IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 75/2022**

BETWEEN ***JUSTIN RICHARD BURKE***

Appellant

AND ***THE KING***

Respondent

APPELLANT'S SUBMISSIONS

2 February 2023

Counsel for the Appellant certify that this submission contains no suppressed information and is therefore suitable for publication

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MAY IT PLEASE THE COURT:

Introduction

1. On 8 December 2018 Shayne Heappey was fatally stabbed 14 times with a knife. The man who wielded the knife, Matthew Webber, pleaded guilty to murder. Mr Heappey's death was the culmination of a minor dispute about the use of a car and a small debt he was said to owe Leonie Cook, whom he knew from the Nomads gang in Christchurch. Ms Cook's step-father, Randall Waho, was the gang's president. He summoned Mr Heappey to meet him to discuss the matter. Mr Heappey repeatedly failed to turn up. Mr Waho construed his failure as disrespectful and instructed Mr Webber to administer a punishment: a "hiding" or physical beating. Mr Heappey accepted he was liable for a hiding and promised to submit himself for it.

2. The appellant, Justin Burke, moved to Christchurch on 29 November 2018 and gravitated to the Nomads. He was present when Mr Webber drew a small knife and murdered Mr Heappey. The Crown said Mr Burke lent his presence to help Mr Webber and was party to the murder.

3. He was tried before Osborne J and a jury, which acquitted him of murder but convicted him of manslaughter. The Judge instructed the jury that manslaughter liability via s 66(1) turned (*inter alia*) on whether Mr Burke "knew that Mr Webber was going to stab", but that he was liable under s 66(2) if during a common unlawful purpose (CUP) to commit a "physical beating or hiding", he foresaw Mr Webber would "assault" Mr Heappey "in a more than trivial way", and regardless whether he foresaw the real risk of either a stabbing or a killing. In sentencing Mr Burke, the Judge found the Crown had not proven that Mr Burke knew of Mr Webber's knife, and that the jury therefore relied on s 66(2) to convict him.[1]

4. The Court of Appeal dismissed Mr Burke's appeals against conviction and sentence.[2] He appeals against the dismissal of his conviction appeal with this Court's leave.[3] The approved question is whether the Court of Appeal correctly interpreted and applied s 66(2).

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[1] *R v Burke* [2021] NZHC 136, at [11] ('Sentencing notes') COA 419.

[2] *Burke v R* [2021] NZCA 279 (Brown, Mallon and Moore JJ) ('COA judgment').

[3] *Burke v R* [2022] NZSC 124.

Summary of the appellant's argument

Ground one

5. Liability for unlawful act manslaughter via s 66(2) requires foresight of a real risk of an unlawful act which causes death (ss 158, 160(2)(a)). The Court of Appeal wrongly permitted Mr Burke's conviction for manslaughter without a jury finding that he foresaw the stabbing (or an act of its type) which caused death. Without such foresight he did not foresee the *actus reus* of the principal offence (s 160(2)(a)), which was a "killing…by an unlawful act". His foresight of acts which did not cause death is legally irrelevant to liability for manslaughter.

6. The jury was not asked to find whether Mr Burke foresaw the fatal stabbing or the grievous bodily harm (GBH) it constituted. It found instead that he foresaw a "hiding or physical beating" and an "assault" likely to cause "more than trivial harm". Both phrases denote acts of materially lesser (actual bodily) harm, which did not cause death and which Osborne J juxtaposed throughout his directions with the fatal acts of "stabbing". Indeed, Osborne J thought Mr Burke did not know Mr Webber had a knife. Yet if he did not foresee a stabbing (or other form of GBH) he could not be liable for the death it caused.

Ground two (in the alternative)

7. Section 66(2) requires foresight of a real risk of the "offence" charged. If the charge is manslaughter "the offence for the purposes of s 66 is… culpable homicide". Liability via s 66(2) requires foresight of every element necessary to establish the "offence", not just the elements in respect of which a principal offender or s 66(1) party must have *mens rea.* A culpable homicide requires an unlawful killing, and without foresight of one, Mr Burke did not foresee and cannot be liable for "that offence". That has been the position in Australian Code states since the judgment of Dixon and Evatt JJ in *Brennan*, and it prevents a party who neither aids, abets, nor wants the principal offender to use more than trivial violence from becoming liable for a homicide when the principal unlawfully kills.

The facts

8. Mr Burke relocated to Christchurch on 29 November 2018. He quickly began to associate with members of the Nomads gang, with which he was affiliated in the North Island. He met its president, Mr Waho, and

commenced a relationship with Mr Waho's step-daughter, Ms Cook, through whom he met Mr Heappey.[4] On 3 December a vehicle was stolen in Christchurch. Mr Heappey gained possession of it, and it came to display number plates registered to Ms Cook, who thought she was entitled to it. On 5 December she demanded Mr Heappey give the car to her. He refused, and she sought Mr Waho's intervention.[5] Mr Waho impressed on Mr Heappey that Ms Cook wanted the car. Mr Heappey promised to meet Mr Waho to discuss the issue, but he reneged, and failed to show up. Meanwhile, Ms Cook continued to remonstrate with Mr Heappey about the car, and added that he owed her $300 for drugs he had purchased from her.

9. In the afternoon of 6 December Mr Waho sent intemperate text messages to Mr Heappey, enjoining him to repay Ms Cook and questioning whether he remained committed to the gang. Later that day, Mr Waho ordered that Mr Heappey be punished for the disrespect Mr Heappey had shown him, and he told Mr Heappey to call the gang's enforcer, Mr Webber, who "wanted" him.[6] Mr Waho told Mr Heappey to meet Mr Webber that evening. Mr Heappey instead replied that "I'll come over tomorrow to see you and Matty to collect my punishment".[7] Mr Waho continued to text Mr Heappey and on 7 December Mr Heappey agreed to meet Mr Waho and Mr Webber in the evening, but again failed to turn up. In the afternoon of 8 December, Messrs Waho, Webber and Burke met at the house of Richard Sim (a Nomads member). Mr Sim's father collected knives and swords and had amassed hundreds of them at the property, including machetes, meat cleavers, pocket knives and cutlasses.[8] While there, Mr Sim gave pocket knives to Mr Waho and Mr Webber. There was, importantly, no evidence this related to planned dealings with Mr Heappey. Were it otherwise, Mr Waho and Mr Sim would have been liable for his death.

10. Later that evening, Mr Sim made contact with Mr Heappey (on Mr Waho's orders), picked him up and drove him back to his house. By that

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[4] Agreed facts 13 and 14, COA 128

[5] Agreed facts 24, COA 129. In the meantime, Mr Heappey used the car to steal petrol from petrol stations.

[6] Agreed facts 31(e), COA 131

[7] Agreed facts 31(g), COA 131, grammar and spelling corrected.

[8] Det. Gunn detailed the ubiquity of knives and swords in the house (Evidence 366-7). Mr Nicho said knives were "everywhere" in the house (Evidence 128) and Ms Murdoch agreed (Evidence 56-7).

time, Mr Sim, his girlfriend, Mr Nicho (a Nomad), his girlfriend, and their toddler and baby were at the house. All knew Mr Heappey was to receive a punishment. Mr Nicho notified Mr Waho that Mr Heappey had arrived, and Mr Waho tried to find Mr Webber. Mr Sim also notified Ms Cook that Mr Heappey had arrived, and asked her and "to get Matty [Webber] here ASAP".[9] Ms Cook and Mr Burke were at the time out in Ms Cook's car and they collected Mr Webber from Lucan Moore's home.[10] Mr Moore said Mr Webber told him that he was armed with a small knife, which Mr Moore saw him put into his pocket. Mr Moore did not think Mr Burke knew Mr Webber was armed.

11. Mr Webber, Mr Burke and Ms Cook arrived at Mr Sim's house shortly before 11pm. Mr Webber told Mr Heappey to come outside and as he exited the house, in the "very dark" surroundings Mr Webber's short, brutal attack "promptly followed".[11] It consisted of 14 stab wounds to Mr Heappey's chest and arms. As Mr Heappey fled towards the house, Mr Burke grabbed him to prevent his escape. The door into the house was opened and Mr Heappey fell inside with Mr Burke on top of him.[12] Mr Burke had him in a chokehold and punched him several times, until he noticed blood on himself in the light of the house and realised Mr Heappey had been stabbed.[13] Despite their awareness that Mr Heappey was to receive a hiding, those inside were surprised at what transpired (one agreed she was "freaked out").[14] Mr Heappey was taken to hospital by Ms Cook.[15] He was declared dead shortly after. The operating cause of death was blood loss from a 12cm deep stab wound to his heart.

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[9] Agreed Facts 65, COA 135

[10] Mr Burke did not have his own phone so was not involved in text communications.

[11] Sentencing notes, above n 1, at [11] COA 419. Mr SIm's neighbour Mr Shannon, said it was "very dark" (Evidence 149). Another neighbour, Mr Gillie, heard grunting for a minute "if that" (Evidence 154). He said it was a very short time between (Ms Cook's) car arriving and leaving (Evidence 156). Ms Cook texted Mr Waho at 10.48pm saying she was at Mr Sim's. By 10.55pm, CCTV cameras showed the car at Yaldhurst Road. (Agreed Facts 71 COA 135).

[12] Murdoch, Evidence at 47. Ms Murdoch described Mr Heappey and Mr Burke coming in "like they had tripped, with Mr Burke on top of Mr Heappey…they tripped and the guy fell on top of him".

[13] Burke police interview, COA 58, 69-71. Mr Nicho, who was very hostile to Mr Burke, sought at trial to exaggerate the chokehold, suggesting that it caused Mr Heappey's death. (Evidence 93-4, 133-4) His account contradicted his statement to police soon after the incident, where he did not mention choking and said Mr Burke did not realise Mr Heappey had been stabbed. (Nicho police interview p 19). When put to him, he did not accept his earlier statement.

[14] Murdoch, Evidence 73

[15] Agreed Facts 72, COA 135.

The trial

12. Mr Webber pleaded guilty to murder.[16] Mr Sim, Mr Waho and Ms Cook pleaded guilty as parties to causing GBH with intent to injure.[17] The Crown applied to adduce their convictions to prove the three "intended the punishment to be a serious act of violence".[18] Mr Burke objected to that formulation, as the Crown's position at their sentencing was that they "only ever intended for Mr Heappey to receive a physical beating".[19] Osborne J agreed with Mr Burke's submission that:[20]

> …insofar as a "plan" to "punish" Mr Heappey existed between the defendants, the Crown's approach to the sentencing of the defendants who have pleaded guilty requires, consistent with the defendants' pleas, that the fact of the convictions do not import a plan to cause *serious* violence to Mr Heappey, beyond a mere physical beating or "hiding".

13. At trial, the Crown said Mr Burke was liable for murder because he aided or abetted Mr Webber by lending his presence to intimidate Mr Heappey and to prevent him fleeing.[21] The Crown also alleged that Mr Burke participated in a CUP with Mr Webber to inflict a "mean hiding, serious violence" and foresaw a real risk Mr Webber would commit murder.[22] The Crown accepted that "for different party liabilities, you'll need to be sure Mr Burke knew Mr Webber was armed with a knife".[23] This (correct) concession can only have been made because absent proof Mr Burke knew of the knife, insufficient evidence existed to prove he knew (s 66(1)) or foresaw as a real risk (s 66(2)) that Mr Webber would inflict injuries of the type which caused death. The Crown did not refer to manslaughter at all.[24]

14. Mr Burke denied knowing Mr Webber was armed. He said, through counsel, that the minor nature of Mr Heappey's infraction and the fact Mr

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16 *R v Webber* [2020] NZHC 2328.

17 *R v Sim* [2019] NZHC 2361*; R v Cook* [2019] NZHC 2890; *R v Waho* [2020] NZHC 112 and [2020] NZCA 526.

18 *R v Burke* [2020] NZHC 1186, at [19] COA 106.

19 *R v Waho*, above n 17 at [11] where Mander J summarised the Crown's submission.

20 *R v Burke* [2020] NZHC 1186, at [22]-[24] COA 107. Ultimately embodied in the Agreed Facts at 8, COA 127.

21 The Crown repeatedly told the jury - wrongly - that Mr Burke told Police "that he was there to make sure that he, Shayne Heappey, wasn't killed" (Crown opening, COA 174) and that "He knew the punishment could result in losing Shayne Heappey. Why else would he say there at page 48 he stayed there to make sure Shayne Heappey didn't die?"(Crown closing COA 255, 271, 274). That is not at all what Mr Burke said. He said (COA 72) "that the only reason I *stayed* around, was because I didn't want this person to die, because now I'm involved. Okay, that, you get what I mean, I am now involved, *for the fact cos I've taken this person here, I've wrestled him to the ground."* This plainly relates to events *after* Mr Heappey had already been stabbed.

22 Crown closing, COA 267.

23 COA 266-8.

24 Summing up of Osborne J at [151] COA 333

Sim had guests (including children) at his house that evening showed there was no plan to inflict serious violence. Counsel also referred the jury to Mr Burke's statement to Police, in which he said that "I've been in gangs all my life. We had hidings all the time. This stuff doesn't happen".

The directions

15. Mr Burke was acquitted of murder. The Judge said that Mr Burke was liable for manslaughter via s 66(1) if he helped or encouraged Mr Webber "to stab" Mr Heappey, knowing Mr Webber was going to stab him (or helping him while he did so), or under s 66(2) if:[25]

    15.1. "Mr Webber killed Mr Heappey by stabbing him" (Q 1);

    15.2. Mr Burke formed a common goal with Mr Webber to "to inflict a physical beating or 'hiding' on Mr Heappey" (Q 16);

    15.3. Mr Burke agreed with Mr Webber to help him out with and participate in that goal (Q 17);

    15.4. "Mr Webber's stabbing of Mr Heappey was committed in the course of carrying out" that goal (Q 18);

    15.5. "Mr Burke knew it was a probable consequence of carrying out that common goal that Mr Webber would assault Mr Heappey"; (Q 19)[26]

    15.6. Regardless whether he knew Mr Webber had a knife (Q 20), "that Mr Burke knew…that Mr Webber knew the assault would be dangerous, being likely to cause harm that was more than trivial" (Q 22).

16. Several points follow from these directions, which were included in the question trail and traversed in the summing up. First, the "common goal" the jury found proven did not encompass "serious violence", still less "really serious violence". Second, the fatal act was consistently described as "stabbing".[27] It was distinguished from other acts, such as a "physical beating or hiding" and an "assault".[28] The use of the term "assault" in the question trail for manslaughter via s 66(2) also contrasted with the question trail for manslaughter via s 66(1). In the latter, liability depended on aiding or abetting Mr Webber "to stab"

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[25] COA 356-8.

[26] This question was superfluous, since the jury would already have answered Q16 affirmatively.

[27] See (for manslaughter) questions 1 COA 348, 12-15 COA 354 and 18 COA 356.

[28] Question 6 COA 350 (murder via s 66(2)) and Question 16 COA 356 (manslaughter via s 66(2)).

"before or during the stabbing", knowing he "was going to stab". "Assault" plainly referred to something other than a stabbing.

17. Third, therefore, the jury did not deliver an opinion on whether Mr Burke foresaw a real risk that Mr Webber would stab, or otherwise inflict GBH. That is confirmed by the structure of the question trail, in particular by Q 22, which asked whether Mr Burke knew that Mr Webber knew "the assault" would be "dangerous, being likely to do more than trivial harm".[29] Since Q 22 was reached *only if* (as Osborne J and the Court of Appeal thought) the jury considered Mr Burke did *not* know of the knife, the "assault" could not have referred to a stabbing.[30] That is, if Mr Burke did not know of the knife, he could not have formed a belief about an assault involving its use.

18. Fourth, it appears that reference to an assault was to a notional assault and not any other act Mr Webber actually did. As the Judge said, Mr Webber's knife attack "promptly followed" Mr Heappey's arrival, and as the Crown said "this was only ever a knife fight".[31] Fifth, the Judge did not define an assault. He assumed the jury knew what it meant, for when introducing them to the elements of unlawful act manslaughter he simply said "assault is an example of an unlawful act", and moved on.[32]

19. Overall, the jury's verdict records its opinion that Mr Burke formed a CUP with Mr Webber to inflict a physical beating or hiding, and that Mr Burke foresaw that Mr Webber would assault Mr Heappey in what Mr Webber would regard as a dangerous, that is a more than trivial, way. In sentencing Mr Burke, the Judge held that the Crown did not prove Mr Burke knew Mr Webber had a knife, and that according to the directions given to the jury, it must have convicted him under s 66(2).[33]

Court of Appeal judgment

20. The majority first addressed the submission that liability for manslaughter via s 66(2) required foresight of a real risk of a killing. First, it said that *Edmonds* "doubted" whether foresight of death was required.[34] Second, the Act's text did not support an "elevated

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[29] Nothing turns on it, but whether an assault was dangerous is an objective question.

[30] Sentencing notes at [11] COA 419; COA judgment at [70].

[31] Crown closing, COA 267; Summing up, [142] COA 331-2.

[32] Summing up, [83] COA 321.

[33] Sentencing notes at [11] COA 419.

[34] COA judgment at [46]-[50], citing *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 245 at [27].

requirement" that a secondary party must foresee a real risk of death where the principal need not.[35] Third, Mr Burke's approach was illogical, as according to it a party under s 66(2) would never be liable for manslaughter.[36] Fourth, liability for manslaughter via s 66(1) does not require foresight of death, and greater foresight cannot be required under s 66(2).[37]

21. The Court thought it "implicit" in the jury's verdict that it did not consider Mr Burke foresaw Mr Webber would stab Mr Heappey.[38] Nevertheless, it held that liability for manslaughter under s 66(2) required only foresight of "an unlawful act likely to do more than trivial harm" in the course of the CUP. A 'hiding' in the "gang context" met that threshold.[39]

22. Mallon J dissented on the issue whether liability for manslaughter required foresight of a killing. She would, nevertheless, have dismissed the appeal, as she considered Mr Burke knew "the risk that Mr Webber, a gang enforcer operating in a meth-fuelled environment, would take a knife to the hiding" and that Mr Burke "must" therefore have appreciated a real risk of a killing.[40]

History of s 66(2) of the Crimes Act 1961

23. Section 66(2) embodies the common law doctrine of 'common purpose' or 'joint enterprise' liability (CUP).[41] The doctrine provides that where A and B embark on a CUP, each is liable for any offence committed in the CUP's execution if the offence was a probable consequence of the CUP and regardless whether they aided or abetted that offence. Before the 20th century, parties were liable for "probable consequences" which objectively flowed from the CUP. Gradually, however, the common law evolved to tie liability to the consequences an accused foresaw as probable.[42] There is little doubt that before the 20th century a CUP

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35 At [59].

36 At [60].

37 At [61]-[66].

38 At [70]

39 At [69] and [70].

40 At [185].

41 See F Stark, "The Demise of 'Parasitic Accessorial Liability': Substantive Judicial Law Reform, Not Common Law Housekeeping" (2016) 75(3) CLJ 550-579, Simester, "Accessory Liability and Common Unlawful Purposes", (2017) 133(1) LQR, 73-90 and *Miller v R* [2016] HCA 30, 259 CLR 380, [1]-[45].

42 See Stark above n 41; *Johns v The Queen* (1980) 143 CLR 108, 121; *Miller* above n 41, at [12] ff.

doctrine existed at common law.[43] Some, however, including the United Kingdom Supreme Court in *Jogee,* contend that thereafter a "significant change in approach" occurred and that proof was required of an intention (even if conditional) to aid or abet the crime ultimately committed.[44]

24. That argument need not be joined, since CUP liability was recognised as a distinct species of complicity liability by Sir James Fitzjames Stephen and the Royal Commission (Stephen, Lord Blackburn, Lush and Barry JJ) whose codification of the common law inspired the Criminal Code Act 1893 (and its descendants).[45] The formula for CUP liability in s 73(2) of the 1893 Act was derived from s 71 of the Commission's draft Bill, which provided:[46]

> If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose.

25. That wording was reproduced in s 90(2) of the Crimes Act 1908 and (save for a change in the *mens rea* requirement, discussed below) s 66(2) of the 1961 Act retains a strong resemblance to the Commission's proposal.[47] The Commission's report has therefore been "referred to on a number of occasions by [the Court of Appeal] when considering the interpretation of provisions in the 1961 Act".[48]

26. Recourse to the common law the Commission purported to codify should briefly be made. First, because the Commission attempted "a change not so much in the substance as in the language of the existing law" and it is "evident that Parliament was intending to give statutory effect to the English common law as it was then understood".[49] Second,

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[43] See Stark, above n 41; JH Baker "*R v Saunders v Archer (1573)"* esp 48-56 in Philip Handler et al (eds) *Landmark cases in Criminal* Law, (Oxford 2017); JM Kaye, "The Early History of Murder and Manslaughter - Part II" (1967) 83 LQR 569, 577-581, discussing a case from 1329.

[44] *R v Jogee* [2016] UKSC 8, [2017] 1 AC 387, at [21].

[45] Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877), Art. 31 "Common Purpose", 31-2; *Uhrle v R* [2016] NZSC 64, (2016) 28 CRNZ 270, [3]-[5].

[46] The Statutes Revision Committee (NZ) recommended adopting much of the UK Bill (in 1883).

[47] *Bouavong v R* [2013] NZCA 484, [2014] 2 NZLR 23, at [61]-[63]

[48] *R v Lee* [2006] 3 NZLR 42 (CA) at [157]; *R v Dunn* [1973] 2 NZLR 481 (CA), 483-4; *R v Cargill* [1995] 3 NZLR 263 (CA) 266-7.

[49] *Bouavong*, above n 47, at [63]; Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences, (1879) [C 2345] at [19]. *Darkan v The Queen* [2006] HCA 34; 227 CLR 373 at [34]-[35].

therefore, the words to which the Commission reduced the CUP doctrine - which survive in s 66(2) - should not be read "as if they were written on a *tabula rasa*, with all that used to be there removed and forgotten".[50] Third, the common law grappled with the precise problem presented by this case, viz., the liability of parties to a CUP encompassing some violence, when one of them acts beyond the group's purpose by committing murder. The Commission was cognisant of the issue and as the cases below illustrate, the common law it codified did not make the CUP's other members liable for manslaughter.

The Common Law codified by the 1893 Act

27. The wording the Commission adopted in its s 71 (translated into the 1893 Act) owed much to Stephen's 1877 *Digest,* Art 38.[51] Stephen illustrated its operation by citing several cases. Among them was *Duffey's Case*, where Park J directed the jury that:[52]

> If three persons go out to commit a felony and one of them, unknown to the other, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out.

28. It was not suggested that if the felony on which all three embarked entailed violence (as many felonies did) the others would be guilty of manslaughter.

29. Second, in *Price* six men chased a "peaceable unoffending" German sailor through the streets.[53] They assaulted him in a "barbarous and dastardly manner" with their fists, until one of them produced a knife and murdered him. Byles J held that any accused who did not contemplate the use of knife, nor assented to its use when produced, was to be acquitted. It was not suggested they were liable for manslaughter.

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[50] *Vallance v The Queen* (1961) 108 CLR 56, 75-76 (Windeyer J).

[51] Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, (1877) at 31: "When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose. If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories unless they actually instigate or assist in its commission."

[52] *Duffey's and Hunt's case* (1830) 1 Lew CC 194, 195; 168 ER 1009. Cited approvingly by Stephen, above at 31 (illustration 5 of Art 38 'common purpose').

[53] *R v Price* (1858) 8 Cox CC 96, 97.

30. Third, in *Caton*, Lush J - a member of the Royal Commission - said:[54]

> If two men concerted together to fight two other men with their fists, and one struck an unlucky blow causing death, both would be guilty of manslaughter. But if one used a knife, or other deadly weapon… without the knowledge or consent of the other, he only who struck with the weapon would be responsible for the death resulting from the blow given by it.

31. These cases were cited to the Court of Criminal Appeal in *Anderson* (a homicide case) for the proposition that:[55]

> if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act.

32. Lord Parker CJ agreed that "for the last 130 or 140 years that has been the true position".[56] At the time of codification therefore, if the infliction of murderous violence was not a probable consequence of a CUP, the common law did not affix manslaughter liability to the CUP's other participants, even though the CUP entailed some, lesser violence. As later authorities show, that proposition survived the emergence of a test by which the probable consequences of a CUP are those an accused subjectively foresaw rather than those they ought to have foreseen. The change in test for determining the CUP's probable consequences left unaltered the rule that unless a principal's acts are among the CUP's probable consequences, a party cannot be liable for them.

The 1961 amendments

33. Several Crimes Bills introduced before 1961 retained the wording of s 93(2) of the 1908 Act, which made a party liable for offences they "knew or ought to have known were a probable consequence" of the CUP. In 1961, however, the House of Lords decided *DPP v Smith*.[57] It held that an intention to do GBH (sufficient *mens rea* for murder at common law) could be conclusively proven by a jury finding that the infliction of GBH was an objectively probable consequence of the defendant's acts, whether or not he actually realised it.

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[54] *R v Caton* (1874) 12 Cox CC 624, 624-625, cited in *R v Mendez* [2010] EWCA Crim 516, [2011] 1 QB 876 at [40].

[55] *R v Anderson* [1966] 2 QB 110 (CCA), 114 and 119. The Court included Edmund Davies and Roskill JJ.

[56] *Anderson* above, 119. Endorsed by Sir Robin Cooke in *Chan Wing Siu v R* [1985] AC 168 (PC), 175-6.

[57] *DPP v Smith* [1961] AC 290. Reversed by the Criminal Justice Act 1967 (UK), s 8 and held to have been wrongly decided by the Privy Council in *Frankland v R* [1987] AC 576, 594.

34. The decision was “very much criticised”[58] and Parliament delivered a “quick and firm rejection of *Smith*”.[59] The Crimes Bill 1961 omitted the words “or ought to have known” from the clauses which became ss 167(d), 70(1) and 66(2). Its explanatory note said the change was prompted by the “much criticised” decision in *Smith* and that those who failed to foresee the consequences of their actions should not be convicted of murder "for being stupid”.[60] Importantly, rejection of the objective approach to proving *mens rea* was not confined to s 167. Parliament instead recast complicity liability to require actual appreciation of offences to which a person could be made party.[61] The words “or ought to have known” were deleted from s 66(2) and liability was circumscribed by what a person foresaw as a real risk of occurring.

Ground 1: liability requires foresight of an unlawful act which causes death

35. The *actus reus* of unlawful act manslaughter is an unlawful (and dangerous) act which causes death. Liability via s 66(2) for “that offence” requires the Crown to prove an accused foresaw a real risk of an unlawful act which caused death. Proof of foresight of unlawful acts which did not cause death is foresight of something other than a homicide.

36. Osborne J and the Court of Appeal wrongly relieved the Crown of that obligation by permitting foresight of a ‘hiding’ or an “assault” likely to cause “more than trivial harm” to masquerade as foresight of an act which killed Mr Heappey. Neither in the Judge’s use of them, in ordinary parlance, nor in law are a ‘hiding’ or a ‘more than trivial assault’ tantamount to a stabbing or to the grievous bodily harm it represented.

The* actus reus *of manslaughter

37. Murder and manslaughter are species of culpable homicide with a common *actus reus*: the killing of a human being by another (s 158) by a means listed in s 160(2). Where culpable homicide is allegedly

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[58] Robert Goff, ”The Mental Element in the Crime of Murder" (1988) 104 LQR 30, 36. including by Dixon CJ (“misconceived and wrong”: *Parker v R* (1963) 111 CLR 610, 632-633.), Lord Reid (“a disaster”: *The Law Lords*, Macmillan 1982, by Alan Paterson, 184) and leading academics: see *Hyam v DPP* [1975] AC 55, 70-71.

[59] Stuart, *Canadian Criminal Law* (2nd ed. 1987), 217-18, cited in *R v Martineau* [1990] 2 SCR 633, 648.

[60] Crimes Bill 1961 (81-2), Explanatory Note, (ii).

[61] The amendment followed a Supplementary Order Paper (1961-29) the Note to which said at (ii) “This amendment is consequential on the omission of the same words from … clauses 70 and 168(1)(d)…”.

committed “by an unlawful act” (s 160(2)(a)), “the unlawful act must cause the death”.[62] As the Court of Appeal said in *Myatt:*[63]

> The use of the word "by" emphasises the fact that the unlawful act or omission must be causative of death by which is meant "a substantial and operative cause of the death of the deceased”.

38. It is likewise settled that the act must be dangerous, that is, likely to do more than trivial harm.[64] From their common root as culpable homicides, murder is distinguished from manslaughter by proof of an intent in s 167, or if accompanied by the circumstances specified in s 168.

The actus reus in this case

39. The culpable homicide to which Mr Burke was said to be party consisted in the killing of Mr Heappey (s 158) by stabbing (s 160(2)(a)). As the jury found: “Mr Webber killed Mr Heappey by stabbing him” (Q1). Mr Burke’s liability via s 66(2) depended on proof (*inter alia*) he foresaw the essential physical and mental elements of the essential facts of that offence.[65] He was therefore required to foresee a real risk that Mr Webber would do an act, or an act of its type, which caused death. Since death was caused by stabbing, the Crown had to prove Mr Burke foresaw a stabbing or the infliction of GBH, of which stabbing was an instance.

40. The Court of Appeal’s first error was to misapply fundamentally the *actus reus* of unlawful act manslaughter by omitting the crucial condition that the unlawful act must cause death[66]. It said instead that:[67]

> liability for manslaughter under s 66(2) requires only that the secondary offender foresee an unlawful act likely to do more than trivial harm as a probable consequence of the prosecution of the common purpose. The common purpose of administering a hiding in the gang context of the trial is easily sufficient to meet the threshold of “more than trivial harm”…
>
> …the jury found that the common purpose involved at least the infliction of a beating. On our analysis the fact that death resulted from Mr Webber’s actions in pursuit of that purpose was a sufficient basis for the jury to find Mr Burke guilty of manslaughter.

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62 *R v Lee,* above n 47, at [138].

63 *R v Myatt* [1991] 1 NZLR 674 (CA), 682-3 (Cooke P, Richardson and Bisson JJ).

64 *R v Church* [1960] 1 QB 59 (CA); *Lee*, above n 47, at [137] and the cases there cited.

65 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493, at [102](e).

66 It correctly identified the need for the act to cause death at COA judgment at [65] and [66](a) and (b).

67 COA judgment at [69] and [76].

41. Two points arise from this passage. First, it misapplies (by ignoring) ss 158 and 160(2)(a) which together require the killing to be caused "*by* an unlawful act" (*Myatt; Lee*). Once the Court (rightly) differentiated between "Mr Webber's actions" (which caused death) and the "hiding" (which did not) the acts designated by the phrase 'the hiding' did not satisfy ss 158 and 160 and foresight of them became irrelevant to Mr Burke's liability for manslaughter.

42. Second therefore, the Court's attempt to ground Mr Burke's liability in his foresight of a hiding transgressed the basic principle that secondary liability is derived from the principal offence. Here, the principal offence was not constituted by a hiding, but by a stabbing.[68] Some connection had to be shown between a hiding and the stabbing to make foresight of the former relevant to liability for the latter. As Gleeson CJ and Callinan J said (with Kirby J's agreement) in *Gillard* (a joint enterprise case):[69]

> …The cause of death is the act that brought it about. The issue is the accused's criminal responsibility for that act. A question that arose was whether the death of Knowles was causally related to an act for which the appellant was criminally responsible. The act causing his death was the presentation and discharge of the weapon by Preston. The issue is whether, and to what extent, the appellant was criminally responsible for that act. The resolution of that issue depends upon the scope of the common criminal design, and the foresight of the appellant…

43. To like effect, Professor Sir John Smith said (with his emphasis):[70]

> The liability of an accessory is liability for an act done by the principal. If D assisted or encouraged P's act (basic accessory liability), or foresaw that P might commit an act of that kind in the course of committing another offence which he assisted or encouraged (parasitic liability), he is responsible in law for *that act* and liable for the consequences of it, to the same extent as P.

44. If Mr Burke was not complicit via s 66 in *that act,* he was not complicit in the homicide. And since it cannot be suggested that foresight of a hiding made him strictly or vicariously liable for Mr Webber's further acts (nor because he "ought to have known" what Mr Webber would do), the only defence of the Court's approach must be to deny any material difference between a "hiding or physical beating" and a stabbing.

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[68] The jury found that (Q1) "Mr Webber killed Mr Heappey by stabbing him" COA 348.

[69] *Gillard v The Queen* [2003] HCA 64, (2003) 219 CLR 1, at [19]-[20] and see [25]; Kirby J, at [85]-[87].

[70] JC Smith "Criminal liability of accessories: law and law reform" (1997) 113 LQR 453, 457.

Different types of act

45. First, Mr Burke's foresight of a hiding and a more than trivial assault are not proof he foresaw the 'essential physical elements' of Mr Webber's offence. While s 66 does not require knowledge (s 66(1)) or foresight (s 66(2)) of the "precise concatenation"[71] of the principal's acts, a party must know the type of crime the principal will commit (s 66(1)) or foresee they might well commit (s 66(2)) (that is, the matters essential to the crime).[72]

46. Second, Mr Webber's repeated stabbing to the chest with a knife is a paradigmatic example of GBH. That categorisation of his acts is underlined by considering that if Mr Heappey had survived, Mr Webber would have been charged with wounding contrary to s 188. If Mr Burke was tried as a party to that offence under s 66(2), the Crown would be obliged to prove he foresaw a real risk of "really serious harm".[73] Nothing less would suffice, as anything less is not GBH.

47. Third, complicity in a stabbing via s 66(2) requires foresight of really serious harm regardless whether the victim survives (and the charge is s 188), or later dies (and the charge is manslaughter). The principal's conduct is the same in each scenario, and the later emergence of consequences of certain acts cannot affect whether a person subjectively foresaw the acts themselves. Subjective foresight is a belief which exists (or does not exist) before the acts occur (*fore*sight), and whether it existed or not is immune to change by external events which subsequently occur. Mr Burke's foresight of the stabbing must therefore be determined according to the same test as if Mr Heappey had not died from the stabbing, that is, foresight of really serious harm.

GBH a different type of act from lesser violence

48. The law has long treated GBH as a different type of harm than lesser violence, as Professor Smith explained:[74]

> the law regards grievous bodily harm as materially different from lesser harm; actual bodily harm, as the statute describes it.[75] If D intentionally assists or encourages P to cause only actual bodily harm to V--say a

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[71] *Edmonds*, above n 34 at [54]

[72] *Ahsin*, above n 65, at [164](e)(i) and [165] ft. 108; *Chan Wing Siu*, above n 56, 174-5; *Edmonds*, above n 34, at [53] ft. 62; *R v Bainbridge* [1960] 1 QB 129, 133-4 and see *R v Keenan* [2009] HCA 1, (2009) 236 CLR 397, [121]-[123].

[73] *R v Vaihu* [2009] NZCA 111, [91]-[95] and [97] per William Young P; *R v Waters* [1979] 1 NZLR 375 (CA), 379.

[74] Smith, above n 68, 455.

[75] Offences Agains the Person Act 1861 (UK), ss 20 (GBH) and 47 (ABH) of which are parents to ss 188 and 189.

> moderate beating with a cane--and it does not cross his mind that P might do more than that; and then P loses his temper and intentionally causes V grievous bodily harm, D is not liable for the offence committed by P of causing grievous bodily harm; and if the harm causes death, P is guilty of murder but D is not.

49. The distinction is not new. In the 17th century Sir Matthew Hale said:[76]

> If A counsels or commands B to beat C with a small wand or rod, which could not, in all human reason, cause death, if B beats C with a great club, or wound him with a sword, whereof he dies, it seems, that A is not accessary, because there was no command of death, nor of anything that could probably cause death, and B hath varied from the command in substance, and not in circumstance.

50. Like the 1893 and 1908 Acts, Part 8 of the Crimes Act 1961 contains a reticulated scheme of offences against the person, which carry unique labels and penalties (from 6 months to 14 years' imprisonment), illustrating parliament's recognition of their distinctiveness (see: assault (s 196), injuring (s 189, defined in s 2 as actual bodily harm)) and wounding (s 188)).[77] These gradations were modelled on the approach of English law for at least two centuries,[78] and are reflected in the model question trails.[79]

The Crown did not prove Mr Burke foresaw GBH

51. The jury was never asked, as it had to be, whether 'Mr Burke foresaw a real risk that Mr Webber would stab Mr Heappey or otherwise cause him really serious harm'. Neither the jury's finding that Mr Burke agreed to (and so foresaw) a CUP involving a physical beating or hiding, nor its finding that he foresaw an assault which was "dangerous, being likely to do more than trivial harm" serve as proof of foresight of GBH.

52. First, variations of the phrase of a 'dangerous assault, likely to do more than trivial harm' appear in two main contexts, in neither of which does it connote really serious harm. The first is as a minimum condition of the *actus reus* of a culpable homicide (s 160(2)(a)), which is satisfied by "some, even though minor, physical harm".[80] The second is as a

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[76] Hale, *Pleas of the Crown* (1800), vol 1, p 436, cited in *Mendez*, above n 54, at [42].

[77] *Lee* above n 48 at [158]; *R v Kimura* (1992) 9 CRNZ 115 (CA), 117: for the proposition that different penalties indicate different types of act.

[78] The phrase 'grievous bodily harm' can be found as early as 1803: 43 Geo. 3 c. 58.

[79] "'Injury' means actual bodily harm. That is discomfort that is more than minor or momentary. The harm need not be permanent or long-lasting. It may be internal or external. "'Grievous bodily harm' is really serious harm interfering with health or human function."

[80] *Edmonds*, above n 34, [27] ft. 21.

definition of “actual bodily harm” (ABH), which is ordinarily explained as “hurt or injury” other than of a “transient or trifling kind”.[81] In neither context are such phrases synonymous with GBH.

53. Second, in his pre-trial ruling Osborne J recognised the significance of different types of violence.[82] Thus the Crown could tender the co-offenders convictions as proof of a CUP to inflict a “hiding or physical beating”, but not “*serious* violence”. The Crown observed the same distinctions. At Mr Waho’s sentencing it submitted that he “*only* ever intended for Mr Heappey to receive a physical beating”.[83] *Only* a beating, *not* a stabbing. The same distinction appeared in Mr Sim’s sentencing and in Ms Cook’s.[84]

54. Third, the meaning conveyed to the jury by the phrase “an assault” which was “dangerous, being likely to cause more than trivial harm” was of an act different to, and less serious than a stabbing. The jury’s ability to convict of manslaughter via s 66(1) depended on Mr Burke’s knowledge of “a stabbing”. For liability via s 66(2) however, references to a stabbing were replaced by references to an “assault” of a more than trivial nature. Even within the s 66(2) question trail the requirement that the “stabbing” occur in the course of the CUP (Q 18) was juxtaposed with the need to prove Mr Burke’s foresight of an “assault” (Q 19) of a “more than trivial nature” (Q 22).[85] The jury was therefore primed to differentiate between types of violence, and cognisant that the Judge’s references to an assault of a more than trivial nature corresponded to a lower level of violence than the stabbing.

55. Fourth, without knowledge of the knife, insufficient evidence existed to prove Mr Burke foresaw a real risk of GBH. The Crown conceded at trial that Mr Burke’s liability for murder depended on his knowledge of the knife.[86] As the knife’s significance was as a proxy for the type of violence which might be inflicted, the concession entails the Crown's acceptance

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81 *R v Donovan* [1934] 2 KB 498 (CCA), 509; *R v Mwai* [1995] 3 NZLR 149 (CA), 154-5.

82 *R v Burke* [2020] NZHC 1186, at [22]-[24] COA 107.

83 *R v Waho*, above n 17, at [11], emphasis added.

84 *R v Sim*, above n 17, at [9]. “You knew Mr Heappey was going to be disciplined…although you did not foresee the level of violence that was actually used”; *R v Cook*, above n 17, at [14](a). “As the Crown says, there was a plan to punish Mr Heappey and…you understood it to be giving Mr Heappey a hiding”.

85 The Crown and defence addresses drew the same distinctions. Indeed, the defence case was to accept Mr Burke’s association with a physical beating, but to deny liability for anything more Defence Opening, COA 180-1, 184-6. Defence Closing, COA 287, 298

86 COA 266-8. See [14] above.

that unless Mr Burke knew about it, it could not be proved that he foresaw a real risk of GBH. From Osborne J's finding that Mr Burke did not know about the knife, it follows that even if it had been asked to, the jury could not have found that Mr Burke foresaw a real risk of GBH.[87]

Edmonds *and* Hartley

56. The propositions that secondary liability for unlawful act manslaughter requires complicity in the act which caused death, and that complicity in some violence does not render a person liable for all more serious violence, are embedded in the decisions in *Edmonds* and *Hartley*.

Edmonds

57. The Court of Appeal's judgment is inconsistent with *Edmonds* in two important respects. First, *Edmonds* held that in a s 66(2) case the Crown must determine at what "level of criminality" to 'pitch' the CUP.[88] The more serious the CUP alleged, the harder membership of it is to prove, but the easier it is to prove the ultimate offence was foreseen (and *vice versa*).[89] If in a manslaughter case under s 66(2) (like *Edmonds* itself) a CUP of low criminality makes it more difficult to show the ultimate offence was foreseen, that must be because (a) the ultimate offence involved more serious violence than the CUP and (b) the secondary party's foresight of that serious violence must be proven.

58. On the Court of Appeal's approach, however, as manslaughter via s 66(2) is proved by membership of a CUP of 'more than trivial' violence, the Crown *never* faces a decision about the level of criminality at which to pitch the CUP. Instead, it need only allege a CUP of more than trivial violence and if a homicide occurs in its course, those party to the CUP are guilty of manslaughter. The dissonance between these positions turns on the implicit recognition in *Edmonds* that complicity for manslaughter requires complicity in the acts which cause death, and where death is caused by serious violence, foresight of such violence is a predicate to liability via s 66(2).

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87 Sentencing notes, n 1 above at [11] COA 419.

88 *Edmonds*, above n 34, at [49].

89 We note this assumes the ultimate offence is distinguished from the CUP by its relative seriousness.

59. Second, *Edmonds* held that in a "group violence case" knowledge of a weapon may provide the only evidence a party joined the CUP or foresaw commission of the ultimate offence. As the Court said:[90]

> Where the alleged party can be shown to have known of the presence of weapons when the fracas started, it will usually be easy to infer that he or she was party to a common purpose which extended to the use of those weapons.

60. On the Court of Appeal's approach, in a "group violence case" (like *Edmonds* itself) knowledge of a weapon is *never* probative of manslaughter liability: foresight of a 'fracas' renders a party liable for manslaughter even if the killing is caused by a weapon of which the party was ignorant. As *Adams* said of the Court 's decision:[91]

> In manslaughter cases no special direction as to weapons will be needed if the evidence establishes a common purpose that includes the infliction of more than trivial, though not serious, harm to an individual: *Burke v R.*

61. In a group violence case where the parties are charged with manslaughter, S's knowledge of a weapon is only significant if the Crown must prove S foresaw the greater violence inflicted by it. Their foresight of lesser violence (while ignorant of the weapon) does not constitute foresight of the greater violence ultimately inflicted with that weapon. The discussion in *Edmonds* is therefore premised on distinctions between levels of violence - even in "group violence cases" - and on the need for the Crown to prove foresight of serious violence, where the ultimate offence includes such violence.

Hartley

62. Mr Hartley and two others drove around assaulting people on three separate occasions in the course of a night. On the second of these he approached the victim's car and punched and kicked him through the window. One of Mr Hartley's confederates then stabbed the victim to death.[92] The Crown accepted it could not prove Mr Hartley knew about the knife.[93] Miller J nevertheless directed the jury to convict of manslaughter in reliance on s 66(1) if Mr Hartley aided or abetted "an assault of a kind that was intended to cause some physical harm that

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[90] *Edmonds*, above n 34, at [49]-[50].

[91] Simon France (Ed) Adams on Criminal Law at CA66.28(3)

[92] *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299. at [3].

[93] At [7].

was more than trivial or transitory".[94] The Crown's position on appeal, redolent of the Court of Appeal in this case, was that:[95]

> [1] manslaughter is killing by an unlawful act. [2] Assault is an unlawful act, and [3] therefore in assisting in the assault of [the victim], the appellant is guilty of manslaughter.

63. The Court rightly rejected that argument. Propositions [1] and [2] are unobjectionable, but [3] is unsound. The assault which Mr Hartley aided and abetted ("completely different" from a stabbing) fulfilled only part of the definition of manslaughter at [1] - it was assuredly an unlawful act, but it did not kill anyone. The Court explained that knowledge of the knife was a "proxy" for the need to prove complicity in "offending of the type which actually occurred".[96] And later, that:[97]

> there must be some more direct link between the act causing the death and what it was that the secondary party assisted or aided the principal to do.

64. In *Hartley* the Crown misidentified the act of the principal in which it had to prove Mr Hartley's complicity. The *actus reus* of the principal offence was a stabbing; materially different to an assault of punches and kicks. The force in that reasoning sounds as loudly in a s 66(2) case. First, the Court did not suggest that the conviction could be rectified by invoking s 66(2), notwithstanding the stabbing clearly occurred in the course of a CUP. Mr Hartley's foresight of an assault by kicking and punching did not constitute manslaughter. The ratio of *Hartley* is not therefore limited to s 66(1), but stems from the failure to prove complicity in the principal's acts which constituted the culpable homicide.

65. Second, the Court relied on CUP cases under s 66(2) and at common law.[98] It noted that where the fatal act was contemplated by accomplices liability attached to those who aided and abetted the act (knowing it would occur), or foresaw its occurrence in the course of the CUP.[99] Mr Hartley's position was distinct:[100]

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[94] *Hartley*, above n 92 at [11].
[95] At [17]. (numbering added.)
[96] At [19],and see [40].
[97] At [54].
[98] At [41] for the English cases.
[99] At [22]-[24], citing *R v Renata* [1992] 2 NZLR 346 (CA) and [30]-[31] citing *R v Rapira* [2003] 3 NZLR 794 (CA).
[100] At [24].

> Although the fact death resulted in *Renata* was unexpected, the death was the result of an act (kicking or punching) within the contemplation of the parties. That is in contrast with the present case where the act contemplated was punching or hitting with the fists in some way but not stabbing.

66. The common thread running through such cases, it is submitted, is that the putative party must aid and abet (s 66(1)) or foresee as a real risk (s 66(2)) an act to which the Crown alleges they were party. If the Crown alleges complicity in a homicide, it must prove complicity in acts of a type which caused death. That proposition is immanent in joint enterprise cases decided at common law, to which we now turn.

The Common Law

67. When *Edmonds* was decided, the common law principles of CUP liability "correspond[ed] closely" to s 66(2) jurisprudence.[101] In England and Wales (though not Australia) that is no longer so. Nevertheless, cases decided when a CUP doctrine was good law remain instructive. Courts were repeatedly confronted by cases where a party to a CUP which envisaged some violence departed from that CUP and committed murder. In those circumstances, the common law did not impose manslaughter liability on the CUP's remaining participants if they did not foresee acts of a type which caused death.

Chan Wing-Siu

68. The former closeness of the common law to s 66(2) cases was attributed to the influence of Sir Robin Cooke, who delivered the opinion of the Privy Council in *Chan* and "plainly had s 66(2) in mind" when he did so.[102] A principle of CUP liability existed at common law:[103]

> whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend….The criminal culpability lies in participating in the venture with that foresight.

69. In fashioning the principle Sir Robin lent on several authorities. First, he reproduced with approval the speech of Lord Simonds LC in *Davies*:[104]

> I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a

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[101] *Edmonds*, above n 34 at [23].

[102] At [23], ft 18.

[103] *Chan,* above n 56, 175, affirmed in *R v Powell* [1999] 1 AC 1 and *R v Rahman* [2009] 1 AC 129.

[104] *Davies v DPP* [1954] AC 378, 401.

> knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, *then Lawson was not an accomplice in the crime consisting in its felonious use.*

70. The fight to which his Lordship referred was between two groups of young men which, even before the knife's introduction, plainly involved causing more than trivial harm.[105] Lawson was nevertheless not guilty of *any homicide offence* related to the use of the knife. His complicity in a CUP to assault the victim in a more than trivial way did not inculpate him in the homicide caused by acts of a different, unforeseen type. According to the law reporter, that proposition was adopted by the Solicitor-General in *Edmonds,* who submitted (and we agree):[106]

> At the other end, A and B may plan to fight C. A produces a knife and kills C. A weapons direction is highly desirable as B should not be convicted if he did not know of the possibility of a lethal consequence (*Davies v Director of Public Prosecutions* [1954] AC 378, [1954] 1 All ER 507 (HL)).

71. After citing the passage from *Davies* in *Chan* Sir Robin continued that "the test of *mens rea* here is subjective. It is what the individual accused in fact contemplated that matters".[107] If, therefore, the jury found that a party to the CUP did not contemplate the risk of the knife attack, "he is in this type of case not guilty of murder *or wounding with intent to cause serious bodily harm*".[108] Once the act, or type of act, is not foreseen as a probable consequence, a person cannot be complicit in it.[109]

Anderson

72. The second authority approved by *Chan* was *Anderson*.[110] Mr Anderson's (A's) wife ("a convicted prostitute") brought a Mr Welch (W) back to her house.[111] She later ran into the street, accosted Mr Morris (M), and claimed that W had tried to strangle her. W appeared and had a fistfight with M. A then arrived, and W ran away. A armed himself with

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[105] *Davies*, above n 104, at 380-2.

[106] *Edmonds*, above n 34, at 448, per DB Collins QC, S-G.

[107] *Chan*, above n 56, 177.

[108] At 178 (italics added). In other words, S is not liable for the "unauthorised act".

[109] For a case where the fatal acts were contemplated see *R v Smith* [1963] 1 WLR 1200 (CCA), where Ds started a pub fight and resolved to "tear up the joint" (1203). S knew his confederates had knives and a razor, and intended to attack anyone who impeded them. When one of them used a knife to kill the barman, S was liable for manslaughter.

[110] *Anderson*, above n 55. Approved in *Hartley*, above n 92, at [40].

[111] At 115-8.

a knife and drove around with M, searching for W. They found him and during a fight, A stabbed W to death. A was convicted of murder. M was convicted of manslaughter. The trial judge directed that even if:[112]

> Anderson, without the knowledge of Morris, had a knife, took it from the flat and at some time formed the intention to kill or cause grievous bodily harm to Welch and did kill him — an act outside the common design [to "attack" Welch] to which Morris is proved to have been a party — then… Morris would be liable to be convicted of manslaughter provided you are satisfied that he took part in the attack or fight with Welch.

73. The Court held this to be a misdirection and quashed Morris's conviction. For a Court of five, Lord Parker CJ said:[113]

> It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.

74. Lord Hutton later said that in so stating, Lord Parker "applied the test of foresight".[114] *Chan* also adopted the formulation of Geoffrey Lane QC (for M) that:[115]

> where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, [and] … that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter)…if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise *his co-adventurer is not liable for the consequences of that unauthorised act.*

Lovesey

75. Third, the principle that a party is not liable "for the consequences of [the] unauthorised act" was reaffirmed in *Lovesey*. Two men were charged with the robbery of three candlesticks from a jeweller's shop, and with murdering its proprietor. No evidence indicated which defendant killed the victim. Both were convicted of robbery and murder after the trial judge directed that the charges "stand or fall together".[116] On appeal, the Crown conceded this was in error, for as Widgery LJ held, if the murderer could not be identified, the jury could not be sure

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[112] *Anderson*, above n 55, 118.

[113] At 120. Approved in *Powell*, above n 103, 22, 28 and 30, and *Rahman*, above n 103, at [13]. [34], [44] and [59].

[114] *Powell*, above n 103, 22

[115] *Chan*, above n 56, 175-176, quoting Mr Lane's submission as summarised in *Anderson*, above n 55, 118-9.

[116] *R v Lovesey* [1970] 1 QB 352 (CA). 356.

the murderous acts fell within the parties' common design.[117] The robbery convictions proved a plan to commit *some* unlawful violence, but not to kill or cause GBH. The Crown invited the Court to substitute convictions for manslaughter. The Court demurred and held:[118]

> It is clear that a common design to use unlawful violence, short of the infliction of grievous bodily harm, renders all the co-adventurers guilty of manslaughter if the victim's death is an unexpected consequence of the carrying-out of that design. Where, however, the victim's death is not a product of the common design but is attributable to one of the co-adventurers going beyond the scope of that design, by using violence which is intended to cause grievous bodily harm, the others are not responsible for that unauthorised act*: Reg. v. Anderson; Reg. v. Morris* [1966] 2 Q.B. 110… Having reached this point, we are unable to substitute verdicts of manslaughter since, if a common design to inflict grievous bodily harm is excluded, *the jury might well have concluded that the killing was the unauthorised act of one individual for which the co-adventurers were not responsible at all.*

76. According to *Lovesey, Anderson, Davies* and *Chan*, if a stabbing was not a probable consequence of the CUP, he should not have been convicted of manslaughter.

Summary of the common law position

77. When a CUP doctrine existed at common law, if murderous violence was not a probable consequence of its prosecution, parties to the CUP were not liable for the consequences of that act, even if the CUP involved non-fatal violence. *Powell* and *Rahman* upheld that proposition, immediately derived from *Anderson,* and earlier sourced in the 19th century cases cited above.[119] As the 2010 edition of *Archbold* put it:[120]

> A secondary party is guilty of murder if he participates in a joint venture realising that in the course thereof the principal might use force with intent to kill or to cause grievous bodily harm, and the principal does kill with such intent; but if he goes beyond the scope of the joint venture (i.e. does an act not foreseen as a possibility), the secondary party is not guilty of murder or manslaughter…

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[117] *Lovesey*, above n 116, 356.

[118] At 356, italics added. Older English cases confusingly use the concept of the "common purpose" to denote what S is liable for, rather than what S agreed to. P's collateral offence was then conceived as 'falling within' the common purpose if it was a probable consequence of it. Stark, above n 41, 577 notes that "The intellectual honesty of *Chan Wing-Siu* was that it was no longer pretended that the collateral offence was *within* the common purpose, even conditionally; at last, the law admitted that it was not, yet remained the secondary party's responsibility."

[119] *Powell*, above n 103, 30 (Lord Hutton). *Rahman*, above n 103, at [13] (Lord Bingham), [34] and [44] (Lord Rodger) and [59] (Lord Brown). The significance given in *Powell* to S's foresight of the particular weapon P used - as a means of judging whether P acted outside the CUP - was not adopted in *Edmonds*. That divergence does not undermine the point expressed by *Archbold* that if P's acts are outside the CUP - however ascertained - S is not liable for them.

[120] The 2010 edition is selected as it followed *Rahman* and predated *Jogee*. J Richardson (ed), Archbold: Criminal Pleading, Evidence and Practice 2010 (London: Sweet & Maxwell, 58th ed, 2009) at [19-24].

78. In this case, the jury did not find that Mr Burke foresaw a stabbing or an act of its type. According to common law authority before *Jogee*, which "closely correspond[s]" to s 66(2), his conviction was wrongly entered.

Considerations of principle and practical consequences

79. The Court of Appeal's approach divorces the application of s 66(2) from any sound conception of its rationale, and produces results Parliament cannot have intended. First, where (as here) P commits an offence which he and S had not agreed to commit, the rationale for holding S liable must differ from the justification for holding liable someone who intends the crime be committed. Professor Simester instead sources S's culpability in the normative positional change she undergoes by participating in a criminal concert with P. By affiliating herself with a criminal enterprise involving others, S cedes control over the manner in which the goal is achieved. And by continuing to participate in the venture, S implies her acceptance of those "foreseen choices and actions that are taken by P" in its pursuit.[121] That rationale evidently runs out where P's acts were not foreseen by S: "S should not be treated as accepting the risk of wrongs by P that she does not foresee".[122]

80. Second, contrary to that rationale, the Court's decision creates vicarious liability by criminalising parties for the homicidal violence of another, which they never contemplated and did nothing to help or encourage. On the Court's approach, S who foresees several punches is liable for manslaughter if P produces a gun (of which S was unaware) and deliberately shoots V dead. S was unaware of the risk that P would so act, and her participation in the venture cannot import her acceptance of P's shooting. Indeed, had S contemplated that P might inflict serious violence, she would have decided not to participate in the enterprise.

81. Third, if foresight of non-fatal acts (the hiding) is permitted to deputise as foresight of fatal acts (the stabbing), the link between the fatal acts and S's mind is severed: S simply did not foresee them. The reason for making S liable for those acts must derive from a source other than S's mind. Yet since 1961, no such reasons are permitted; the link between S and the ultimate offence can only be established by S's subjective

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[121] Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing,* (Oxford 2021), 176-183. See also Simester, "The mental element in complicity" (2007) 122 LQR 578.

[122] At 181. Earlier versions of the argument were accepted in *Clayton v R* [2006] HCA 58, 168 A Crim R 174 at [20].

foresight. Justifying the Court's approach therefore requires resort to the sort of non-subjective reasons which were interred with the repealed words "or ought to have known" and cannot be exhumed.

82. The unsatisfactory state in which the Court of Appeal's judgment has left the law is exemplified by the hypothetical examples in **Appendix 1.**

Ground 2: foresight of a culpable homicide necessary for liability

83. The majority erred in permitting a conviction for manslaughter without proof of foresight of an unlawful killing - an essential ingredient of a manslaughter "offence". Section 66(2) requires foresight of the "offence" to establish complicity in it. The absence of foresight of any element of the offence essential to its commission precludes liability.

Identifying the "offence" to which s 66(2) applies

84. First, "the approach of New Zealand courts to common purpose liability must be firmly based on the wording of s 66(2)".[123] Second, in identifying the "offence" to which s 66(2) refers, "the essential legal ingredients of criminal liability are the statutory elements of the offence".[124] Under the Act, the elements of manslaughter are (a) a homicide (s 158), (b) caused by a means listed in s 160(2) and (c) an absence of circumstances which satisfy ss 167 or 168.[125] As Cooke J said in *Tomkins*, "as to both murder and manslaughter":[126]

> We think that the act constituting the offence for the purposes of s 66 is rightly to be seen, simply and broadly, as culpable homicide.

85. The corollary is that in a manslaughter case, foresight of "that offence" requires foresight of a culpable homicide - an essential ingredient of any manslaughter charge:[127]

> he will be guilty of manslaughter if the jury are satisfied that he knew that, as knives were being carried, *a killing could well eventuate……*
>
> …. But if he knew only that at some stage in the course of the carrying out of the criminal plan there was a real risk of a *killing short of murder, he will be guilty of manslaughter.*

86. The effect of *Tomkins* is that foresight of a culpable homicide is required in every case where a person is charged under s 66(2) as a party to

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[123] *Edmonds*, above n 34, at [47]. Emphasis added

[124] *Ahsin*, above n 66, at [172].

[125] Sections 160(3) and 171. See Orchard, "Strict liability and parties to murder and manslaughter [1997] NZLJ 93.

[126] *R v Tomkins* [1985] 2 NZLR 253 (CA), 255-6. See Mallon J at [153]-[155].

[127] *Tomkins*, above n 126, 256, emphasis added.

murder or manslaughter - a culpable homicide is an essential element of each offence. As such, attempts to distinguish *Tomkins* on grounds it concerned s 167, rather than s 168 or manslaughter are unsound. The need to foresee the "offence" makes foresight of a culpable homicide necessary to establish complicity via s 66(2) to any offence of which culpable homicide forms part.

The Australian position in Code states

87. Third, Cooke J's approach has prevailed in Western Australia (WA), Queensland (Qld) and Tasmania (Tas), the Criminal Codes of which descend from Stephen's codification project. Each defines homicide in terms analogous to the Crimes Act and contains CUP provisions equivalent to s 66(2), save for the addition of the words "or ought to have known". In *Brennan*, the High Court explained that s 8 of the WA Code required an unlawful killing to be a probable consequence of the CUP in order to secure a conviction for manslaughter. Giving the lead judgment, Dixon and Evatt JJ said:[128]

> Manslaughter is a form of homicide. It cannot be committed unless death is caused and by an unlawful act. Thus, to establish under sec. 8 that the applicant was guilty of manslaughter, it must appear that among the probable consequences of prosecuting the unlawful purpose upon which the prisoners had resolved was the death of the caretaker, or of a person chancing to be in their way…

88. In Queensland, whose Code contains an "identical" provision, the position is the same.[129] It came before the High Court in *Stuart*, where Jacobs J said that liability for manslaughter depended on the "the possibility of death" being among the probable consequences.[130] In *Barlow*, the High Court again confronted s 8 of the Qld Code.[131] The trial judge told the jury that to convict Barlow of manslaughter the victim's death had to be a probable consequence of the CUP. The majority reproduced his direction with apparent approval and continued:[132]

> Pursuant to this direction, it was open to the jury to convict Barlow of manslaughter if *the striking and resultant death* of Vosmaer were unlawful and were a probable consequence of the execution by the co-accused of a plan to which Barlow was a party,

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[128] *Brennan v R* (1936) 55 CLR 253, 264 and 265. Quoted by Kiefel J in *Keenan,* above n 72, at [118].

[129] *Keenan*, above n 72, at [118].

[130] *Stuart v The Queen* (1974) 134 CLR 426, 453.

[131] *R v Barlow* (1997) 188 CLR 1.

[132] *Barlow*, above 5, per Brennan CJ, Dawson and Toohey JJ, original emphasis.

89. *Barlow* affirmed the Queensland Court of Appeal's decision in *Jervis,* where an accused claimed she was a vampire who needed human blood to sustain her.[133] She enlisted two others to help her procure it, and the appellant (J) provided a knife for them to use. The accused other than J used it to murder a man. J was convicted of manslaughter and argued that the only "offence" to which s 8 could make her party was murder (of which she was acquitted). By majority, the court disagreed, for reasons relevant to this case. Like s 160 of the Crimes Act, s 300 of the Qld Code provided that "any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case". McPherson ACJ referred to s 300 and continued:[134]

> Both murder and manslaughter nevertheless are and remain, particular forms of what is viewed by s. 300 as a single ''crime'' of unlawfully killing another.

90. McPherson ACJ noted that the same reasoning led courts in Tasmania[135], WA[136], Papua New Guinea[137] and earlier Queensland cases[138] to the same result. That a manslaughter verdict could be returned where P was convicted of murder "can only have been reached on the basis that under s 8 the ''offence'' was the unlawful killing".[139] The corollary was that to convict of manslaughter the jury "must have been persuaded that death was, within the terms of s 8, a probable consequence of a common intention".[140]

Summary and effect of the Australian approach

91. The reasoning common to these authorities can be encapsulated as follows. First, murder and manslaughter are constituent offences of 'culpable homicide' or 'unlawful killing' (as the Codes variously describe it). Second, where complicity to the "offence" of murder or manslaughter is alleged via the respective CUP provisions, the "offence" includes the ingredients of culpable homicide (or unlawful killing) as necessary

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133 *R v Jervis* [1993] 1 Qd R 643 (CA), 645, affirmed *R v Georgiou,* [2002] QCA 206, 131 A Crim R 150, [59]-[65].

134 At 653.

135 *Murray v. The Queen* [1962] Tas. S.R. 170 (TCA), esp. 186-7 per Gibson J.

136 *Saunders v. The Queen* [1980] W.A.R. 183 (CA). Applied *Nguyen v R* [2001] WASCA 176, at [41]-[42].

137 *Imiyo Wamela v. The State* [1982] P.N.G.L.R. 269, 277.

138 *R. v. Solomon* [1959] Qd.R.123 (CA), 131-5. The jury "would still have to consider whether, applying s 8, the unlawful killing of the victim was objectively a probable consequence…".

139 *Jervis*, above n 133, 655, l 20.

140 *Jervis*, above n 133, 650.

prerequisites to murder or manslaughter. Third, therefore, the "offence" which must be among the probable consequences of a CUP's commission includes a culpable homicide, that is, an unlawful killing.

92. As Cooke J's conclusion in *Tomkins* illustrates, the force in this reasoning is unaltered by the absence in s 66(2) of the words "or ought to have known", which appear in the Australian Codes. The Australian cases reveal the composition of the "offence" of manslaughter, where under provisions mirroring s 66(2) complicity to that offence is alleged. That is unrelated to whether the offence, so defined, is among the probable consequences because the accused foresaw it or because they ought to have foreseen it.

***The approach of the Court of Appeal,* Rapira, Tuhoro *and* Hardiman**

93. Cooke J's approach was taken by the Court of Appeal in several cases.[141] On the strength of those authorities, the "practice in other culpable homicide cases" was to require proof that a s 66(2) party foresaw a real risk of a killing.[142] Nevertheless, the majority in this case, as in *Rapira, Tuhoro* and *Hardiman,* did not require foresight of a culpable homicide. Its reasons for doing so are unpersuasive.

The statutory language

94. The majority's first argument, echoing *Rapira*, ran as follows: (a) s 66(2) inculpates S for any offence committed during the CUP if S foresaw "that offence" as a real risk, (b) if "that offence" is manslaughter, P commits it by an unlawful and dangerous act without having to foresee a killing, therefore (c) "that offence" includes no mens rea requirement about a killing and S need not foresee a killing as a real risk.

95. The superficial attraction in the symmetry this creates between *mens rea* requirements for P and S (as to a killing) conceals several problems. First, it is wrong to assume at the outset, as the majority did, that the "offence" in s 66(2) refers only to parts of the *actus reus* for which P must have *mens rea*. There is no *a priori* reason, extraneous to the Act's text, why that must be so. Second, shorn of that assumption, it is apparent that P's manslaughter offence is not committed unless his unlawful act actually causes death (s 160(2)). While neither the Act nor

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[141] *R v Hartley* [1978] 2 NZLR 199 (CA), 203; *R v Te Moni* [1998] 1 NZLR 641 (CA); *R v O'Dell* CA46/86, 28 October 1986; *Doctor v R* CA366/92, 20 July 1993.

[142] *Edmonds*, above n 34, at [27].

judicial gloss requires P to have any *mens rea* about that consequence, its occurrence remains an inextricable part of the *actus reus* of the manslaughter offence he commits.[143]

96. Third, unlike s 160 (and s 66(1)), s 66(2) prescribes a *mens rea* requirement for S which is quite different from the *mens rea* required of P: knowledge that an "offence" - without qualification or division - is a probable consequence of the CUP. That clear requirement cannot be curtailed or ignored in pursuit of a textually unprompted and unjustified search for symmetry between the *mens rea* requirements for S and P.

Asymmetry between ss 66(1) and 66(2)

97. The majority further argued that neither the Act's wording, nor any principle, required foresight of an unlawful killing under s 66(2), where no such foresight is required under s 66(1). The dual premises that symmetry between the *mens rea* of parties under each subsection exists and is desirable are unsound.

98. First, it is settled that liability for manslaughter via s 66(1) does not require *mens rea* as to the victim's death.[144] That is of no moment, however, given the *mens rea* requirements for subs. (1) and (2) derive from different sources. Section 66(1) describes the *actus reus* of certain types of secondary liability, and like the English Act on which it was based, contains no *mens rea* requirement, which is left for judicial decision.[145] On the other hand, s 66(2) does prescribe a *mens rea* standard: knowledge of probable consequences.

99. Second, 'congruence' between subs. (1) and (2) neither exists nor need exist.[146] Section 66(1) requires intentional acts of aiding or abetment etc., coupled with an intention that P commit the offence or knowing P will. On the other hand, s 66(2) requires mere foresight of a real risk, which as Lord Mustill and Lord Steyn explained, makes S liable though he desires that P not commit the offence, remonstrates with him not to,

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[143] See Orchard, above n 126. A variant of that fallacy infects the discussion in *Rapira* of s 168. After correctly describing the ingredients of liability for a principal under that section, Elias CJ asserted (at [22], [25]) that "just as" *mens rea* as to death is not required of P, nor is it required of S. The "offence" S must foresee, however, is nowhere limited to only those of the facts essential to the commission of murder under s 168 that P must have *mens rea* about.

[144] *R v Renata* above n 99, 349.

[145] *Edmonds* above n 34, at [22]: "s 66(1)(b), (c) and (d) was borrowed from s 8 of the Accessories and Abettors Act 1861 (UK)". The 1861 Act is silent about *mens rea* and the correct standard for aiders and abetters was contested until *Jogee*. See Simester "The Mental Element in Complicity", above n 121, 583-588 and *Jogee*, above n 44, at [16].

[146] See Simester, The Mental Element in Complicity, above n 121.

and tells P he will not participate in the CUP if P intends to commit it.[147] If P ultimately commits that offence, however, S is liable for it. The *mens rea* required of S under s 66(2) is therefore markedly less than under s 66(1). There is thus no congruence to preserve. Moreover, the normative attraction in requiring foresight of a killing under s 66(2) but not s 66(1) follows from the lower *mens rea* otherwise required by s 66(2). A party who does nothing to advance the offence's commission (and might well deprecate it) is differently situated to one who knows what P will do, and helps or encourages P to do it.

100. Third, requiring foresight of a killing under s 66(2) but not s 66(1) is likewise defensible for evidential reasons. Greater caution is needed before permitting a jury to return a homicide conviction which depends on its assessment of S's foresight which, unlike aiding or abetting, may find no outward expression. Where S is charged via s 66(2) with an offence other than that which she agreed to assist in, putative evidence of foresight may consist entirely of circumstantial inferences about S's mental state, uncorroborated by any act S did in furtherance of the collateral offence. Attempted reconstructions of S's foresight are therefore particularly susceptible to unjustified *post hoc* imputations to S of foresight of a risk the jury knows was actually realised. Insofar as requiring proof of a killing imposes an additional burden on the Crown, that is to be welcomed.

101. Fourth, in permitting manslaughter convictions for those who neither intend nor foresee, nor even ought to have foreseen death, unlawful act manslaughter "does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility".[148] In so holding, the High Court of Australia in *Wilson* held that the act must also carry "an appreciable risk of serious injury" to found manslaughter liability.[149] This Court is not invited to take the same approach, but it is instructive to consider the criticisms in *Wilson,* and the *dictum* that "constructive crime 'should be confined to what is truly unavoidable'".[150]

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[147] *Powell,* above n 103, 11 (Lord Mustill) and 20 (Lord Steyn).

[148] *Wilson v R* [1992] HCA 31; (1992) 174 CLR 313, at [50] per Mason CJ, Toohey, Gaudron and McHugh JJ.

[149] At [48]. It declined to follow *Church*, above n 63.

[150] *Wilson*, above n 149, at [32], quoting King CJ: *Wilson v R* (1991) 53 A Crim R 281, 286.

102. The harshness in convicting P of manslaughter without foresight of a risk of death is aggravated by affixing liability via s 66(2) onto S, if S need only foresee a more than trivial act. Unlike P, or a party under s 66(1), S may fleetingly contemplate an array of actions she thinks a real risk of occurring, but none in any detail. She may hope they do not occur, and do what she can, short of withdrawing from the CUP, to prevent them. The distance between S's moral culpability and her legal liability in such cases illustrates Parliament's wisdom in requiring actual foresight of an unlawful killing, and greater foresight under s 66(2) than for principal offenders, or parties under s 66(1).

Distinction between murder and manslaughter via s 66(2)

103. Next, the majority contended that if liability via s 66(2) for manslaughter depends on foresight of a real risk of a killing the distinction between murder and manslaughter would be "rendered illusory".[151] That was said to follow because if S foresaw a real risk of death, the jury would inevitably find that S foresaw that P was reckless as to death and therefore convict S of murder. This would lead to "absurdity", because S would never be liable solely for manslaughter under s 66(2).

104. That conclusion should also be resisted. First, S can be liable for manslaughter when P is. Second, it remains possible for S to be convicted of manslaughter where P is convicted of murder.[152] If S foresees a real risk that P will unlawfully kill, but thinks P will do so without realising that his acts are likely to cause death, S is liable for manslaughter if P commits murder. Perhaps more commonly, if S simply lacks any belief about how the unlawful killing might occur he is liable for manslaughter if another party to the CUP commits murder. In a group violence case with many participants and fast-moving events, S may foresee a real risk that events might turn for the worst and culminate in a killing, but without any belief about who might commit it, or what the circumstances of the killing will be.[153] If, in the course of that CUP S's confederate commits murder, S is liable for manslaughter.

105. Third, it is correct that if P is convicted of murder under s 168, the circumstances in which S is liable for manslaughter are reduced by

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[151] COA judgment, at [60].

[152] COA judgment, at [161]-[162] per Mallon J

[153] S need not foresee who P might be, just that there will be a P: *Edmonds*, above n 34, at [53], ft 62.

requiring that S foresee a real risk of an unlawful killing. If S has such foresight and P commits murder under s 168, S must nevertheless foresee that the unlawful killing will be in pursuit of a listed offence, or to aid an offender's flight or prevent arrest. If therefore, S foresees an unlawful killing, but not the purpose for which it is inflicted, S is liable for manslaughter if in the CUP P commits a s 168 murder.

Disposition

106. If the argument under either Ground is accepted, Mr Burke was convicted of manslaughter without a trial on the elements of the offence and his conviction should be quashed. As Simon France J said:[154]

> Mr Stretch is entitled to have the jury correctly directed on the elements of the offence, and expressly on the need for him to have foreseen that one of his co-defendants would intentionally inflict grievous bodily harm. This is important when the charged offence is alleged to be not the common purpose but a foreseeable and foreseen more serious offence.

107. First, the jury's verdict neither establishes that Mr Burke foresaw GBH, nor that he foresaw an unlawful killing. The Crown accepted its case depended on proof that Mr Burke knew Mr Webber had a knife. The jury rejected that case. Osborne J thought Mr Burke did not know Mr Webber had a knife. As the Crown's position shows, if Mr Burke did not know about the knife, there was insufficient evidence that he foresaw GBH as a real risk. Second, the jury's consideration of manslaughter was uninformed. The Crown said nothing about manslaughter, and the defence only three sentences. The CUP from which Mr Burke's manslaughter liability via s 66(2) was said to arise (a "physical beating or hiding") was not the Crown's formulation and Osborne J did not explain to the jury what it had to find to prove this CUP existed.

108. Third, Mallon J erred by summarily suggesting that a trial on the elements of manslaughter was unnecessary. First, like Osborne J, it is likely the jury was not satisfied that Mr Burke knew about the knife. Second, Mr Burke moved to Christchurch nine days before the killing, knew no-one ultimately involved in it and only briefly met Mr Webber. He cannot be imputed with close appreciation of Mr Webber's temperament. Third, those who knew Mr Webber were convicted of non-fatal offences and the Crown accepted they did not foresee Mr Webber's

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154 *Stretch v R* [2020] NZCA 195, at [10]

behaviour. Fourth, Mr Heappey's planned punishment was to resolve the issue so he could resume membership of the gang, not to seriously hurt him. Fifth, the jury's murder verdict entails that it did *not* think Mr Burke was apprised of Mr Webber's intentions. It is speculative to suggest that he nonetheless foresaw a killing. Mallon J cited no evidence in support of that startling conclusion, and none exists.

Conclusion

109. For the foregoing reasons, the appeal should be allowed and Mr Burke's manslaughter conviction quashed.

Dated at Christchurch this 2nd day of February 2023

……..

J R Rapley KC / S M Grieve KC / S J Bird

Counsel for the appellant

Appendix 1

(a) P and Ss agree to burgle a house. Ss foresee that if they encounter householders they might have to inflict more than trivial violence. P has no intent to stick to the CUP - he harbours a grudge against V, which he conceals from Ss. P has only enlisted Ss' help to break into the house, as without them he would have had a harder time getting access to V. Unknown to Ss, P knows V will be home, and actually wants to kill V. Ss are guilty of manslaughter if P deliberately kills V.

(Even if S *could not have known* of P's intention to inflict greater violence than S foresaw, S is liable.)

(b) S, P and A agree to intimidate V. S knows A hates V and it is for him who S participates in the intimidation. S knows that A might well punch V in the head - just once, because A is not crazy, but might well let off steam to the extent of a punch. P actually hates V too. But, unknown to S, P has a gun. P shoots V. The Court of Appeal says S is liable for manslaughter.

(c) S and P agree to pickpocket V. S considers P may well use more than trivial violence if V cottons on to their theft, but instead P pulls a gun and shoots V dead. S is liable for manslaughter.

(d) P (the father) routinely smacks his child (V) as punishment. S (V's mother) is scared of P, who is volatile and aggressive. V misbehaves. S takes V to P, for though she does not like V being smacked, S knows P likes to instil discipline in V. S knows that P is volatile and liable to inflict more than trivial harm on V if he is angry. P loses his temper and repeatedly smashes a glass against V's head and stomps on V's head. V dies. S is liable for manslaughter. (The result is identical if P instead stabs V with a knife.)

(e) A (20), B (20), C (15) and D (15) plan to burgle a house. A and B do not require C and Ds' help, but acquiesce in the younger boys participating. C is A's brother, and D is C's friend. D is uneasy about going along with the plan, because he knows A and B are aggressive and might well punch or beat any householders who happen to be home. D nevertheless goes along with the plan, out of loyalty to C and because C reassures him it will be fine. Once in the house, A and B tell C and D to wait in the hallway and look out for any danger. Meanwhile, A and B encounter V, the householder. A pulls a knife - which B, C and D knew nothing about - and when confronted by V, stabs him. V dies, and B, C and D are liable for manslaughter.