CRIMINAL RESPONSIBILITY 2011 [1]

1 Introduction.

The principles of complicity establish the liability of a person for an offence which he or she has intentionally assisted another to commit. Accessorial liability arises in several ways. A person who provides assistance before or during the commission of the offence may be liable for the offence itself as an accessory. A person who participates pursuant to an understanding or agreement may be liable for the offence under the principles of joint criminal enterprise or extended joint criminal enterprise (common purpose). Assistance provided after the commission may make a person an accessory after the fact, or liable for a related offence such as conceal serious offence (s.316 *Crimes Act* (NSW)), or hinder investigation of an offence (s.315 (1) *Crimes Act* (NSW))

2 Terminology

The offender who commits the actus reus of an offence is often referred to as the 'principal offender' and the offence committed as the 'principal offence'.[2] Where more than one person performs the actus reus of the offence, the persons are working together, and together complete the offence, they are each regarded as the principal offender. The person who is liable for assisting in the commission of an offence is referred to as an accessory.[3]

3 Innocent Agent

A person may be liable for an offence as a principal offender where they use an innocent agent to commit the offence.[4] A person may be an innocent agent if they lack the mens rea for the offence or have no criminal responsibility due, for example, to age or insanity.[5]

4 Establishing Accessorial Liability

To establish the liability of a person as an accessory the prosecution must prove the following elements:

1. Commission of the principal offence
2. The accessory knew all the essential facts or circumstances necessary to show the crime was committed by the principal offender (including the relevant mens rea required of the principal offender)

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[1] The paper updates the paper entitled Principles of Complicity, written Feb 2007 by Peter Zahra SC, judge of the District Court and Jennifer Wheeler, Researcher, Public Defender's Chambers. The original paper relied to some degree on the second author's contribution to Halsbury's Laws of Australia, Lexis Nexis – Terminology, Innocent Agent, Establishing Liability, Withdrawal, Procedure and Sentencing.

[2] *Osland* (1998) 197 CLR 316; 159 ALR 170 at 188; *Chishimba* [2010] NSWCCA 228 at [30]-[31]; (CTH) *Criminal Code* s 11.2(5) and (NSW) *Crimes Act* 1900 ss 345, 346, 347, 351.

[3] At common law an accessory who is present at the commission of a serious indictable offence is called a 'principal in the second degree'. An accessory who participates in the preliminary stages of the offence, but is not present at the commission of the offence, is called an 'accessory before the fact'.(*Osland* (1998) 197 CLR 316; 159 ALR 170 at 189; *Chishimba* [2010] NSWCCA 228 at [30]-[32];) In New South Wales this terminology is used in referring to serious indictable offences. ((NSW) *Crimes Act* 1900 ss 345 (principal in the second degree), 346 (accessory before the fact).) Accessories to minor indictable offences are called abettors. ((NSW) Crimes Act s 351). In the Commonwealth legislation no particular term is used.((CTH) Criminal Code s 11.2)

[4] *Cogan* [1976] 1 QB 217; [1975] 2 All ER 1059; [1975] 3 WLR 316; *Matusevich* (1977) 137 CLR 633 at 637-8; *White v Ridley* (1978) 140 CLR 342 at 346-7; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 193; *Pinkstone* (2004) 206 ALR 84; at [8] per Gleeson CJ and Heydon J, at [59]-[66] per McHugh and Gummow JJ, at [102]-[106] per Kirby J.

[5] *Cogan* [1976] 1 QB 217; [1975] 2 All ER 1059; [1975] 3 WLR 316 *Matusevich* (1977) 137 CLR 633 at 637; *White v Ridley* (1978) 140 CLR 342 at 346; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 193.In *Pinkstone* (2004) 206 ALR 84; the High Court concluded police officers making a controlled delivery were not acting as innocent agents (at [59]-[60] per McHugh and Gummow JJ, at [104]-[106] per Kirby J).

3. The accessory intentionally assisted or encouraged the principal offender to commit the crime.

4.1 Commission of the principal offence

The prosecution must prove, on evidence admissible against the accessory, that the principal offence has been committed.[6] Evidence of the conviction of the principal offender, or admissions made by the principal offender, are not admissible as evidence of the commission of the principal offence against the accessory (unless admitted by consent).[7]

It is not necessary that anyone be convicted as the principal offender.[8] Where the person charged as the principal offender is acquitted because of insufficient evidence, an accessory may still be convicted if it is proved that the principal offence was committed, and there is no evidentiary inconsistency in the different results.[9]

4.2 Assistance

An accessory must provide intentional assistance to the principal offender. Neither unintentional encouragement or assistance,[10] nor intention alone,[11] is sufficient for liability as an accessory.

4.2.a Actus reus

An accessory must aid, abet, counsel or procure the commission of an offence to be liable as an accessory.[12] This requires that the accessory was linked in purpose with the principal offender, and by words or conduct did something to bring about, or render more likely, the commission of the principal offence.[13] The assistance may be provided through a third party.[14] Mere presence at the commission of an offence is insufficient,[15] although presence may be evidence of encouragement or assistance sufficient to make a person an accessory.[16]

There is no general liability for a failure to prevent the commission of an offence,[17] although the failure of a person to act where they have a duty to do so may be sufficient for liability as an accessory.[18]

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[6] *Giorgianni* (1985) 156 CLR 473 at 491; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 174 per Gaudron and Gummow JJ.
[7] *Kirkby* (1998) 105 A Crim R 323; *Mallan v Lee* (1949) 80 CLR 198 at 210; (CTH) *Evidence Act* 1995 s 91; (NSW) *Evidence Act* 1995 s 91 (exclusion of evidence of judgments and convictions)
[8] (NSW) *Crimes Act* 1900 s 346; (NSW) *Criminal Procedure Act* 1986 s 24; *Giorgianni* (1985) 156 CLR 473 at 491; *King* (1986) 161 CLR 423 at 433-4, 435.
[9] *King* (1985) 17 A Crim R 184 at 189; *King* (1986) 161 CLR 423 at 433-4; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 174 per Gaudron and Gummow JJ, at 187 per McHugh J.
[10] *Coney* (1882) 8 QBD 534 at 557; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440 per Roden J.
[11] *Mills* (1985) 17 A Crim R 411 at 440 per Roden J; *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [69].
[12] (NSW) Crimes Act 1900 s 351, 351B (in relation to minor indictable and summary offences) For serious indictable offences see *Johns* [1978] 1 NSWLR 282 at 285; *Giorgianni* (1985) 156 CLR 473 at 493.
[13] *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [69].
[14] *Cooper* (1883) 5 C & P 535; 172 ER 1087 at 1088 (the accessory may make a general request to the third party that the third party find 'someone' to commit the offence: see, for example, *King* (1986) 161 CLR 423 at 434)
[15] *Coney* (1882) 8 QBD 534 at 539, 540 per Cave J, at 552 per Lopes J, at 560 per Hawkins J, at 561 per Huddleston B; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440; *Adam* (1999) 106 A Crim R 510 at [69]-[70].
[16] *Coney* (1882) 8 QBD 534 at 540, 543 per Cave J, at 558, 560 per Hawkins J; 15 Cox CC 46; *Russell* [1933] VLR 59 at 66; [1933] ALR 76 per Cussen ACJ
[17] *Coney* (1882) 8 QBD 534 at 539 per Cave J, at 557-8 per Hawkins J; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440.

In the recent case of *Chishimba* [2010] NSW CCA 228 at [137]-[148] the court reviewed the cases on this topic and concluded

> [148] These authorities indicate that proof of "encouragement" of the commission of a crime ordinarily requires proof that the accused took some active steps to indicate to the perpetrator his or her approval of the perpetrator's conduct, such that the accused and the perpetrator may be regarded as being linked in purpose. Expressions, gestures and other actions, as well as words, will qualify as active steps if they are intended to communicate approval to the perpetrator of the perpetrator's actions. Mere presence when a crime is committed will not generally however so qualify unless the circumstances are exceptional, such as they were in *Russell* where the moral duty of a father to intervene to save his wife and children and exercise control over the situation gave to the father's presence and inaction "the quality of participation" in the wife's criminal acts.

4.2.b Mens rea

An accessory must have knowledge of the essential facts and circumstances of the principal offence, and with this knowledge provide intentional assistance or encouragement.[19] The essential facts and circumstances of the principal offence include both the actus reus and the relevant state of mind or intent of the principal offender.[20] It is sufficient for the accessory to have knowledge of the type of offence that is committed, and does not need to have knowledge of all the details of the offence.[21] The accessory need not be aware of the illegal nature of the conduct which constitutes the offence.[22] The accessory does not need to have had knowledge of, nor intend, the consequences of the offence committed.[23] Actual knowledge is required; recklessness or mere suspicion is insufficient.[24] The requirement of knowledge and intention for the accessory applies where the principal offence is one of strict liability and no intention is required of the principal offender.[25]

5 Joint Criminal Enterprise and Extended Joint Criminal Enterprise (Common Purpose)

5.1 Joint Criminal Enterprise

Liability by way of joint criminal enterprise is established where "a venture is undertaken by more than one person, acting in concert pursuant to a common criminal design".[26] The joint criminal enterprise

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[18] *Russell* [1933] VLR 59 at 77, 81-82; *Ex parte Parker; Re Brotherson* [1957] SR (NSW) 326 at 330; (1956) 74 WN (NSW) 463. A person may be liable for a failure to act where he or she is in a position of power or control, is aware that an offence is about to be committed or is being committed, has reasonable opportunity to intervene, and fails to take reasonable steps to prevent the offence being committed: *Smith* (TAS CCA 6.3.1979) at 34 referred to with approval in *Randall* [2004] TASSC 42 (applied to manager of club who permitted office to be used for rape).

[19] *Giorgianni* (1985) 156 CLR 473 at 482, 487-8 per Gibbs J, at 494 per Mason J, at 500, 505 per Wilson, Deane, Dawson JJ; *Stokes* (1990) 51 A Crim R 25 at 37-8, 41.

[20] *Stokes* (1990) 51 ACrimR 25 at 38; *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [105].

[21] *Bainbridge* [1960] 1 QB 129; [1959] 3 All ER 200 at 202; [1959] 3 WLR 656 per the court, CCA; *Director of Public Prosecutions (Northern Ireland) v Maxwell* [1978] 3 All ER 1140 at 1147-8 per Lord Hailsham of St Marylebone, at 1150 per Lord Fraser of Tullybelton, at 1150-1 per Lord Scarman, at 1162 per Lowry LCJ; *Glennan* [1970] 2 NSWR 421 at 426; (1970) 91 WN (NSW) 609 per the court, CCA(NSW); *Cavallaro v Waterfall* (1988) 8 MVR 271 at 278; BC8801179 per Carruthers J, SC(NSW); *Bruce v Williams* (1989) 10 MVR 451; 46 A Crim R 122 at 129-30 per Priestly JA, CA(NSW).

[22] *Giorgianni* (1985) 156 CLR 473 at 500, 506; *McCarthy* (1993) 71 A Crim R 395 at 409; *Buckett* (1995) 79 A Crim R 302 at 309.

[23] *Giorgianni* (1985) 156 CLR 473 at 495 per Wilson, Deane and Dawson JJ, at 500 per Mason J; *Mills* (1985) 17 A Crim R 411 at 450; *Stokes* (1990) 51 A Crim R 25 at 38, 39.

[24] *Giorgianni* (1985) 156 CLR 473 at 483, 486-8 per Gibbs CJ, at 495 per Mason J, at 505, 506 per Wilson, Deane and Dawson JJ; *Stokes* (1990) 51 A Crim R 25 at 42.

[25] *Giorgianni* (1985) 156 CLR 473 at 479, 483 per Gibbs CJ, at 494 per Mason J, at 500, 504-5 per Wilson, Deane and Dawson JJ; *Buckett* (1995) 79 A Crim R 302 at 309; *Sexton* (2008) 181 A Crim R 507 at [22].

[26] *McAuliffe* (1995) 183 CLR 108 at 113-14.

arises where two or more persons reach an understanding or arrangement amounting to an agreement to commit an offence.[27] The agreement or understanding need not be express and may be inferred from all the circumstances.[28] There must be an agreement to assist – it is not sufficient for an offender to decide to commit an offence and be aware that others also intend to commit the offence.[29] The doctrine may be referred to as joint criminal enterprise.[30]

Where one or more of the parties commit the offence agreed upon, acting in accordance with the continuing understanding or agreement, each party to the agreement is liable for the offence regardless of the part they played.[31]

5.2 *Extended Joint Criminal Enterprise (Common Purpose)*

A party to a joint criminal enterprise may also be liable where the offence committed is not the offence agreed upon by the parties, but is an offence falling within 'the scope of the common purpose'.[32]This may be referred to as extended joint criminal enterprise or common purpose. The test for an offence being with the scope of the common purpose is a subjective one – the party to the joint criminal enterprise must have foreseen the offence as a possible consequence of the execution of the joint criminal enterprise.[33] Where an agreement encompassed the infliction of serious bodily harm it is not necessary for the prosecution to show that the accessory foresaw the particular manner in which harm was inflicted, nor the weapon used.[34] The accessory will only be liable for such offence as he or she foresaw as a possible consequence of the joint criminal enterprise, and may be convicted of a lesser offence than the principal offender.[35]

The principles relating to extended joint criminal enterprise (common purpose) extend to accessories before the fact who were not physically present at the time of the offence,[36] although the existence of the agreement cannot be inferred from the circumstances of the offence itself where the accused is not present.[37]

In *Clayton, Hartwick and Hartwick v The Queen* (2006) 168 A Crim R 174 the High Court was asked to reformulate the test for extended joint criminal enterprise set down in *McAuliffe* and *Gillard* (2003) 219 CLR 1. It was argued that under the principle of extended joint criminal enterprise a person may be guilty of murder if he or she foresaw the *possibility* of a murderous assault by the principal offender, although the principal offender must have intended or foreseen the *probability* that an assault would be murderous. Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ declined to reconsider the law in this area, and dismissed the appeal. They affirmed the principles as set out in *McAuliffe* and *Gillard*:

> [17] A person who does not intend the death of the victim, but does intend to do really serious injury to the victim, will be guilty of murder if the victim dies. If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight *McAuliffe v The Queen* (1995) 183 CLR 108 at 118; *Gillard v The Queen* (2003) 219 CLR 1 at [112]. That the participant does not wish or intend that the victim be killed

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[27] Ibid at 114
[28] Ibid at 114.
[29] *Taufahema* [2006] NSW CCA 152 at [28], [30].
[30] *McAuliffe* (1995) 183 CLR 108 at 113-114. See also *Tangye* (1997) 92 A Crim R 545 at 556-7; *Osland* (1998) 197 CLR 316 and *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30
[31] *McAuliffe* (1995) 183 CLR 108 at 113-114 affirmed in *Gillard* (2003) 202 ALR 202; 139 A Crim R 100 at [110].
[32] *McAuliffe* (1995) 183 CLR 108 at 113-114
[33] *McAuliffe* (1995) 183 CLR 108 at 114, 115; *Johns* (1980) 143 CLR 108 at 130-1; *Gillard* (2003) 202 ALR 202 at [112].
[34] *Suteski* (2002) 56 NSWLR 182; 137 A Crim R 371 at [135]-[159]
[35] *Gillard* (2003) 202 ALR 202 (where the principal offender is convicted of murder the accessory may be convicted of manslaughter if he or she foresaw as a possibility that the principal offender would kill, but did not foresee the relevant intent for murder); *Taufahema* [2006] NSW CCA 152 at [35]-[36]; *Nguyen* (2010) 271 ALR 493 at [49]-[50].
[36] *Johns* (1980) 143 CLR 108 at 125-6, 130-1 *Sever* [2010] NSW CCA 135 at [146].
[37] *Sever* [2010] NSW CCA 135 at [146].

> is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder.

Kirby J dissenting, referred to the current law on extended joint criminal enterprise as "unjust, overbroad and anomalous."[38]

In *Taufahema* [2007] NSW CCA 33, 16.2.2007 at [27]-[33] the Court of Criminal Appeal emphasised the requirement that in an extended joint criminal enterprise (common purpose) murder the accessory must have foreseen the possibility that the principal offender acted with intent to kill or inflict grievous bodily harm.[39]

6 When is it Appropriate to Base a Case on Common Purpose?

The Crown should not rely upon a case of extended common purpose where the crime committed is the crime the Crown alleges the accused agreed to commit,[40] or where liability for the offence can be established by the ordinary principles of principle and accessory.[41]

Hunt CJ at CL said in *Tangye* (1997) 92 A Crim R 545 at 556

> The Crown needs to rely upon a straightforward joint criminal enterprise only where -- as in the present case -- it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been making that point for years, and it is a pity that in many trials no heed is taken of what has been said.

7 In Company

In *Leoni* [1999] NSW CCA 14 the court considered the meaning of the term 'in company' in relation to the offence of robbery in company under s97(1). Adams J concluded, Abadee and Barr JJ agreeing, that the element would be satisfied by presence accompanied by either awareness of the victim or an intention to assist.

> [20] In my opinion, presence at the scene with the intention of physically participating, if required, is sufficient to satisfy the section, even if that presence is unknown to the victim. However, if the offender makes his presence known to the victim so that, to use the words of the Chief Justice in *Brougham* 'the victim is confronted by the combined force or strength of two or more persons" that will be sufficient to satisfy the section even if the offender did not, as it happened, intend to physically participate.

Button & Griffen (2002) 54 NSWLR 455; (2002) 129 A Crim R 342 was a case of aggravated sexual assault under s.61J where the sexual acts occurred fifty metres from other members of the group. After considering the cases, Kirby J proposed the following five guidelines:

> [120] …
> - First, the statutory definition (s61J(2)(c)) requires that the offender be "in the company of another person or persons".
> - Secondly, the accused and such person, or persons, must share a common purpose (either to rob, or as here, sexually assault).
> - Thirdly, the cases appear to assume that each participant is physically present.
> - Fourthly, participation in the common purpose without being physically present (for example, as a look-out or as an accessory before the fact) is not enough.
> - Fifthly, the perspective of the victim (being confronted by the combined force or strength or two or more persons) is relevant, although not determinative. If two or more persons

[38] *Clayton, Hartwick and Hartwick v The Queen* (2006) 168 A Crim R 174 at [98]
[39] See also *Nguyen* [2007] 180 A Crim R 267 at [91]-[117].
[40] *Stokes and Difford* (1990) 51 A Crim R 25 per Hunt J at p.36
[41] *Clough* (1992) 64 A Crim R 451 at 453, 456 per Hunt CJ at CL.

> are present, and share the same purpose, they will be "in company", even if the victim was unaware of the other person.

Kirby J further considered the requirement of physical presence

> [125] However, there must be limits. The point must be reached where the separation between the offender and the group is such that the offence can no longer be characterised as being in the presence of a group. How are those limits determined? I believe the learned trial Judge accurately identified the test. The test is the coercive effect of the group. There must be such proximity as would enable the inference that the coercive effect of the group operated, either to embolden or reassure the offender in committing the crime, or to intimidate the victim into submission.

8 Constructive Murder

Under s.18(1) *Crimes Act* murder is committed where the act causing death is done or omitted

> 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.

To establish a constructive murder the Crown must establish:

- an offence was committed or attempted to be committed;
- the offence being one punishable by 25 years imprisonment or life;
- during or immediately after an the commission or attempted commission of the offence;[42]
- the victim was killed;
- by a voluntary act of the offender.[43]

No intent in relation to the killing is required on the part of the offender.

In *Sharah* (1992) 30 NSWLR 292 at 297 Carruthers J set out what is required to establish liability as an accessory to constructive murder.

> As to felony-murder (upon the assumption that the foundational crime was the offence under s98) it was incumbent upon the Crown to prove beyond reasonable doubt:
>
> > (i) that there was a common purpose between the appellant and Attard in company to rob John whilst Attard was, to the knowledge of the appellant, armed with an offensive weapon, namely, a sawn-off double-barrelled shotgun;
> >
> > (ii) that during the course of the armed robbery Attard wounded John and during the course of such armed robbery with wounding or immediately thereafter, Attard discharged the gun causing the death of Nick;
> >
> > (iii) that the discharge of the gun by Attard during or immediately after the armed robbery with wounding of John, was a contingency which the appellant had in mind, whether or not the gun was fired intentionally and whether or not in furtherance of the common unlawful purpose.

Sharah is a helpful case because it contrasts liability as an accessory to constructive murder with liability under common purpose murder[44]. To establish common purpose murder the Crown must prove the principal offender killed with an intent to kill or inflict grievous bodily harm, and that the accessory

[42] As to the connection between the foundational offence and the murder see *Munro* (1981) 4 A Crim R 67 at 69-70; *Spathis; Patsalis* [2001] NSWCCA 476 at [313],
[43] *Ryan* (1966-1967) 121 CLR 205 p.213. 216-7.
[44] At p.297

contemplated the principal offender might act with such an intent. No such intention or foresight is required from an accessory to constructive murder.

9 Identifying the Case to the Jury

It is essential that judges carefully direct juries as to the nature of the Crown case and the basis for alleged liability of the accused[45]. Hunt CJ at CL suggested the following directions in *Tangye* (1997) 92 A Crim R 545 at 556[46]

> So far as a straightforward joint criminal enterprise is concerned, the jury should be directed along these lines:
>
> > (1) The law is that, where two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out that enterprise. The Crown must establish both the existence of that joint criminal enterprise and the participation in it by the accused.
> >
> > (2) A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.
> >
> > (3) A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime. The presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime.
> >
> > (4) If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.[47]

It is also essential to detail the relationship between the general principles and the evidence of the case.[48]

10 Withdrawal

A person will not be liable for an offence if he or she withdrew his or her involvement prior to the offence being committed.[49] The accessory must make a timely and unequivocal[50] communication, by words or conduct,[51] to all other parties of the intention to withdraw,[52] and must take all reasonable steps to prevent the commission of the offence.[53] A withdrawal is only timely if it is can be effective and is not

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[45] *Tangye* (1997) 92 A Crim R 545 at 556
[46] Approved most recently in *Chishimba* [2010] NSW CCA 228 at [29].
[47] See, generally, *McAuliffe* (1995) 183 CLR 108 at 113-116; 79 A Crim R 229 at 233-236.
[48] *Georgiou & Harrison* [2001] NSW CCA 464, 21.11.2001 at [19]
[49] (CTH) *Criminal Code* s 11.2(4)(a); *White v Ridley* (1978) 140 CLR 342; *Tietie* (1988) 34 A Crim R 438
[50] A countermand which is vague, ambiguous or perfunctory is insufficient: *White v Ridley* (1978) 140 CLR 342 at 351.
[51] *White v Ridley* (1978) 140 CLR 342 at 351
[52] *White v Ridley* (1978) 140 CLR 342 at 348-351; *Tietie* (1988) 34 A Crim R 438 at 447
[53] (CTH) *Criminal Code* s 11.2(4)(b); *White v Ridley* (1978) 140 CLR 342 at 351 *Tietie* (1988) 34 A Crim R 438 at 447CCA(NSW); *Truong* NSW CCA 22.6.1998: if the accessory honestly believes that the offence will not take place he or she does not have to take any further steps to prevent its commission.

made too late to prevent the offence being committed.[54] Where there is evidence of withdrawal the onus is on the prosecution to prove beyond reasonable doubt there was no withdrawal.[55]

11 Procedure

Although an accessory may be prosecuted as a principal offender,[56] the indictment should indicate the basis for liability is accessorial, or this should be made clear early in the trial, to prevent unfairness to the defence.[57]

Where a prosecutor is unable to establish who, of the parties involved, committed the actus reus of an offence, an offender may be convicted of the offence provided the prosecutor can prove they were ***either*** the principal offender ***or*** an accessory.[58] The prosecution does not need to specify the basis for the liability contended.[59]

12 Admissibility of evidence of previous representation made by A in furtherance of a common purpose with B.

Once there is reasonable evidence of the existence and participation of an accused in an unlawful agreement or common purpose, the words and actions of other parties to the agreement are admissible as evidence against the accused providing the words and actions are in furtherance of the common purpose.[60]

This common law rule has been codified in the Commonwealth and New South Wales Evidence Acts at .87(1)(c)[61]

13 Punishment

An accessory is liable to the same punishment as a principal offender[62], although the actual role played by an offender will be relevant to the assessment of the appropriate sentence.[63] Although an accessory would usually expect a lesser sentence than the principal offender this will depend upon the circumstances of the case, and in some circumstances the culpability of the aider and abettor may be equal to or greater than the principal offender.[64]

14 Commonwealth Criminal Code

Accessorial liability is provided for in the Commonwealth Criminal Code at s.11.2 and 11.3.

> **11.2 Complicity and common purpose**
>
> (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
>
> (2) For the person to be guilty:

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[54] *White v Ridley* (1978) 140 CLR 342 at 351
[55] *White v Ridley* (1978) 140 CLR 342 at 348
[56] (CTH) *Criminal Code* s 11.2(1), 11.2(7); (NSW) *Crimes Act* 1900 ss 346, 351, 351B
[57] *Giorgianni* (1985) 156 CLR 473 at 497; *King* (1985) 17 A Crim R 184; *King* (1986) 161 CLR 423 at 425 per Murphy J, at 436-7 per Dawson J; *Buckett* (1995) 79 A Crim R 302 at 305.
[58] *Mohan* [1967] 2 AC 187; [1967] 2 All ER 58; *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30; at [65] per Wood CJ at CL and [90] per Smart AJ.
[59] *Serratore* (1999) 48 NSWLR 101 per Greg James J at [154]-[225].
[60] *Tripodi* (1961) 104 CLR 1; *Ahern* (1988) 165 CLR 87; *Masters* (1992) 26 NSWLR 450 at 461; 59 A Crim R 445; *Chan Kam Wah*, NSW CCA, 13.4.1995 at p.5; *Velardi* NSW CCA, 24.5.1996.
[61] *Macraild* NSW CCA 18.12.1997
[62] (NSW) *Crimes Act* 1900 ss 345, 346, 351, 351B(2)
[63] *Johns* (1980) 143 CLR 108 at 117; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 238.
[64] *GAS* (2004) 206 ALR 116 at [22]-[23].

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:
(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
(a) terminated his or her involvement; and
(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
(a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
(b) is guilty of that offence because of the operation of subsection (1);
but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

11.3 Commission by proxy

A person who:
(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
(b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;
is taken to have committed that offence and is punishable accordingly.

Despite the use of the title 'common purpose' for section 11.2, the section did not refer to liability under the principle of joint criminal enterprise and section 11.2A was inserted into the Code, commencing 20 February 2010.

11.2A Joint commission

Joint commission

(1) If:
(a) a person and at least one other party enter into an agreement to commit an offence; and
(b) either:
(i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or
(ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));
the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

Offence committed in accordance with the agreement

(2) An offence is committed in accordance with the agreement if:

(a) the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the joint offence) of the same type as the offence agreed to; and

(b) to the extent that a physical element of the joint offence consists of a result of conduct—that result arises from the conduct engaged in; and

(c) to the extent that a physical element of the joint offence consists of a circumstance—the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.

Offence committed in the course of carrying out the agreement

(3) An offence is committed in the course of carrying out the agreement if the person is reckless about the commission of an offence (the joint offence) that another party in fact commits in the course of carrying out the agreement.

Intention to commit an offence

(4) For a person to be guilty of an offence because of the operation of this section, the person and at least one other party to the agreement must have intended that an offence would be committed under the agreement.

Agreement may be non-verbal etc.

(5) The agreement:

(a) may consist of a non-verbal understanding; and

(b) may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence was engaged in.

Termination of involvement etc.

(6) A person cannot be found guilty of an offence because of the operation of this section if, before the conduct constituting any of the physical elements of the joint offence concerned was engaged in, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent that conduct from being engaged in.

Person may be found guilty even if another party not prosecuted etc.

(7) A person may be found guilty of an offence because of the operation of this section even if:

(a) another party to the agreement has not been prosecuted or has not been found guilty; or

(b) the person was not present when any of the conduct constituting the physical elements of the joint offence was engaged in.

Special liability provisions apply

(8) Any special liability provisions that apply to the joint offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of this section.

The section imposes liability on a party to an agreement who does not commit the offence in the following circumstances:

(1) the offence is committed by another party to the agreement, and the offence is either the offence agreed upon, or the same type of offence agreed upon.[65]

(2) the offence is committed by another party to the agreement, and the offence is different to that agreed upon but was committed in the course of carrying out the agreement, and the person charged was reckless to the commission of the offence.[66]

[65] (CTH) Criminal Code s 11.2A(1)(b)(i), (2)

Many of these statutory provisions replicate the common law.

- A person held liable under these provisions is punished as a principal offender;[67]
- A principal offence must have been committed;[68]
- A person can be convicted although neither the principal offender, nor other party to the agreement, has been prosecuted or found guilty;[69]
- A person may be convicted of an offence although it cannot be established whether they acted as the principal offender or an accessory;[70]
- Provision is made for withdrawal from an offence or agreement where the person withdrawing has taken reasonable steps to prevent the commission of the offence;[71]
- Provision is made for the use of an innocent agent;[72]
- The person must have intentionally assisted the principal offender;[73]

Where liability lies under section 11.2A:

- The person must have entered into an agreement;[74]
- The agreement must be to intentionally commit an offence;[75]
- An agreement may include a non-verbal understanding, and may be entered into at the time the offence was committed;[76]
- A person can be convicted under the principles of joint commission although they were not present at the time of the offence;[77]

The main difference appears to be a modification to the foresight required by parties under the extended joint commission provisions. Under s11.2A(3) a party will be liable for any offence committed under an agreement if they are reckless about the commission of the offence. Under the Code definition a person is reckless if he or she is aware of a substantial risk that the offence would be committed, and having regard to the circumstances known to that person, it was unjustifiable to take that risk as to the commission of the offence.[78] This is slightly different to the common law test which requires foresight as to the possibility of the commission of the offence.[79]

It is also interesting to note some of the examples given in the Explanatory Memorandum to the bill inserting section 11.2A, that illustrate the possible breadth of the liability.

The phrase "offence of the same type as the offence agreed to" in s.11.2A(2)(a) means liability can apply

> where people agree to commit a specific drug offence, but the quantity of the drugs, or the type of drug varies from the offence agreed to. For example, if two people agree to import 1 kilogram of cocaine (marketable quantity), and instead import 1.5 kilograms of heroin

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[66] (CTH) Criminal Code s 11.2A(1)(b)(ii), (3).
[67] (CTH) Criminal Code s 11.2(1), s 11.2A(1). See *McAuliffe* (1995) 183 CLR 108 at 113-114 affirmed in *Gillard* (2003) 202 ALR 202; 139 A Crim R 100 at [110], and 11 – Punishment (above).
[68] (CTH) Criminal Code s 11.2(2)(b); s 11.2A(1)(b). See 4.1 Commission of Principal Offence (above).
[69] (CTH) Criminal Code s 11.2(5), s 11.2A(7)(a). See 4.1 Commission of Principal Offence (above).
[70] (CTH) Criminal Code s 11.2(7). See 9 – Procedure (above).
[71] (CTH) Criminal Code s 11.2(4), s 11.2A(6). See 8 – Withdrawal (above).
[72] Ibid s 11.3. See 3 – Innocent Agent (above)
[73] (CTH) Criminal Code s 11.2(2)(a), (3). See 4.2 – Assistance (above).
[74] (CTH) Criminal Code s 11.2A(1)(a). See *Taufahema* [2006] NSW CCA 152 at [28], [30].
[75] (CTH) Criminal Code s 11.2A(4). See *McAuliffe* (1995) 183 CLR 108 at 114
[76] (CTH) Criminal Code s 11.2A(5). See *McAuliffe* (1995) 183 CLR 108 at 114
[77] (CTH) Criminal Code s 11.2A(7(b). See *Johns* (1980) 143 CLR 108 at 125-6, 130-1.
[78] (CTH) Criminal Code s 5.4
[79] See *McAuliffe* (1995) 183 CLR 108 at 114, 115; *Johns* (1980) 143 CLR 108 at 130-1; *Gillard* (2003) 202 ALR 202 at [112].

(commercial quantity), this definition is broad enough to capture the offence of importing 1.5 kilograms of heroin, because it is an offence of the same type as the offence agreed to.

Section 11.2A(2)(a) also allows for the offence to be made up on 'the conduct of two or more parties', allowing the prosecution to aggregate the criminal conduct of parties to the agreement.

> This enables the prosecution to target groups who divide criminal activity between them. For example, the prosecution would be able to charge two offenders with robbery by aggregating their conduct where one offender makes a threat and the other offender appropriates the Commonwealth property (section 132.2 of the Criminal Code).
>
> Further, the ability aggregate the conduct of the parties to the agreement means that it is not necessary for the prosecution to specify which party to the agreement engaged particular conduct. This is helpful in situations where it is not possible to determine with precision the role of each party to the agreement.
>
> The ability to aggregate the conduct of parties to the agreement also enables the prosecution to charge more serious offences. … For example, the prosecution would be able to charge three defendants with importing a commercial quantity of heroin (1.5 kilograms of heroin) by aggregating the conduct of each offender where they import 500 grams each. The offence of importing a commercial quantity of heroin carries a penalty of life imprisonment or 7,500 penalty units (section 307.1 Criminal Code). Without aggregation, each party to the agreement to import 1500 grams of heroin could only be charged with importing a marketable quantity, attracting a maximum penalty of 25 years imprisonment.

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