Complicity and Common Purpose:

A practical guide to common problems involving young offenders.

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Introduction

When two or more children commit a crime together there is a fair assumption that their liability should be shared and that putting subjective features to the side they should be liable to equal punishment.

But, and it's a big but, we know that things are rarely so simple. Crimes are rarely planned. Foresight is rare. More often than not things just happen. Children do not know what is happening let alone have the capacity to think through what might happen. Their life experience, often conditioned by television, doesn't yet equip them with the knowledge to appreciate the gravity of the things they do

You, more than most, know this already. It is comforting to know that even the superior courts get it on occasions. In ***Roper v Simmons*** US 03-633 2005, March1 543/2, the US Supreme made the following relevant points which, although made in a death penalty case, are equally applicable to any crime committed:

- *Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.*
- *The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.*
- *The susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult.*
- Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.
- The signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

That being said principles of criminal liability apply to all children over 14 (or doli incapax aside, over 10). Unravelling instructions can sometimes be hard enough. Understanding the relevant principles, which may or may not make your client guilty as a principal or accessory can be an additional burden. It is however an essential that you understand the basic as the wrong plea can have devastating consequences.

The Basics:

I do not propose to set out the relevant law in any detail. Three excellent papers by Public Defenders do that already. Peter Zahra and Jennifer Wheeler, *Principles of Complicity* (2006), Peter Zahra, ***Common Purpose and Joint Criminal Enterprise (2001)***. All are now available on the public Defenders webpage- http://www.lawlink.nsw.gov.au/publicdefenders. Also very useful is Col Scoular and Richard Button, *Guide to Accessorial Liability in NSW* (2001) Criminal Law News [1325]. A useful review of the law can also be found in Justice McHugh's judgment in ***R v Osland*** (1998) 197 CLR 316 at 341-351 and in the NSW Bench Book under the heading "Complicity". I commend them all to you.

Today I have been asked to present a practical guide. So here are a couple of examples designed to elicit discussion, some of which you will know only too well.

Examples and case studies

Example A1:

Bob and Andy decide to rob a Chemist. They go in together. Bob threatens the cashier with a knife. Andy takes the money form the till.

Both are equally liable as principles.

Example A2:

Bob and Andy decide to rob a Chemist. Before they do they go to Teresa and say, "we want to rob a chemist can we borrow your knife?" Teresa gives them the knife.

Bob and Andy are equally liable as principles. Teresa is liable as an accessory before the fact. She knew all the essential facts of what Bob and Andy intended to do and helped them do it by providing the weapon. She is liable for the same penalty as the other s (s. 346 *Crimes Act*).

Example A3:

Teresa wasn't told what was going on and thought the boys wanted to cut up an apple.

Teresa is not guilty.

Example A4:

Teresa knew the boys were desperate for cash and had heard them planning the robbery. When the boys said they wanted to cut up an apple she knew this was a lie.

Teresa is guilty. Belief in the existence of facts, which would constitute a criminal offence is equivalent to actual knowledge (**Giorgiani v The Queen** (1985) 156 CLR 473 at 506).

Example A5:

Teresa knew the boys were desperate for cash and had heard them planning the robbery. When the boys said they wanted to cut up an apple she thought it pretty odd as none of them ate fruit.

Teresa is not guilty. Exposure to the obvious may warrant an inference of knowledge but shutting one's eyes to the obvious is not enough. The Crown must prove actual knowledge of the elements of the crime to be committed before someone is liable as an accessory before the fact **Giorgiani v The Queen** (1985) 156 CLR 473 at 507-508.

Example A6:

Having given the boys the knife Teresa had a change of heart. She goes and tells them not to be stupid and gets the knife back of them. The boys get a gun from someone else and commit the robbery.

Teresa is not guilty. Teresa not only had to withdraw from involvement she had to neutralise what she had done- taking back the knife does this.

Example A6:

Bob and Andy decide to rob a Chemist. Before they do they go to Teresa and say, "we want to rob a chemist can we borrow your knife?" Teresa gives them the knife. Bob stabs the cashier with Teresa's knife. Both Andy and Teresa are equally liable with Bob.

If Andy and Teresa foresaw the "possibility" the knife might be used this is enough to make them liable.

Discussion A:

The law is fairly simple up to this point. It matters not whether you are present or not if you help commit a crime you are equally liable not only for that crime but for any consequences of it which are reasonably possible.

Example B1:

Rickie and Tony decide its time to teach the Eddie Avenue Gang to show some respect. They get their gang together and a fight ensues. In the course of the ensuing melee Tony goes berserk and stomps the head of a rival causing brain damage.

Rickie and the rest of the gang would be liable for what Tony did. All had agreed to join the fight. The enterprise on which they were all jointly engaged involved the possibility harm would be occasioned to the rival gang (***R v Tangye*** (1997) 92 A Crim R 545).

Example B2:

Peter is a member of Rickie and Tony's gang. He knows the fight is on and goes along to watch what happens.

Peter is not guilty but he has a problem. He is not guilty because he had no intention of assisting the others. He was simply a spectator. However the objective observer may well think that as a member of the gang Peter was there with the intention of assisting or encouraging the others. The prosecution must prove his intention to assist. That intention can only be proved by admissions or logical inference from proved facts. Everything depends on what he did and said. If he was too close to the action most Magistrates would be tempted to convict.

Example B3:

Peter is a member of Rickie and Tony's gang. He knows the fight is on and goes along to watch what happens. On arresting Rickie the police find a written note detailing the "Plan of Attack". It says Pete's job is to close off any chance of retreat.

Peter has a bigger problem. Any representation (here statement written or oral) by Tony is at the very least provisional admissible as evidence against Peter to prove both the common purpose of the gang and Peter's part in it (s.87 Evidence Act).

Example C1:

Helen and Dina are out driving. Helen has her gun with her. A yob makes a sexist remark. The girls pull over. They decide to scare the yob. The yob ignores the threat "what's that a popgun?" are his last words as Helen shoots him dead.

Helen is guilty of murder.

If Dina knew the gun might be used and their was a real risk the yob might be injured as a consequence she too is guilty of murder.

If Dina knew Helen had a gun but did not think it would be used she is guilty of manslaughter. What she did in getting out of the car and assisting Helen in her plan to scare the yob with the gun was unlawful and dangerous and death was a possible consequences. If she knew that death was a probable consequence she would be guilty of murder (see **R v M.A; R v DIAB** [2003] NSWSC 978).

Example D1:

Andrew and Peter are out for a drive in Peter's dads new Subaru. They are stopped at the lights when a drunk walks across in front of them and goes to lean on the car. Both get out and confront the drunk. Peter king-hits the drunk breaking his jaw.

Peter is liable for maliciously inflicting grievous bodily harm. His self-defence of his car claim will fail.

Andrew is in trouble. The Crown will allege he acted in concert with Peter. If they establish this he too is as liable as if he threw the punch. He is a simple accessory - present and ready to assist if called on. As the two had agreed actually or implicitly to assault the drunk both are equally liable as participants in a (straight forward) joint criminal enterprise. If they cannot establish any pre-agreement or joint action Andrew escapes liability.

Example D2:

The drunk dies. Both are again equally liable, this time for manslaughter. The death of the drunk falls within what is now called the extended joint criminal enterprise or common purpose. It must be shown that both Peter and Andrew contemplated the death as a "possible incident" of the initial agreed assault . What has to be contemplated is the substantial risk of death not just a mere slender chance (***Johns v The Queen*** (1980) 143 CLR 108 at 130-131 & ***McAuliffe v The Queen*** (1995) 183 CLR 108 at 114-115).

Example D3.

When the drunk goes down with the broken jaw Peter jumps on his head and chest causing injuries, which kill him.

The death was outside the scope of the joint criminal enterprise initially agreed on. For Andrew to be liable the Crown must prove that he contemplated the possibility that Peter might do what he did but continued to assist him with the original assault with that knowledge. (See for example ***R v Sharah*** (1992) 30 NSWLR 292 at 297) The crime in contemplation need not correspond in every detail to that actually committed. (See ***Markby v The Queen*** (1978) 140 CLR 108 at 113 & ***Johns*** at 131-132.) In establishing what the intention was the Crown cannot rely on the existence of the original common purpose to establish the accused sate of mind (***McAuliffe*** at 115-118)

Example D4:

In his record of interview Peter says to police " before we left the car Andrew said "lets kill the bastard"". Andrew is in trouble. Section 87 *Evidence Act 1995* applies to make what Peter said admissible against him. See also ***Tripodi v The Queen*** (1961) 104 CLR 1 & ***Ahern v The Queen*** (1988) 165 CLR 87.

Example E1:

John and Angus are driving in a stolen car. John is showing off his new gun. They are chased by the police. The car crashes. Angus runs. John runs but is cornered by the officer. He shoots him.

John is liable.

Angus is not liable for anything to do with the shooting. Even if Angus knew John had a gun and might use it.

Unless, the prosecution can show Angus and John agreed they would assist each other in their escape And that Angus knew the gun might be used and their was a real risk the officer might be injured as a consequence. (**R v Taufahema** [2006] NSWCCA 152- an application for special leave to the High Court has been filed.)

Example F1:

Colin, Ruth and Lyn plan to burgle a factory. Colin drives the car, Ruth squeezes through a window, Lyn stays at home and uses a scanner to monitor out for any radio

calls, which indicate the others might be at risk. She will call them on their mobile and give directions if necessary. Eleana knew the layout of the factory she drew up a plan for Ruth to get to the safe.

All are liable; presence at the scene is not necessary. Even if only Colin and Ruth were to benefit from the proceeds all are equally liable.

Example F2:

Unbeknownst to all, the factory foreman is staying back late to do a stock take. Ruth sneaks up behind him and knocks him out using a piece of wood causing him serious injury.

Everyone is in danger but not liable. The law makes all participants liable for anything, which is within the contemplation of those involved in the joint criminal enterprise. If any of them do an act, which they all contemplated, may possibly be done then they are criminally responsible for that act. Although the onus remains on the Crown the reality of the situation is that the others would have to show that it was simply not contemplated first that there would be someone in the premises and secondly that Ruth would do what she did.

Example F3:

Eleana knows the foreman will be there and tells the others. Colin gives Ruth his gun but takes out the bullets as all agree it will only be used to scare the foreman.

Ruth is not happy with this and loads the gun without telling the others. She uses the gun to wound the foreman.

Colin, Eleana and Lyn would not be liable for the shooting. You cannot be made criminally responsible for something you had not contemplated as a possibility.

Example F4:

What if Colin knew Ruth to be a bit of a hothead who could not be trusted to keep to the agreement and not to load the gun? If Colin with this knowledge still went ahead and acted as a lookout he would be liable despite the agreement not to use the gun. Colin's state of mind would be enough to make him equally liable for Ruth doing what he contemplated might happened despite the express agreement it would not.

Example G1:

Mark and Craig arm themselves with guns intending to rob a Service Station. Both agree that the guns are not to be used. The Servo takes on Mark and during the struggle Mark's gun goes off accidentally killing the Servo.

Both are guilty of murder. The principle of constructive murder, what was known as felony murder, applies. Here the foundational crime is armed robbery with a dangerous weapon (s. 97(2) *Crimes Act*).

Once a foundational crime carrying a maximum of 25 years or more is proved and death occurs during the commission of it every participant is deemed guilty whether

or not the gun was fired intentionally or in furtherance of the joint criminal enterprise to rob. It is enough that the Crown prove that the accused had in mind the possibility that the gun might be discharged whether intentionally or not or whether in furtherance of the joint criminal enterprise or not (See ***Sharah***; ***R v Spathis & Patsalis*** [2001] NSWCCA 476 & ***R v Jacobs & Mehajer*** [2004] NSWCCA 462).

Example G2:

Craig didn't know the guns were loaded. It was agreed that they not be and he didn't suspect Mark to go against their agreement.

Craig is not guilty of murder. The discharge or the firearm was not contemplated either as part of the original unlawful enterprise nor as a possible result of what might occur.

Craig would however be found guilty of manslaughter if, as was inevitable, he contemplated as a possibility that violence might occur during the robbery. Where death results from a joint criminal enterprise involving violence, and the level of violence contemplated by one participant exceeds that contemplated by the other, one may be guilty of murder and the other guilty of manslaughter. (See ***R v Barlow*** (1997) 188 CLR 1 at 11-13).

Example G3:

Craig didn't know the guns were loaded. It was agreed that they not be but he suspected that Mark might go against their agreement.

Craig is guilty of murder. There is no difference where the weapon is a firearm i.e. a dangerous weapon. There is no added requirement for constructive murder that the accused knew or even contemplated as a possibility that the firearm was loaded. (See ***R v Bikic*** [2002] NSWCCA 227. It is enough that the Crown prove that so far as the original lawful enterprise was concerned Craig contemplated that Mark might use a loaded gun.

Example G4:

Mark and Craig arm themselves with knives intending to rob a Service Station. Both agree that knives are not to be used. The Servo takes on Mark and during the struggle Mark's knife accidentally stabs and kills the Servo.

The Crown must first establish the foundational crime here section 98 *Crimes Act*, robbery in company with wounding. To do this the Crown must show that the accused contemplated that in carrying out their joint criminal enterprise of armed robbery a wounding might occur. Once they do so all they then need to do is show that there was an agreement there be a robbery using a knife; that during the robbery the knife wounded the victim and then he died and that someone might be hurt by the knife was a contingency or possible happening that the Craig had in mind. It is not necessary that the Crown prove the knife was used intentionally or even that that it was being used to assist in the robbery.

Example G5:

Mark and Craig agree to steal from a servo. Mark is to distract the Servo while Craig steals some chocolates. Unbeknown to Craig Mark has a knife and uses it to wound the servo.

Mark is guilty of armed robbery with wounding.

Craig is not guilty of armed robbery with wounding. Craig did not know Mark had a knife and did not contemplate Mark would use it. It was not within their joint criminal agreement or a possible incident of it.

Example G6:

Mark and Craig agree to steal from a servo. Mark is to distract the Servo while Craig steals some chocolates. Mark has a knife and uses it to wound the servo. Craig sees him with the knife and continues to rob the store.

Mark and Craig are both guilty. Craig's state of mind changed once he saw the knife and stayed. He then became a party to the armed robbery and liable for its consequences. He was ready and present able to give assistance to Mark and by implication offering encouragement to him to commit the more serious crime.

Example H1:

Ron turns up at his best mate Lloyd's house covered in someone else's blood. He tells Lloyd he stabbed and killed a bloke during a fight at the pub. Lloyd helps him clean up and takes the knife and throws it in the Harbour.

Lloyd is guilty as an accessory after the fact to murder. Knowing the facts he assisted Ron to escape justice (**R v Williams** 32 SR (NSW) 504.

Example H2:

After Ron tells Lloyd what he's don. Lloyd calls Ron is an idiot and tells him to go home and not come back. Lloyd tells no one else what has occurred until the police interviews him and he is charged as an accessory.

Lloyd is not guilty of accessory after the fact to murder. Lloyd is still in trouble as he has concealed a serious indictable offence (s.316 *Crimes Act*). Not wanting to dob in a mate is not a reasonable excuse.

Conclusion

The trick to determining any complicity case is:

First, to break down into simple steps what your client has done (either admitted or able to be proved).

Second, ask what did they know if anything about what occurred or what is available as a reasonable inference that they knew.

Third, assess what if anything they may be liable for.

You can’t do any of he above without first understanding what the prosecution case is and what your instructions are. There is a tendency among some legal practitioners to wilful blindness when it comes to getting instructions. It is as if knowing what your client did or didn’t do might hamper their defence. It can never do that. It may mean you can no longer continue to act for ethical reasons and a client may have to lie to their next lawyer but your first duty to your client is to know the facts and advise them accordingly. To do that you need to know.

Good Luck

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