



## Précis Paper

### Criminal Complicity: Part I

Part I of this discussion explores the law on accessorial liability & joint criminal enterprise liability

#### **Discussion Includes**

- What is the law of criminal complicity?
- Accessorial liability
- Joint criminal enterprise liability
- Difference between accessorial liability and joint criminal enterprise liability
- *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75
- *IL v The Queen* [2017] HCA 27

# Précis Paper

## Criminal Complicity: Part I

1. In this edition of BenchTV, Andrew Dyer (Colin Phegan Lecturer, The University of Sydney Law School, Sydney) and Tim Smartt (Associate, NSW Attorney General's Office, Sydney) discuss the common law of criminal complicity – which continues to operate in New South Wales and in South Australia – with particular focus upon accessorial liability and joint criminal enterprise liability in this first part.

### What is the law of criminal complicity?

2. The law of criminal complicity is the law that sets down when a person can be convicted of an offence, in spite of the fact that that person did not personally perform the *actus reus* of the offence. This person (otherwise known as the 'passive participant') has also not caused the relevant death, to use murder as an example. It is actually the perpetrator's free and voluntary act that has caused the relevant death.
3. Because the normal rules of causation must be set aside in order for the law of criminal complicity to operate, and because the passive participant has not actually performed the relevant conduct, it is very important that the rules of criminal complicity are not stated too broadly.
4. And yet there are people at the moment who think that these rules *are* stated too broadly.

### Accessory liability

5. Accessorial liability applies when a person intentionally assists or encourages (or in rare cases procures) the commission of an offence.
6. The common law has traditionally stated that there are two types of accessories:
  - accessories at the fact/principals in the second degree
  - accessories before the fact
7. As was pointed out by Mason J in *Giorgianni v R* [1985], there is really no difference between the principle in the second degree, and the accessory before the fact, beyond the question of presence. (The principle in the second degree is present at the scene of the crime; the accessory before the fact is absent). So it makes sense to just do away with this distinction.
8. To intentionally assist or encourage the commission of a crime, a person needs to know the essential elements of the crime. So for example in the case of murder, an accessory to a crime needs to know that the actual perpetrator

- intends to kill a particular person(s), and
  - possesses the *mens rea* for murder (intention to kill)
9. The interesting thing about accessorial liability is that it is derivative in nature (unlike other types of criminal complicity, which are primary). The first thing the Crown needs to do in an accessorial case is prove that the principal offender is guilty of the relevant crime. Unless it can prove his or her guilt of that crime, the prosecution will not be able to then prove accessorial liability of another.
10. In *Likiardopoulos v The Queen* [2012], the Crown sought to persuade the High Court that this derivative nature be done away with. Ultimately in this case the Court did not need to decide this point. So at the moment in Australia, accessorial liability is fully derivative.
11. This feature of accessorial liability has an interesting effect in circumstances where, for example, a person intentionally assists a person who is mentally ill to commit murder. That is, the mentally ill person might come within the M'Naghten rules, and on that basis be found to bear no criminal responsibility. In such circumstances, any person who would otherwise have been deemed an accessory, will not be found to have accessorial liability, or to be guilty of murder.

#### Joint criminal enterprise liability

12. In the case of joint criminal enterprise, a person can be convicted of an offence that has actually been perpetrated by another person if:
- that person has agreed with the actual perpetrator to commit the offence
  - the actual perpetrator has done all of the things that constitute the crime
  - the passive participant has participated in some way in the wrongdoing that has occurred

#### Difference between accessorial liability and joint criminal enterprise liability

13. There are two key differences, as Andrew sees it:
- the first difference: that joint criminal enterprise is primary liability, not derivative liability (*Osland v the Queen* (1998) 197 CLR 316; [1998] HCA 75)
  - the second difference: that accessorial liability catches some offenders who are not caught by joint criminal enterprise
14. The Court said in *Osland* that the liability of a joint criminal enterprise passive participant is primary in nature (i.e. liability of a principal in the first degree). The principal in the first degree is someone who actually performs/co-performs the *actus reus*.

15. In this case, the Court essentially said in relation to joint criminal enterprise that the passive participant is deemed to have performed the relevant act, regardless of whether that participant actually performed it or not. So a passive participant can be convicted of an offence even if the actual perpetrator is not found guilty of the offence, as was ruled in *Osland*.
16. Although this reasoning caused problems in cases to follow, it achieved the right result. It was nevertheless criticised for permitting, in essence, a 'fiction' – that is, the law was saying that a person had performed conduct that in fact he or she had not performed.
17. A number of academic commentators have pointed out that when the law starts developing these fictions in order to achieve the 'right result', problems can creep in. In the case of *IL v The Queen*, problems did creep in.

IL v The Queen [2017] HCA 27

18. In the recent decision of *IL v The Queen*, High Court allowed an appeal from a decision of the NSW Court of Criminal Appeal on the intersection of constructive homicide and joint criminal enterprise.
19. The appellant (IL) and victim were involved in the joint criminal enterprise to manufacture a large commercial quantity of methamphetamine, during the course of which a fire was sparked by a gas burner, killing the victim.
20. Because the Crown in this case could not prove whether it was the accused or the deceased who lit the ring burner, it was compelled to proceed on the assumption that it was the deceased's act of lighting the gas ring burner which caused the deceased's death.
21. The liability of IL as alleged by the Crown was based on a combination of the joint criminal enterprise doctrine and the constructive murder rule contained in s 18 of the *Crimes Act*. Bell and Nettle JJ pointed out in their joint judgment the problem in the reasoning of the trial judge – that is, it supposed, contrary to *Osland*, that joint criminal enterprise liability is derivative, i.e. the trial judge's reasons were predicated upon the idea that IL could not be convicted of murder unless the actual perpetrator was himself guilty of the offence.
22. But as we have seen in *Osland*, the actual perpetrator does not have to be guilty of the offence for the passive participant to be found guilty of the same offence, because *Osland* established that joint criminal enterprise liability is primary, not derivative.
23. Bell and Nettle JJ said in *IL v The Queen* that the object of joint criminal enterprise liability is to ensure that a person can be convicted of a crime in which he or she was complicit. Their Honours distinguished the circumstances in *IL* from those in *Osland*, saying that:

- *IL* is not a case of two people getting together to conspire to kill a third person and then doing so, and
  - it is not the object of the law of criminal complicity to get somebody for murder in these circumstances
24. Their Honours said that properly analysed, the reasoning of McHugh J in *Osland* states that the acts of the actual perpetrator are indeed attributed to the passive participant, *but only where* those acts amount to the *actus reus* of the crime, i.e. only an act causing the death of another person will be attributed, whereas an act killing oneself will not be attributed, because it is not the *actus reus* of any crime.
  25. The plurality however based their reasoning on s 18 of the *Crimes Act 1900* (NSW), saying that *Osland* states that *all* of the acts of the actual perpetrator are attributed to the passive participant in the enterprise.
  26. The plurality held that s 18 is not engaged in circumstances that involve either an intentional or even unintentional self-killing, because self-killing as a form of homicide has never been treated by the law as either murder or manslaughter.
  27. The NSW Court of Criminal Appeal in *Moussa v R* [2017] said that no real *ratio decidendi* emerges from *IL v The Queen* [2017].
  28. Perhaps the only real takeaway from *IL v The Queen* is this: if a person agrees with another to commit an offence punishable by 25 years imprisonment or more, and the actual perpetrator then unintentionally kills him or herself during his or her commission of that offence, the passive participant will not be criminally liable for the murder or manslaughter of the perpetrator. Precisely why this is so has not yet been conclusively determined.
  29. Perhaps it can also be said that this case reinforces the idea established in *Osland* that criminal liability under the joint criminal enterprise doctrine is primary, not derivative.

## **BIOGRAPHY**

### Andrew Dyer

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Andrew is a lecturer at the University of Sydney Law School and also the Deputy Director of the Sydney Institute of Criminology. Andrew's current research concerns criminal law and human rights law, and the relationship between them.

### Tim Smartt

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Tim currently works in the NSW Attorney General's Office. Prior to this, he was tipstaff to a judge of the Supreme Court of NSW. All views expressed in this presentation are his own and not those of his employer.

## **BIBLIOGRAPHY**

### Cases

*Giorgianni v R* [1985] HCA 29; 156 CLR 473

*Likiardopoulos v The Queen* [2012] HCA 37; 247 CLR 265

*Osland v Secretary to the Department of Justice* [2008] HCA 37; 234 CLR 275

*Attorney-General's Reference (No. 1 of 1975)* [1975] QB 773

*IL v The Queen* [2017] HCA 27

*Moussa v R* [2017] NSWCCA 237

### Legislation

*Crimes Act 1900* (NSW)