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*

NEW ZEALAND CRIMINAL BAR ASSOCIATION SUBMISSIONS (AS INTERVENOR)

Dated 23 February 2023

The New Zealand Criminal Bar Association certifies that this submission contains no suppressed information and is therefore suitable for publication

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MAY IT PLEASE THE COURT

1. OVERVIEW

1.1. As intervenor, the New Zealand Criminal Bar Association ("CBA") supports the view espoused by Mallon J in *Burke v R.*[1]

1.2. The CBA invites the Court to consider at a broader level the meaning of s 66(2) and submits the current interpretation of its component elements has resulted in over criminalisation. To achieve an application of s66(2) that appropriately criminalises group behaviour there are a number of reinterpretations of s66(2) to be considered. First by implying a mens rea element of intention which is consistent with the mens rea element implied in s 66(1) and throughout the Crimes Act A further restraint on the scope of s 66(2) is giving 'probable" its plain meaning of "more likely than not".

1.3. The reasons for the CBA's support are based in history, policy and statutory interpretation.

2. SECTION 66(2) AND *BURKE*

2.1 Section 66(2) of the Crimes Act 1961 provides that:

> Where 2 or more 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 the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

2.2 In *Burke*, the majority of the Court of Appeal held that in the context of s 66(2) and the mens rea component for potential liability for manslaughter:

[1] *Burke v R* [2022] NZCA 279.

(a) To be liable, it is sufficient that the secondary party knew that the principal offender would commit an unlawful act to do more than trivial harm to the deceased as a probable consequence of the prosecution of the common purpose [2]

(b) A "probable consequence" is something that "might well happen" or "could well happen" or where there is a real or substantial risk of it happening. [3]

(c) Foresight of death is not a prerequisite to liability. [4]

2.3 In the context of confrontations between groups of youths or gangs these elements capture a large number of peripheral individuals who take no active role and do not foresee death. In the CBA's submission a conviction for manslaughter using the elements endorsed by the majority in Burke is over criminalisation. Therefore this Court should consider how the component elements of s66(2) should be modified to achieve appropriate criminalisation of group participation.

3 WIDER CONSIDERATIONS AND BACKGROUND

3.1 The approved question covers the correct interpretation and application of s66(2). At a narrower level, it relates to the question of the correct application of s66(2) in the context of existing jurisprudence; but at a broader level it invites consideration of what is the proper meaning of the section as a whole. The latter is particularly evident in the context of the dissent of Mallon J as to the law in the Court of Appeal judgment (albeit not to the outcome, though that was through the conclusion that there was no miscarriage of justice on the facts)[5].

3.2 The wider question is how does section 66(2) interplay with the law of mens rea. More particularly the question is whether s66(2) authorises a lower level of mens rea for someone who is involved in a common enterprise, which can

[2] Above n 1 at [66].
[3] At [44].
[4] At [55].
[5] At [151].

arise in a variety of settings. This was the central question that gave rise to the important joint decision of the UK Supreme Court and Privy Council in *R v Jogee and Ruddock v R.*[6] In essence, in *Jogee*, the judges determined that the common law of common enterprise had taken a wrong turn since the judgment of the Privy Council (delivered by Sir Robin Cooke) in *Chan Wing-Siu v R*,[7] whereby the mens rea for a secondary participant in an offence committed by a principal who went outside a joint enterprise was foresight that the principal might do something more, in substitution for the mens rea required for that offence (which was applied only to the principal). In *Jogee*, correcting this error, it was confirmed that, at common law, a secondary party requires the mens rea for the further offence committed to be guilty of the same offence as the principal, whether in a joint enterprise situation or any other form of secondary aiding or encouraging; and that the role of foresight is as evidence of whether that mens rea is present.

3.3 In short, *Chan Wing-Siu* did not state the common law but instead introduced a new and unwarranted doctrine. To this end it is noticeable that:

(i) the language used in *Chan Wing-Siu* has some resonance with the language of s66(2) of the Crimes Act 1961 – though it is submitted that this does not represent the correct interpretation of s66(2);

(ii) the reasoning in *Edmonds v R*[8] *and Ahsin v R*[9], is consistent with *Chan Wing-Siu* – though it is respectfully submitted that they are flawed;

(iii) one of the features in *Jogee* was that the holding in *Chan Wing-Siu* led to a significant extension of the ambit of criminality, particularly of young people and people in minority groups, who were found guilty of very serious offending on the basis of a reduced mens rea (who, post *Jogee*, might still be guilty of something, namely the criminality that

[6] *R v Jogee and Ruddock v R* [2016] UKPC 7 and [2016] UKSC 8, [2016] 2 WLR 681.
[7] *Chan v R* [1985] 1 AC 168.
[8] *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445.
[9] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

was the joint enterprise). This aspect is covered in our submissions below, in relation to policy considerations.

3.4 In the New Zealand context, the matter can be treated as one of statutory interpretation, which turns on text, context and purpose[10] In summary, the CBA submits that:

(i) the statutory language in New Zealand, traced through the Criminal Code Act 1893 to the Crimes Act 1961, did not have the purpose of securing a lower mens rea for a common enterprise defendant; and

(ii) the fundamental role of mens rea in criminal law means that the statutory language of s66(2) is not appropriate to achieve such a radical role.

3.5 As to the fundamental role of mens rea, Lord Steyn in *B (A Minor) v DPP*[11] identified the principle of legality as the jurisprudential basis for implying a mens rea, so finding that the presumption of mens rea required suitably clear language,[12] expressly or by necessary implication (which it had not done in relation to the offence in question, such that the defendant did not have the mens rea).[13] Similarly, French CJ, in *Momcilovic v R*, noted that it was a "powerful" principle that "requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law".[14]

[10] Section 10 of the Legislation Act 2019.
[11] *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428 at 470.
[12] Above n 11, at 470G-H: "Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text". See also *R v K* [2001] UKHL 41, [2002] 1 AC 462: Lord Steyn, concurring, noted that the presumption of mens rea was a constitutional principle, supplementing the language defining the offence without any need for ambiguity: paragraph 32.
[13] For the power of legality, see *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 (per Lords Steyn and Hoffmann); *Re Bolton, ex parte Beane* (1987) 162 CLR 514 and *Electrolux Home Products Pty v Australian Workers' Union* [2004] HCA 40, 221 CLR 309, 209 ALR 116; and *R v Pora* [2001] 2 NZLR 37 (CA). See also Legislation Design and Advisory Committee, Legislation Guidelines, September 2021, part 4.3.
[14] *Momcilovic v R* [2011] HCA 34, [43].

3.6 Supplementing the principle of legality is the principle of lenity, namely the approach that ambiguity is construed in favour of the defendant.[15]

3.7 Turning then to the text, it occurs in the context of s66 as a whole, and its constituent parts:

(i) Section 66(1)(a) – guilt of the principal: this requires that the elements of the offence are made out, as set out in the relevant statutory provisions, assisted by the presumption of mens rea;

(ii) Sections 66(1)(b)-(d) – guilt of the secondary party by way of aiding, abetting, counselling or procuring: this expressly requires intention in the case of s66(1)(b) aiding, and in all other cases mens rea is implied (assisted by the presumption of mens rea*)*, involving an intention to assist or encourage (even if the principal can be guilty through a lesser mental element such as recklessness) and knowledge of the essential elements of the offence.[16] Note that s66(1)(d) liability is extended to offences known likely to be committed by reason of s70(2).

(iii) Section 66(2) –

(a) makes reference to being "a party to" (note, not "guilty of", in contrast to s66(1), which refers to a person being both a party to and guilty of the offence in the circumstances delineated, which is to be read together with the implied mens rea)

(b) "every offence … known to be a probable consequence of the prosecution of the common purpose".

3.8 In the context of the principle of legality, the CBA submits that:

[15] For an example of its use in New Zealand, see *R v Darwish* [2006] 1 NZLR 688, [22] (per Winkelmann J): notwithstanding the purposive approach, "it is nevertheless the case that the accused is still entitled to the benefit of the doubt where there is a genuine uncertainty as to the meaning and purpose of a provision".
[16] See *Edmonds* [2011] NZSC 159, [22]; *Ahsin and Rameka v R* [2014] NZSC 153, [22] and [82].

(a) the question arising is whether the language in s66(2) is sufficient to lead to a lesser mens rea than arising under s66(1)?

(b) that the answer is that it is not; and

(c) that the proper construction of s66(2) in its context is limited to making the common purpose secondary party "a party to" the actus reus of any further offence "known to be a probable consequence of the prosecution of the common purpose", but with the prosecution still being required to demonstrate the mens rea.

3.9 As such, the statutory language in context is consistent with the outcome in *Jogee*. It is, of course, accepted that there are risks arising from combinations of people involved in criminality, but:

(a) Has Parliament made it clear that there is such a risk arising for that as to remove the need for a mens rea as applies to other secondary parties? The CBA submits that a change in the law of this magnitude could only properly be brought about by clear and deliberate legislative change.

(b) It is to be noted that conspiracies are criminal on the basis of the risk of the combination, but the case law is very clear that they require a full mens rea (agreement as to the offence and intention to carry it out)[17] even though the statutory language in s310 of the Crimes Act 1961 is silent (and so the mens rea is implied). The CBA submits that the contrast between the mens rea requirements for conspiracy and the case law relating to s66(2) is not justified by the statutory language.

(c) Note that the case law in New Zealand is also incoherent in that, as was accepted in *Edmonds*[18], the secondary party could be guilty of

[17] *R v Gemmell* [1985] 2 NZLR 740.
[18] Above n 8, at [28]-[29]: it seems to be that it is more likely that the conviction will be of a different offence than the principal.

manslaughter rather than murder on the basis of a difference in mens rea. However:

(i) The express language in s66(2) refers to being a "party to" an "offence" which is "known to be a probable consequence". This does not leave room for guilt of a lesser offence than the principal unless circumstances arise where the secondary party's level of mens rea is inferior to the principal's mens rea.

(ii) The true construction is being party to the actus reus, which can then produce a different outcome in a homicide situation if the secondary party has the mens rea for the different and lesser offence of manslaughter.

4 HISTORICAL ANALYSIS

4.1 A historical review of the legislation provides an insight to the purpose of the statutory language.

4.2 The Crimes Act 1961 is an amended version of what started as an attempt to codify the common law as it was understood in the late Victorian period, which by then had already seen some statutory changes. William Young J refers to this in both *Edmonds*[19] and *Ahsin*,[20] and it is clear that this is a useful way of seeking to explain language still used.[21]

4.3 The English Royal Commission on the Law Relating to Indictable Offences reported in 1879,[22] included a Draft Code as volume 2 to its report. Clause

[19] Above n 18, at [22].
[20] Above n 9, at [208]-[215}.
[21] Language in the Crimes Act 1961 can often be traced back through the Crimes Act 1908 and the Criminal Code Act 1893 to the Draft Code from England, which may assist with interpretation. See Stephen White "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 VUWLR 353, and Jeremy Finn, "Codification of the Criminal Law: the Australasian Parliamentary Experience", in in B Godfrey and G Dunstall (eds) Crime and Empire 1840-1940 criminal justice in local and global context (Willan Publishing, Cullompton, England, 2005) pp 224-237.
[22] Report of the Royal Commission appointed to consider the Law Relating to Indictable Offence with an appendix containing a Draft Code Embodying the Suggesting of the Commissioners Cmd 2345.

71 of this Draft Code, relating to "Parties to offences", was in the following terms:

> 71. Every one is a party to and guilty of an indictable offence who—
>
> (a) Actually commits the offence or does or omits any act the doing or omission of which forms part of the offence;
>
> (b) Aids or abets any person in the actual commission of the offence, or in any such act or omission as aforesaid; or
>
> (c) Directly or indirectly counsels or procures any person to commit the offence, or do or omit any such act as aforesaid.
>
> 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.

4.4 In a side note, it was commented that "This section is so framed as to put an end to the nice distinctions between accessories before the fact, and principals in the second degree, already practically superseded by 24 & 25 Vict c94". The reference is to the Accessories and Abettors Act 1861, and the distinction is one between those who incite, counsel or procure (accessories before the fact) and those who aid and abet at the scene of the crime (principals in the second degree, also referred to as accessories at the fact). This had procedural consequences at common law as the latter could only to be tried together with the principal (which explains the reference to principals in the second degree) – which included those in a common enterprise, who were deemed to be present even if not at the scene.

4.5 In short, the statute amended the common law to allow more trials together: but this was a procedural matter, not designed to affect the substantive law of the elements of offences. The 1861 statute, which proclaims itself as a consolidating and amending statute in its preamble, provided in sections 1

and 2 for the trial of accessories before the fact in relation to felonies as principals, which could be jointly with the principal or even if the principal had not been tried and convicted or was not amenable to trial; section 8 made substantively similar provision in relation to misdemeanours. In *Jogee*, it was commented that this statute – and specifically section 8, which still remains in effect in England and Wales, having been amended to refer to indictable offences[23] - "was to simplify the procedure for the prosecution of secondary parties. It did not alter the substance of the law governing secondary liability".[24]

4.6 The Draft Code continued with clause 72, headed "Offence committed other than offence intended":

> 72. Every one who counsels or procures another to be a party to an offence of which that other is afterwards guilty is a party to that offence, although it may be committed in a way different from that which was counselled or suggested.
>
> Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew or ought to have known to be likely to be committed in consequence of such counselling or procuring.

4.7 In a side note, it was commented that "This is believed to express the existing law. See Foster, Chapter III", which is a reference to Foster's discussion of accessories before the fact[25] , which was cited extensively by the Supreme Court in *Jogee*.[26] In their report, the Commissioners commented that their aim was to effect a change "not so much in the substance as in the language of the existing law".[27] (A further clause, clause 73, relates to accessories after the fact.)

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[23] Offences triable before a jury; section 44 of the Magistrates Courts Act 1980 makes similar provision for summary trials before magistrates.
[24] Above n 6, at [6]
[25] Sir Michael Foster, Crown Law, 3rd Edition, W Clarke and Sons, London, 1809, 369-375. At 347-348, Foster sets out the problems that occurred previously, which had led to various statutory modifications: the common law, for example, initially did not allow aiders and abettors (accessories at the fact) to be tried until after the principal had been convicted, but gradually modified that rule to treat them all as principals. At 355-360, he discusses the problems caused if the principal was not amenable to common law punishment by reason of such matters as being able to claim benefit of clergy.
[26] Above n 6, at [6], [13], [18]-[21] and [73].
[27] Above n 22, vol I at p19.

4.8 The CBA submits that these clauses were designed to summarise the common law as understood by the Commissioners and as modified by statute. Note the absence of reference to mens rea requirements in the first paragraph of clause 71: this is because it says nothing about the elements of offending; leaving that for the substantive law. Further, note that the second paragraphs of clauses 71 and 72 make reference to what was or ought to have been known (ie subjective and objective knowledge): if this is designed to replace the law of mens rea with the introduction of an objective mens rea for inciters and parties to a common enterprise, it would surely have been recorded as such.

4.9 However, the common law texts do not indicate special rules for common purpose liability. Foster describes it as a situation of aiding and abetting that was agreed to in advance rather than spontaneous, mentioned in the context of his discussion of when people would be considered to be accessories at the fact and hence principals: he noted that those who took their assigned part, including to guard, would be present at the scene and so principals, and guilty in light of playing a part which "tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise".[28] So described, they are active participants and, importantly, share the fault element for the offences involved.

4.10 The most prominent Code Commissioner, James Fitzjames Stephen, judge and compiler of the common law structures the propositions in his *A Digest of the Criminal Law*[29] in a way that reflects the Draft Code and Foster's writing, dealing with (i) principals, including those who operate through an innocent agent such as a child below the age of criminal responsibility, are covered in Articles 35 and 36; then (ii) aiders and abettors (principals in the

[28] Above n 25, 350. He also noted that presence at the scene of a murder would produce liability for all for the homicide provided it was part of the common unlawful design, which seems to rest on special rules as to homicide: 351-355.

[29] James Fitzjames Stephen *A Digest of the Criminal Law* (Third Edition, MacMillan and Co, London, 1883). See also James Fitzjames Stephen *A History of the Criminal Law of England* (MacMillan and Co, London, 1883), 229-240, where he dealt with principal and accessory liability in a fairly brief way, largely cross-referring to his *Digest*. He noted the complexities of accessories before and after the fact, which was linked with the complexities of treason, felonies and misdemeanours, and the statutory clarification of this.

second degree) and those involved in a common purpose situation are covered in Articles 37 and 38; (iii) Articles 39-43 contain the rules as to accessories before the fact and the possible extension of liability in their case if the person encouraged into crime does more (as reflected in clause 72 of the Draft Bill). Stephen notes in Article 44 that the two groups of accessories will be indicted for the offence committed as a result of the Accessories and Abettors Act 1861. His account of "Common Purpose" in Article 38 is in the following terms:

> 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.

4.11 Stephen's approach is then to give examples. He sets out one instance of common purpose guilt, three of no liability and one where the liability depends on an additional feature. His first example, of guilt, involves a group in a house who drive off police officers who attend to arrest one of the group: if one of those involved in the attempted arrest is killed, all of the group driving the officers away are guilty irrespective of who committed the killing. In contrast, he notes that if smugglers are fighting customs officers and one smuggler's shot kills a fellow smuggler, only the man who fires the shot has any potential liability. Similarly, he notes that if two groups are fighting and one kills a by-stander, there will be no liability. In the middle is a situation in which people are stealing from an orchard and a look-out kills someone who comes to challenge them: those in the trees would only be liable if there was a "common resolution to overcome all opposition".

4.12 This suggests that common purpose involves aiding and abetting on the basis of an agreement as to what should happen in developing circumstances around the basic offence (where the parties are principals in the first and second degree at common law). As such, the second paragraph of clause 71

defines the demarcation between an offence that is part of the common purpose and one that is foreign to it (the test noted in Article 38 of Stephen's Digest). In other words, a probable consequence of the common purpose is within its scope. But this is all in the context of this defining who could be tried together as principals and does not set the fault element for any of them. The reference to "each of them" being "a party to every offence" that is or ought to be known to be probable is to allow joint trials: importantly, just as the principal's mens rea is to be determined by looking at the offence-defining language, so the aider and abetter is liable only if the mens rea is made out. Naturally, if the offence was subject to an agreement as to going further, that will supply the relevant intention: but that mens rea still has to be proved.

4.13 The analysis in *Jogee* is consistent with all this save that the Supreme Court suggested that the recognition in later case law of the importance of subjective standards required the removal of the objective knowledge test.[30] This is precisely what has happened in New Zealand via statutory modification. The Criminal Code Act 1893 provided in sections 73 and 74 that:

> 73(1) Every one is a party to and guilty of an offence who—
>
> (a) Actually commits it;
>
> (b) Does or omits an act for the purpose of aiding any person to commit the offence;
>
> (c) Abets any person in the commission of the offence; or
>
> (d) Counsels or procures any person to commit the offence.

[30] Above n 6, at [73].

> (2) 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.
>
> 74(1) Every one who counsels or procures another to be a party to an offence of which that other is afterwards guilty is a party to that offence, although it may be committed in a way different from that which was counselled or suggested.
>
> (2) Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew or ought to have known to be likely to be committed in consequence of such counselling or procuring.

Essentially, this follows the language of the Draft Code, save that aiding and abetting are split into separate sub-sections and it is made clear that aiding has to be intentional aiding. But this language is clearly designed to put into practice in New Zealand the common law as modified by the Accessories and Abettors Act 1861 in England and Wales.

4.14 The language was preserved in sections 90 and 91 of the Crimes Act 1908.

4.15 When the Crimes Act 1961 was enacted, there were two changes: one was that the sections were separated within the code, which should make no substantive difference, but may have thrown lawyers off the relationship between the two sections as being read together to provide a code for principal liability.[31] The other was a change to the joint enterprise language and its equivalent in relation to incitement in section 70(2). Section 66(2) can be set out in full for convenience to illustrate the change:

> (2) Where 2 or more 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 the common

[31] Accessory after the fact liability has its separate rules in section 71 (as to who is an accessory after the fact) and section 312 (as to punishment), whereas sections 66 and 70 provide for who can be charged with the offence.

> purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

4.16 This clarifies that "several persons" includes 2 or more; and it removes the reference to what ought to have been foreseen, which clearly narrows the scope of the doctrine and reflects the move towards subjectivity in fault elements. There is no evident statutory purpose to provide an alternative (and much reduced) *mens rea* for those involved in a common enterprise. The view that it had such a radical effect did not emerge until after *Chan Wing-Siu*. For example, in the 1981 edition of Garrow and Caldwell's Criminal Law In New Zealand, the author's account of common purpose emphasises the importance of the concerted action and whether it included the use of force to overcome resistance: cases such as *Wesley Smith*, endorsed in *Jogee*, are described as setting the law.[32] The only New Zealand authorities mentioned are *R v Malcolm*[33] and *R v Morrison*.[34] These are both Court of Appeal cases involving homicide situations, and seem to have been tied up in the question of whether murder and manslaughter convictions could be combined. In the former case, Gresson J does summarise the statute – then section 90(2) of the Crimes Act 1908 – as leading to a conviction if the was a common intention to do something unlawful and what happened was or ought to have been known to a probable consequence of that:[35] but the case was put as a common intention as to the killing, and so there was no in-depth discussion of this. In *Morrison*, the death occurred as a result of a blow to the head by one of two escapees from custody: and the question was whether this attack, which involved a long-handled scrubber, was part of the common purpose or not. The contention on appeal was that the judge had failed adequately to differentiate between a separate intention by the principal and the common intention:[36] but this was dismissed on the basis that the trial

[32] RA Caldwell *Garrow and Caldwell's Criminal Law In New Zealand* (6th Ed, Butterworths, Wellington, 1981), 73-4.
[33] *R v Malcolm* [1951] NZLR 470 (CA).
[34] *R v Morrison* [1968] NZLR 156 (CA).
[35] Above n 33, at 482.
[36] Above n 34, at 157.

judge had put this line of defence and that the scope of the common intention was the important matter to be proved.[37]

4.17 In conclusion in relation to the historical factors, the CBA submits that the 1961 Act is the product of a nineteenth century project to codify the common law. The language of s66 therefore can be traced directly back to that codification process and was intended to represent the common law as it stood at the time.

4.18 The language of s66(2) can be traced to the English Royal Commission of 1879 and its Draft Code. This was transposed into New Zealand's Criminal Code Act 1893. The relevant provisions were kept verbatim in the Crimes Act 1908. When drafting the Crimes Act 1961 Parliament only introduced one substantive change, which narrowed the scope of the doctrine.

4.19 Notwithstanding the fact that s66(2) was intended by Parliament to be a restatement of the common law position, the New Zealand courts have interpreted it substantially more broadly, particularly in *Edmonds* and *Ahsin*. The broader interpretation of s66(2) has much in common with the law as determined in *Chan Wing-Siu* and *Powell and English*,[38] which have since been corrected by the UK Supreme Court and Privy Council in *Jogee*. This broader interpretation is, to borrow the language of the Supreme Court, a 'wrong turn' in the development of the common law. [39]

4.20 At its simplest this misinterpretation of the common law was summarised thus: "[t]he error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent".[40] It is submitted that this error manifests itself in the reasoning of both *Edmonds* and *Ahsin*.

4.21 This erroneous interpretation is not inherent in the legislation itself, but is an error of judicial interpretation. Therefore it is submitted that the correct

[37] Above n 34, at160.
[38] *R v Powell, R v English* [1999] 1 AC 1.
[39] Above n 6, at [87].
[40] At [87].

interpretation of the common law can be made by restating the common law unambiguously as was done in *Jogee*. The wrong turn does not need to be corrected by amending the legislation, but by judicial clarification of the common law, a conclusion also reached in *Jogee*.[41]

4.22 The common law position set out in *Jogee* is more clear, more fair and more jurisprudentially coherent than the position derived from the reasoning in *Chan Wing-Siu*. It is submitted that restating the common law in line with that envisaged in the criminal codes from which the Crimes Act 1961 derive is the best approach to the approved question in this case.

5 POLICY CONSIDERATIONS

5.1 The current application of s66(2) case law has the potential to give rise to injustice. For example, consider the following gang homicide context:

> Gang rivalry results in an organised standoff between rivals "Gang A" and "Gang B"
>
> Gang A members range between 16 and 50 years of age: it is an intergenerational gang- many are brothers, sons or cousins. Younger members are subordinate and progress through steps such as associates, prospects, full members and potentially to office holders such as sergeant at arms and president.
>
> Prospect A is 18 years old. He has a number of older relatives in the gang. Prospect A attends a gang meeting where a gang confrontation is planned in response to alleged provocation by Gang B. Prospect A hears that some members will have firearms and he knows the gang history of violence and death.

[41] At [85].

Prospect A foresees that one of his gang may shoot a rival gang member.

He is scared and does not want to kill anyone, but his family and gang associations require him to go with the other gang members to the scene Prospect A goes to scene, but does not take part in the violence. One of his gang associates fires a gun, killing a rival gang member.

5.2 On the current law prospect A would be guilty of murder without any intention to assist in a murder. On the English law post *Jogee* he would not be guilty of murder.

5.3 The CBA submits that the current law over-criminalises offending. This in turn leads to disproportionately high sentences and unfairly labels these lower level offenders as murderers as would be the case in the example of Prospect A above. These were the same concerns as expressed in Jogee. The disproportionate representation of minorities in prison is well known to the Courts. The CBA is not aware of any attempt to collect data on the effect of s66(2) on minorities but it would be a reasonable to infer that the effect of s 66(2) is disproportionate.

5.4 The CBA also submits that the practical effect of a requirement of both foresight and an intention to assist in a foreseen offence is becoming increasingly significant. In contrast to 1961 when s66(2) was introduced, youths and young adults in the 2020s are exposed to a diet of violence of every flavour through smart phones, tablets, gaming consoles, and television. A jury of their peers will find it increasingly easy to find foresight proven. Therefore the additional requirement of intention becomes warranted to prevent overcriminalisation.

5.5 The CBA accepts that the proposed addition of a mens rea element of intention into s66(2) would be a significant change to the law. The court in *Jogee* was similarly confronted with making a decision which would

acknowledge a period whether the law jumped the track or took a wrong turn.[42]

5.6 Nevertheless the court choose to correct the error.

5.7 The court considered the implication for convictions since Chan Wing-Sui, noting [43] the effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in *Chan Wing-Siu* and in *Powell and English*. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction.

5.8 Following *Jogee* there have been a very small number of successful appeals for historical convictions relying on *Jogee*.[44]

6 "TRIVIAL HARM" v "THE OFFENCE"

6.1 The CBA adopts and endorses Mallon J's reasoning and approach in *Burke*. Her Honour began her analysis by starting with the words of s66(2) and first principles. Whereas the majority in *Burke* and preceding case law has watered down the requirement of knowledge of "the offence", Her Honour Mallon J gave the words ("the offence") their plain meaning.

6.2 Previous cases[45] had suggested that knowledge of the offence in the context of s66(2) meant foresight of an unlawful act likely to do more than trivial harm to the deceased.

[42] At [74].
[43] At [100].
[44] Cecil J and Mehigan J A Practical Guide to secondary liability and joint enterprise post-Jogee at 2.
[45] Such as 2

6.3 The CBA submits that although this (more than trivial harm) approach has developed over years of jurisprudence, it is such a departure from the natural and ordinary meaning of the words "the offence", that it cannot be sustained and upheld on review by the Supreme Court.

6.4 The CBA agrees with Mallon J that in the context of a homicide case, the words "the offence" must mean "culpable homicide". There are three likely outcomes:

(i) If the principal offender's culpable homicide amounts to murder, and the secondary party knew that the murder was a probable consequence of the parties' unlawful purpose, then the secondary party is guilty of murder;

(ii) If the principal offender's culpable homicide amounts to manslaughter, and the secondary party knew that the manslaughter was a probable consequence of the parties' unlawful purpose, then the secondary party is guilty of manslaughter. In terms of the principal party, the mens rea for manslaughter is obviously less than what it is for murder, in that it is not necessary for the Crown to prove an intention to kill, or recklessness. However the CBA submits that for the secondary party to be liable for manslaughter under s66(2), the secondary party must have turned their mind to the probability that "the offence" of manslaughter would ensue (from the prosecution of the unlawful purpose). The CBA submits that this would entail an appreciation that the principal would (probably) commit the offence of manslaughter, namely by unintentionally causing the victim's death by an unlawful act.

(iii) If the alleged secondary party turned his or her mind to neither the probability of manslaughter or murder, then he or she could not be found guilty of either under s66(2).

6.5 The CBA submits that the plain wording of the s66(2) – "the offence" permit no other meaning, especially when one takes account of the need for lenity in the interpretation of criminal statutes.

6.6 In addition to the reasons espoused by Mallon J, the CBA notes that the need for a heightened degree of mens rea for liability on the part of the secondary party is counterbalanced by a lack of control on the part of the secondary party in relation to the principal party's actus reus. The CBA submits that this is further justification for a high standard of mens rea on the part of the secondary party as a requisite element for liability in relation to the culpable homicide.

6.7 The CBA respectfully disagrees with the *Burke* majority's view that it will suffice to establish liability that the secondary party knew that the principal offender would commit an unlawful act to do more than trivial harm to the deceased as a probable consequence of the prosecution of the common purpose. The CBA submits that that approach deviates too far from the plain words of s66(2).

7 PROBABLE CONSEQUENCE

7.1 The CBA agrees with the submissions made by intervenor DLANZ regarding the appropriate interpretation of 'probable consequence 'in s66(2).

7.2 The two competing interpretations are:

(i) The natural and ordinary meaning of 'probable consequence' means that the consequence is more probable than not; versus

(ii) A "probable consequence" is something that "might well happen" or "could well happen" or where there is a real or substantial risk of it happening. This would include something that is unlikely but not fanciful.

7.3 The CBA submits that the natural and ordinary meaning of the words to suggest that a consequence is more likely than not, in common parlance it will 'probably happen' The current line of authorities however have effectively replaced probable with possible.

7.4 The CBA further submits that for an individual to be found guilty under s66(2) the words "probable consequence" must import a high degree of mens rea in terms of the foreseeability of the offence committed by the principal.

7.5 The CBA is of the view that this submission is again consonant with the need to avoid overcriminalisation in the criminal law. Therefore the mens rea requirement should not be watered down when considering the lower actus rea requirements for s 66(2) and the secondary party's with limited control over the principal's actions and his or her (the principal's) ability to commit the principal offence.

7.6 The CBA further submits that when considering the meaning of probable consequence the overall breath of liability of s 66(2) needs to be considered.

7.7 The cumulative effect of the Court of Appeal's interpretation of the component elements of s 66(2) has broadened liability on each element.

8 CONCLUSION

8.1 It follows from the submissions above that the CBA is of the view that to be liable under s66(2) in the context of a case of manslaughter, a defendant must have subjectively foreseen death as a probable consequence and that foresight of non fatal harm does not satisfy that element.

8.2 That the general application of s 66(2) to avoid overcriminalisation should require first a subjective foresight of probable consequence means an appreciation by the offender that the offence will probably happen rather than a mere possibility. And secondly a mens rea element of intention to assist.

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