – factual summary

Mrs Osland and her son, David, were charged with murder of Mr Osland. At 1st trial the jury convicted Mrs Osland but couldn’t reach a verdict in relation to son. Mrs Osland appealed her conviction. Prior to the appeal being heard her son had been retried and acquitted notwithstanding that, on the Crown case, it was he alone that had struck the blow (or blows) that killed his father.

The defences of both Mrs Osland and her son included that they acted in self-defence and / or had been provoked. Neither disputed that Mrs Osland had sedated the deceased on the evening of his death and that, after he’d fallen asleep, David struck his father to the head with an iron bar causing his death.

IL [2017] HCA 27 – factual summary

The Crown case was that IL and the deceased were participants in a joint criminal enterprise to manufacture a large commercial quantity of methylamphetamine in a ‘backyard’ lab in Ryde. The lighting of a “ring burner” in the lab caused an explosion and fire killing the deceased. The appellant was present when emergency services arrived and tried to block their entry. IL was charged with murder (and in the alternative manslaughter), on the basis that although the Crown couldn’t exclude the possibility that the deceased had lit the ring burner,

thereby causing his own death, because IL was in a joint criminal enterprise with the deceased at the time, that act (of lighting the burner) was attributable to her.

Kiefel CJ, Keane and Edelman JJ

(at [26]-[40], particularly [34] and [40]) – attribution of acts, and the distinction between attribution of acts where liability is primary as opposed with liability is derivative.

“[34]..... Liability which is primary can involve attribution of the acts of another. But the liability remains personal to the accused. Liability which is derivative depends upon attribution to the accused of the liability of another. If the other is not liable then the accused cannot be liable.

.....

[40] In summary, the decision of the majority of this Court in *Osland* resolved much confusion that had existed in the context of the primary liability of an accused person based upon the attribution of acts done in the course of a joint criminal enterprise. That decision was, and continues to be, authority for the proposition that joint criminal liability involves the attribution of acts. The attribution of acts means that one person will be personally responsible for the acts of another. The decision in *Osland* does not involve attribution of liability for either the whole of a crime or part of a notional crime.”

(see also **Gaegler J** at [106] and **Gordon J** at [145]-[148], both dissenting as to the outcome of the appeal but agreeing on this point)

Bell and Nettle JJ

(at [65] – [66]) – limiting “acts” to those identified expressly or by necessary implication, as comprising the actus reus of a crime.”

“[65] With respect, however, that is not so. Although it is not infrequently, and in a sense not inaccurately, stated in the authorities that a participant in a joint criminal enterprise is criminally liable for acts committed by a co-participant in the course of carrying out the enterprise, a careful examination of those authorities shows that such references are invariably to acts that are identified, expressly or by necessary implication, as comprising the actus reus of a crime. And logically it could not be otherwise, given, as has been seen, that the essence of joint criminal enterprise liability is that two or more participants in a joint criminal enterprise who between them do all the things that are necessary to constitute a crime are equally liable for the acts which constitute the actus reus of that crime[105]. Thus, by definition, joint criminal enterprise liability is limited to participation in acts constituting the actus reus of a crime and has nothing to say about liability for acts which are not the actus reus of a crime or are incapable of constituting the actus reus of a crime.

[66] Of course, that does not mean that the liability of one participant for the actus reus of a crime committed by another participant in the course of carrying out their joint criminal enterprise is derivative of the other participant's liability for committing the act constituting the offence[106]. As was established in *Osland v The Queen*[107], the liability of each participant in a joint criminal enterprise for acts committed in the course of the enterprise is direct, primary liability. Rather, the foregoing observations emphasise that the purpose of the doctrine of joint criminal enterprise liability in this respect is, and is only, to attribute liability for crimes incidental to the enterprise[108]. For that reason, it is not open under the doctrine of joint criminal enterprise liability to attribute criminal liability to one participant in a joint criminal enterprise for an act committed by another participant in the course of carrying out the enterprise unless the act is or is part of the actus reus of a crime."

4. Withdrawal

Recently in *Tierney v R* [2016] NSWCCA 144 Adamson J (Basten JA and R A Hulme J agreeing) summarised the principles of withdrawal in the following passage (at [19]-[22]):

"[19] The question whether a co-accused has withdrawn from a joint criminal enterprise is a question of fact to be decided by the jury. Thus, what is required to satisfy a jury that an accused has not withdrawn from a joint criminal enterprise (it being for the Crown to prove the negative) depends on the facts and circumstances of any given case. The extracts from the authorities are generally to be understood as illustrative of the principle that if someone has withdrawn from a common enterprise he or she is no longer criminally responsible, rather than as prescribing what is required in any given case. Indeed, Vanstone J made that point immediately preceding the extract from *R v Sully* set out above on which the appellant relied at [75]:

What will suffice in terms of withdrawal from a joint enterprise or from a situation which a defendant has counselled and procured or aided and abetted a crime will vary markedly from case to case. It will involve an assessment of what was reasonable and practical in the circumstances. The more the defendant has done by way of planning or providing information or items to enable completion of the crime, the more is likely to be required of him by way of withdrawal or countermand, if he is to avoid criminal responsibility. *In some cases, particularly where the participation or aiding and abetting is spontaneous, withdrawal by leaving the scene, especially when coupled with advice or other indication to those who remain of the abandonment, or with the effluxion of time, might be sufficient.* [Emphasis added to indicate where the passage relied on by the appellant appears in the context of the paragraph.]

[20] The High Court considered the question of withdrawal from a common enterprise in *White v Ridley* [1978] HCA 38; (1978) 140 CLR 342, which was applied in *R v Tietie* (1988) 34 A Crim R 438 at 446-447 per Lee J (Matthews and Loveday JJ agreeing). At 349, Gibbs J set out the following passage from *R v Whitehouse* [1941] 1 DLR 683 at 685:

Can it be said on the facts of this case that a mere change of mental intention and a quitting of the scene of the crime just immediately prior to the striking of the fatal blow will absolve those who participate in the commission of the crime by overt acts up to that moment from all the consequences of its accomplishment by the one who strikes in ignorance of his companions' change of heart? I think not. After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

[21] In *White v Ridley* Gibbs J addressed the question whether a person, who has previously participated in a joint criminal enterprise and raises the possibility that he has withdrawn, is required to do anything to prevent the other persons to the criminal enterprise from carrying it to completion. After considering the authorities and texts, Gibbs J said at 350-351:

It seems entirely reasonable to insist that a person who has counselled or procured another to commit a crime, or has conspired with others to commit a crime, should accompany his countermand or withdrawal with such action as he can reasonably take to undo the effect of his previous encouragement or participation.

[22] In the present case the trial judge directed the jury that they must be satisfied either that the accused did not intend to withdraw or that he did not take reasonable steps to prevent his brother from committing the crime (of breaking entering and stealing). Her Honour's direction was consistent with principle. No error has been shown. Her Honour was not obliged to direct the jury in terms of the example given by Vanstone J in *R v Sully*, since this was merely an illustration of a circumstance where it would be open to a jury in a particular case to acquit an accused on the basis that the Crown had not proved that he had not withdrawn from the common enterprise."

5. Admissions by accomplices, ss83 and 87 Evidence Act 1995 (NSW)

Section 83

Section 83 is headed "Exclusion of evidence of admissions as against third parties" and provides:

- (1) Section 81 does not prevent the application of the hearsay rule or the opinion rule to evidence of an admission in respect of the case of a third party.
- (2) The evidence may be used in respect of the case of a third party if that party consents.
- (3) Consent cannot be given in respect of part only of the evidence.
- (4) In this section:

"third party" means a party to the proceeding concerned, other than the party who:

- (a) made the admission, or
- (b) adduced the evidence.

The "hearsay rule" referred to in section 83 is, of course, that contained in section 59(1) which is headed "The hearsay rule--exclusion of hearsay evidence" and relevantly provides:

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
- (2) Such a fact is in this Part referred to as an asserted fact.

Section 81 is the familiar exception to the operation of the hearsay rule that provides:

- (1) The hearsay rule and the opinion rule do not apply to evidence of an admission.
- (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation:
 - (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time, and
 - (b) to which it is reasonably necessary to refer in order to understand the admission.

“Admission” is defined in the Dictionary as meaning “a previous representation that is:

- (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding), and
- (b) adverse to the person's interest in the outcome of the proceeding.

Section 87

Section 87 is headed “Admissions made with authority” and provides:

(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:

- (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made, or
- (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority, or
- (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

(2) For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove:

- (a) that the person had authority to make statements on behalf of another person in relation to a matter, or
- (b) that the person was an employee of another person or had authority otherwise to act for another person, or
- (c) the scope of the person's employment or authority.

In the context of a prosecution case alleging liability on the basis of joint criminal enterprise, s87(1)(c) may well be relied upon to render representations by one accused admissible as hearsay evidence establishing the guilt of another.

A reasonably clear articulation of the principle, albeit if from a pre-*Evidence Act* case, can be found in *Ahern* [1988] HCA 39; 165 CLR 87, which itself refers to the earlier and well-known case of *Tripodi* [1961] HCA 22; 104 CLR 1. The joint majority judgment (Mason CJ, Wilson, Deane, Dawson and Toohey JJ) in *Ahern* includes the following passage (at [4]):

“An appropriate starting point from which to consider the use which might be made of the acts and declarations of one co-conspirator against another is the rule of thumb referred to in *Tripodi v The Queen* [1961] HCA 22;

(1961) 104 CLR 1, at p 7. There it was said to be an "empirical but practical and convenient test" that acts and declarations done or made outside the presence of an accused are not admissible against him. Practical and convenient though that test might be, it can be no more than a rule of thumb, because it is clear that it has a limited application. It represents an attempt to state in practical terms the effect of the hearsay rule although, of course, acts (other than certain acts of communication) cannot of themselves constitute hearsay and, strictly speaking, lie outside the rule. However, acts may contain an implied assertion on the part of the actor which makes it appropriate to treat evidence of those acts for some purposes as the equivalent of hearsay. A conspirator may, in the absence of another person alleged to be a co-conspirator, say or do something carrying with it the implication that the other person is involved. The statement or the act may be admissible in evidence to prove the fact of a conspiracy and, by way of admission, the participation of the maker of the statement or the actor in that conspiracy. But evidence of neither the statement nor the act should, except in the circumstances which we shall elaborate presently, be admitted against the other person to prove his participation because it would for this purpose be hearsay or the equivalent of hearsay."

The circumstances were elaborated in the following terms (at [8]):

"That basis is provided in an appropriate case by the rule which states that when two or more persons are bound together in the pursuit of an unlawful object, anything said, done or written by one in furtherance of the common purpose is admissible in evidence against the others. The combination implies an authority in each to act or speak on behalf of the others: *Tripodi*, at p.7. Thus anything said or done by one conspirator in pursuit of the common object may be treated as having been said or done on behalf of another conspirator. That being so, once participation in the conspiracy is established, such evidence may prove the nature and extent of the participation. The principle lying behind the rule is one of agency and the closest analogy is with partners in a partnership business. Indeed, conspirators have been described as partners in crime. The principle of agency has a particular application in cases of conspiracy where preconcert is the essence of the crime."