IN THE SUPREME COURT
OF NEW ZEALAND

SC75/2022

I TE KŌTI MANA NUI
O AOTEAROA

JUSTIN RICHARD BURKE

Appellant

v

THE KING

Respondent

SUBMISSIONS OF INTERVENERS
TE MATAKAHI
DEFENCE LAWYERS ASSOCIATION NEW ZEALAND

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Counsel for Te Matakahi – Defence Lawyers Association of New Zealand certify that these submissions do not contain suppressed information and are suitable for publication.

MAY IT PLEASE THE COURT

The Interveners

1 Te Matakahi Defence Lawyers Association New Zealand ("Te Matakahi") was established in April 2020 and is the only organisation in New Zealand that solely addresses issues relevant to the conduct of criminal cases for the defence and impacting defendants appearing before the criminal courts. Te Matakahi is a nationwide organisation and has hundreds of members which include the lawyers employed by the Public Defence Service.

Introduction

2 The appellant was convicted of manslaughter following a trial in the High Court at Christchurch.

3 The appellant's appeal to the Court of Appeal was dismissed.[1]

4 The appellant has been granted leave to appeal to the Supreme Court.[2] Pursuant to a Minute of Williams J dated 8 November 2022 Te Matakahi was granted leave to intervene in the appeal.

Approved question

5 The approved question is "whether the Court of Appeal correctly interpreted and applied s 66(2) of the Crimes Act 1961."

Summary of Te Matakahi's Submissions

6 The proper interpretation of s 66(2) is that a secondary party must foresee that death is a probable consequence of the prosecution of the common purpose in order to be guilty of manslaughter.

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[1] *Burke v R* [2022] NZCA 279 SC COA 7.
[2] *Burke v R* [2022] NZSC 124 SC COA 5.

7 Although a direction in relation to knowledge of a weapon is not a *legal* requirement there will be, in some cases, an *evidential* requirement for such a direction.

8 In providing guidance on the correct interpretation of s 66(2), it is submitted this Court should also revisit and review the approach to "probable consequence". It is submitted in cases involving s 66(2) the trial Judge should direct the jury:

> Knowing something to be a probable consequence means that the secondary party knew the offence was a likely outcome on the facts known to him or her at the time.

9 In the present case, it is submitted the majority, Brown and Moore JJ, failed to correctly interpret s 66(2). In particular, their Honours erred by determining that liability for manslaughter under s 66(2) requires only that the secondary offender foresees an unlawful act likely to do more than trivial harm as a probable consequence of the prosecution of the common purpose. Given this error, it was inevitable that their Honours would reach an erroneous conclusion.

10 It is submitted Mallon J, in the minority, correctly interpreted s 66(2) but failed to properly apply it.

The Majority Judgment in the Court of Appeal

11 The majority in the Court of Appeal reviewed the authorities and concluded that a secondary party is liable for manslaughter under s 66(2) if:[3]

> (a) an unlawful act likely to do more than trivial harm to the deceased was known by that secondary party to be a probable consequence of the prosecution of the common purpose; and
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> (b) that unlawful act was a substantial and operative cause of death.

12 The majority gave five reasons for preferring this approach.

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[3] *Burke v R*, above n 1, SC COA 25 at [66].

The statutory language

13 The majority decided that their approach was consistent with the statutory language because where the offence is manslaughter, there is no requirement that the principal offender foresees the risk of death. Moore and Brown JJ held:[4]

> The secondary party can thus foresee the actus reus and non-specific mens rea elements of manslaughter being a probable consequence of the common purpose without appreciating the risk of death. The secondary party need only foresee the risk of an unlawful act that is likely to do more than trivial harm.

14 This approach is not consistent with the statutory language. It imports into the offence of manslaughter a requirement that the unlawful act is likely to do more than trivial harm. Although this approach has some support in the authorities, it is a gloss that is not provided for in the wording of the statute. Nor is it part of the actus reus of the offence of manslaughter. Moreover, it does exactly what the majority suggest cannot be done by requiring the secondary party foresees the risk of death: introducing an element that is not part of the actus reus of the offence – "harm that is more than trivial".

15 In a similar vein, the Court of Appeal recognised in *R v Lee*:[5]

> The requirement of objective dangerousness, as pointed out by the Crown, is not part of the statutory definition of manslaughter. It is a common law gloss on that definition. We accept the Crown submission that whether a Judge should direct the jury on objective dangerousness will depend on the nature of the act alleged.

16 It is submitted the proper approach to common purpose liability for manslaughter is to limit liability by the requirement to foresee "an unlawful act causing death".

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[4] *Burke v R* above n 1 SC COA 23 at [59].
[5] *R v Lee* [2006] 3 NZLR 42 (CA) at [139]: App Auth Tab 5 .

17 The actus reus of manslaughter is the killing of any person by an unlawful act. In this particular case the actus reus is an assault causing death. Both the assault and its consequences must be foreseen. It is an essential ingredient of the offence that there is the killing of one person by another.

18 In deciding that the majority's approach effectively conflated the mens rea element for a manslaughter verdict for a principal with the mens rea component of s 66(2), Mallon J in the minority observed:[6]

> [155]...for a party to a common purpose to be liable under s 66(2) for murder or manslaughter for a killing carried out by the principal, the offence that must be foreseen as a real risk by that party is a culpable homicide. That is, as relevant here, the real risk that the victim will be killed by the principal's unlawful act. If that is foreseen, whether the party is guilty of murder or manslaughter will depend only on whether the party also foresees the risk that the principal will kill the victim with murderous intent. If the party does, they have foreseen all the actus reus and mens rea components that make up the offence of murder. If the party does not, they have foreseen all the actus reus and mens rea components of manslaughter. If the party does not foresee the risk of a killing, they are entitled to an acquittal on the charge.
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> [156] On my view, the majority's analysis at [59] omits a central requirement from the actus reus component of the offence of manslaughter that must be foreseen by the party: that the act carried out by the principal is one that causes a person to be killed. The actus reus in my view is not simply the assault. Rather, it is an assault causing a death. Both the assault and its consequences must be proven.

19 It is submitted Mallon J is correct, it is not sufficient, for liability as a party to manslaughter, for the secondary party to foresee that in doing the unlawful act the principal will assault the victim in a manner that is likely to do more than trivial harm. The party must foresee the risk of death.

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[6] *Burke v R* above n 1 SC COA 47 at [155].

Interpretation consistent with logic

20 The majority considered their interpretation to be consistent with "logic", because if secondary party liability for manslaughter required a party to foresee the risk of death, the distinction between reckless murder and manslaughter would be rendered illusory.[7]

21 This ignores the mens rea element required for "reckless murder". To commit "reckless murder", the offender must know that their actions are likely to cause death and still *take the conscious decision to proceed*.[8] To be a party to "reckless murder" under s 66(2), the secondary party needs to know this was the mens rea of the principal.

22 By contrast, the secondary party does not need to know anything about the principal's thinking or intention to be guilty of manslaughter. The secondary party must simply know death may ensue if he or she participates in the unlawful purpose. Evidentially, a meaningful distinction remains.

Congruence with s 66(1)

23 The majority held that their interpretation is congruent with the orthodox approach to a secondary party charged with aiding and abetting manslaughter under s 66(1)(b),(c) or (d).[9] It is submitted this is misguided as s 66 creates two separate foundations upon which party liability can be established.

24 Sections 66(1) and (2) are intended to address quite distinct situations. In order to be a party under section 66(1), the secondary party must intend to aid, abet, or incite the actual offence the principal commits. Under s 66(2), secondary party liability arises even if the secondary party did not intend that the principal would commit the actual offence for which the secondary party is being

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[7] *Burke v R* SC COA 23 at [60].
[8] Crimes Act 1961, s 167(b).
[9] *Burke v R* above n 1 SC COA 24 at [61].

held liable and does nothing to advance the commission of the offence.

25 Professor Julia Tolmie (at the time an Associate Professor) has recognised this, commenting:[10]

> It can be immediately noted that the actus reus and mens rea requirements for these two forms of liability are different, with stricter requirements for liability set out under s 66(1). As the New Zealand Court of Appeal observed in *Bouavong v R*, under s 66(1) the accused must actually assist or encourage the offence for which they are held liable, whereas under s 66(2) they may not provide any assistance or encouragement (and may even conceivably provide active discouragement) in respect of the incidental offending. Furthermore, whilst liability based on aiding and abetting requires the most culpable forms of mens rea – knowledge and intention – the mens rea requirements for the common purpose doctrine are built on recklessness – subjective foresight of the probable risk of the incidental crime occurring.

26 Section 66(1) establishes liability on the basis the secondary offender assists in some way with the act that causes the death of the person.

27 Section 66(2) doesn't require the secondary offender to take any part in causing the victim's death other than foreseeing it. As Professor Tolmie points out, the secondary party's role is not only likely to be more remote causally, but also morally less culpable.[11]

> ... the liability of the party is both more remote causally and may be considerably less in terms of mental culpability than the principal. Requiring foresight of death by the party limits liability for homicide (including felony murder and manslaughter) under s 66(2) to those cases where they committed to a course of offending in spite of knowing that they were risking, at least, the accidental death of another human being. As it has been said, "an actus reus deficit is usually counterbalanced by a mens rea surplus".

28 The secondary party must foresee every element necessary to establish the offence, not just those for which the principal must

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[10] Julia Tolmie, "Uncertainty and Potential Overreach in the New Zealand Common Purpose Doctrine" (2014) 26 NZULR 441 at 442: DLANZ Auth Tab 1.
[11] Tolmie above n 10 at 466.

have mens rea. If the secondary party does not know death is probable, he or she has not foreseen the offence.

29 Thus, the differing requirements as to the foreseeability of death by parties under s 66(1) and (2) can be reconciled. If a party does not intentionally assist with the act causing death, they will not be liable for manslaughter under s 66(1), and if they do not foresee an act causing death, they will not be liable under s 66(2).

30 Professor Gerald Orchard also supports this interpretation:[12]

> Section 66(2) codifies a "wider principle" governing secondary liability ... and it would not be anomalous if it were held that its seemingly clear terms demand more knowledge of likely consequences than is required of a principal, or an aider, abettor, counsellor or procurer.

Consistency with the authors of Adams on Criminal Law

31 The majority noted that their approach was consistent with the view of the learned authors of *Adams on Criminal Law* who observe that because there is no requirement that principals and secondary parties to manslaughter under s 66(1) must foresee a risk of death as a consequence of an unlawful act, the same principle must apply to secondary parties to manslaughter under s 66(2).[13] The authors of *Adams* also observed knowledge that death is a probable consequence is not an element of the offence of manslaughter by unlawful act, and is not required of the principal nor of secondary parties under s 66(1)(b)-(d).

32 For the reasons addressed above in relation to the congruence argument, the contention in *Adams* is demonstrably wrong. The requirement that the secondary party under s 66(2) should have a greater appreciation of the risk of the principal's actions causing death, is consistent with the fact that the secondary party is not the person who is causing the death. The key to party liability

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[12] Gerald Orchard "Strict Liability and Parties to Murder and Manslaughter" [1997] NZLJ 93 at 94: App Auth Tab 41.
[13] *Burke v R* above n 1 SC COA at 24 at [63].

under s 66(2) is that the secondary party must know *that offence*, in this case manslaughter, is a probable consequence of the common purpose.

Consistency with section 168

33 Finally, the majority decided that although *R v Rapira*[14] concerned s 168, it is a useful statement of general principle that secondary party liability under s 66(2) should not require an elevated mens rea compared to the principal. Their Honours observed that it is "inherent in the offence of manslaughter that the offender has a state of mind falling short of an appreciation that death might result from their actions".[15]

34 Section 168 is unique in relation to the definition of murder because foresight of killing is not required. In contrast s 167 provides, in each instance, for a mens rea element in the commission of the offence of murder.

35 Professor Orchard has argued that an appreciation of the risk of death is also inherent in the offence of manslaughter under s 168 as manslaughter is culpable homicide which in itself consists in the killing of any person.[16] This is arguably correct. Section 168 excludes the mens rea that the principal or a party under s 66(1) means or knows death will ensue but still refers to culpable homicide as part of the actus reus. Therefore, for a party to foresee the offence as a probable consequence, he or she must foresee the actus reus of a killing.

36 The majority in the Court of Appeal also addressed a submission from the appellant's counsel that not requiring foreseeability of death would result in a much lower level of criminality being

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[14] *R v Rapira* [2003] 3 NZLR 794 (CA): App Auth Tab 20.
[15] *Burke v R* above n 1 SC COA at 25 at [64].
[16] Orchard, above n 12 at 94: App Auth Tab 41.

required to support a conviction for manslaughter. The majority observed:[17]

> ...it must not be overlooked that a secondary party is only liable where they participate with another or others in prosecuting an unlawful common purpose and death is caused as a probable consequence of prosecuting that purpose. Criminalisation of the secondary party's conduct is not unjustified where there is an agreement to do an unlawful act, the pursuit of which causes another's death.

37 This approach entirely dispenses with the need to prove any form of knowledge on the part of the secondary party – liability for manslaughter would arise simply through participation in the common purpose. This cannot be correct.

The correct approach to party to manslaughter under s 66(2)

38 The approach to common purpose liability must be firmly grounded in the wording of s 66(2).[18] Under s 66(2), a secondary party is guilty of any offence committed by the principal in the prosecution of a common purpose, provided the commission of *that offence* was a probable consequence of the prosecution of the common purpose.

39 The essential legal ingredients of *that offence* are determined by its statutory definition. In this case, the relevant offence is manslaughter, defined as "culpable homicide not amounting to murder."[19]

40 In the present context the essential legal ingredients of culpable homicide are: (a) the killing of any person, and (b) by an unlawful act. If a culpable homicide is committed with murderous intent, it will be murder. If not, it will be manslaughter.

41 It follows that, for a party to be liable for manslaughter under s 66(2), that party must have foreseen the killing of a person as a probable consequence of the execution of the common purpose.

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[17] *Burke v R*, above n 1 SC COA 25 at [65].
[18] *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 at [45]: App Auth Tab 1.
[19] Crimes Act 1961, s 171.

42 There is no basis, when considering whether a party is guilty of manslaughter under s 66(2), for importing a requirement that the secondary offender foresees an unlawful act that "is likely to do more than trivial harm".[20]

Case law supports this interpretation

43 In *R v Tomkins*, the Court of Appeal commented that the "offence" under s 66 "is rightly to be seen, simply and broadly, as culpable homicide".[21] Providing guidance for directions for juries on party liability for murder or manslaughter in common enterprise cases, the Court observed:[22]

> He will be guilty of murder if he intentionally helped or encouraged it. He will also be guilty of it if he foresaw murder by a confederate, and in the kind of situation which arose, as a real risk. *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.* So too if he foresaw a real risk of murder but it was committed at a time or in circumstances very different from anything he ever contemplated: so different that the jury are not satisfied that the murder should fairly be regarded as occurring in the carrying out of the plan. In the latter case they can still convict of manslaughter if satisfied that he must have known that, with lethal weapons being carried, there was an ever-present real risk of a killing in some way.

44 Similarly, in *R v Te Moni*, the Court referenced *Tomkins* and, summarising that case, noted:[23]

> If the accused knew there was a real risk of a killing, but did not contemplate any substantial risk that the killing would occur in circumstances amounting to murder, he will be guilty of manslaughter only.

Policy and principle support this interpretation

45 As a matter of policy and principle, there should be a close correlation between moral culpability and legal responsibility.[24]

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[20] *Burke v R*, above n 1, SC COA 25 at [66].
[21] *R v Tomkins* [1985] 2 NZLR 253 (CA) at 256: App Auth Tab 26.
[22] At 256 (emphasis added).
[23] *R v Te Moni* [1998] 1 NZLR 641 (CA) at 649: App Auth Tab 34.
[24] *Wilson v R* [1992] HCA 31 at [50]; (1992) 174 CLR 313 at 327: DLANZ Auth Tab 2.

Liability for a culpable homicide merely on the basis of foreseeing a risk of something tantamount to modest harm, is a graphic example of serious over criminalisation. It casts the net too wide. The constraint recently exercised in similar circumstances by the Supreme Court in the United Kingdom is instructive.[25] There must be correlation between intention or knowledge and liability. Not aligning intention or knowledge with liability, especially in such serious cases, undermines public notions of fair justice.

A further issue – Knowledge of carriage of a weapon

46 The majority in the Court of Appeal also considered whether the trial Judge misdirected the jury by failing to give a direction to the effect the jury would have to be satisfied the appellant knew the principal offender had a knife in order to find the appellant guilty of manslaughter. Their Honours held that there was no misdirection, as knowledge to that level would be more consistent with elevating the level of criminality from manslaughter to murder.[26]

47 It is submitted the majority erred on this point. Although a direction in relation to knowledge of a weapon is not a *legal* requirement there will be, in some cases, an *evidential* requirement for such a direction.[27] Such a direction may, for example, be necessary in order to establish the outcome foreseen by the secondary party.

48 In *Edmonds*, the Court held s 66(2) creates one level of risk, probability of the offence in issue being committed.[28] There can be no stand-alone legal requirement that common purpose liability depends on the party's knowledge that one or more members of his or her group were armed or, if so, with what weapons.[29] All that is

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[25] *R v Jogee* [2016] UKSC 8: App Auth Tab 3.
[26] *Burke v R* above n 1 SC COA 26 at [69].
[27] Amy Hill "Knowledge of the Weapon in Party Liability Cases: An Analysis of *Edmonds v R*" (2013) 44 VUWLR 167 at 185: DLANZ Auth Tab 3.
[28] *Edmonds v R* above n 18 at [47].
[29] At [47].

necessary is that the level of appreciated risk meets the s 66(2) standard. The Court went on to say:[30]

> We accept, however, that there are circumstances in which a knowledge-of-the-weapon direction may be required as part of the judge's discussion of the evidence, in particular in relation to:
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> (a) establishing the extent of the common purpose;
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> (b) deciding whether the party recognised that the commission of the offence was a probable consequence of commission of the common purpose; and
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> (c) determining whether the offence committed by the principal was in the course of the implementing of the common purpose.

49 The Court said what was material for the purposes of s 66(2) was that the accused knew the ultimate result (meaning the generic crime in issue) was a probable consequence of the common unlawful purpose rather than that they foresaw the "exact concatenation of events which, in the end, brought that result about."[31]

50 In *Rameka v R* the Court of Appeal held:[32]

> We think common assault can be distinguished from murder, given the specific intent required. Knowledge of a weapon will usually be needed before the jury can infer that the parties had knowledge that death was a probable consequence of the assault.

51 Thus, although knowledge of a weapon is a question of fact, it may impact upon the foreseeability of "the offence", or the nature of the common purpose and whether the commission of the offence was a probable consequence of the carrying out of the common purpose. It should be included in the summing up and the question trail in appropriate cases.

52 As Amy Hill comments:[33]

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[30] At [48].
[31] At [54].
[32] *Rameka & Ors v R* [2011] NZCA 75, (2011) 26 CRNZ 1 at [144]: DLANZ Auth Tab 4.
[33] Amy Hill, above n 27 at 179.

> ... avoiding over-criminalisation is very important. It is absolutely a relevant consideration for the application of s 66(2) in New Zealand. It could also be argued that it is better to take an overly cautious approach and provide directions that are appropriately friendly to the defendant at trial. Imposing liability for someone else's actions onto another person should not be taken lightly and secondary liability for homicide or other serious criminal activities carries equally harsh penalties.

A final issue – the Meaning of "probable consequence"

53 Finally, it is submitted this Court should take this opportunity to revisit and review the proper approach to "probable consequence". Over time, the courts have read-down "probable consequence" to mean less than it should. Now, so far as juries are instructed, all that is required is foresight of a possibility. If this Court considers it appropriate to correlate intention or knowledge and liability, then it is submitted the reading down of the statutory language at this juncture of the provision should not be ignored.

54 "Probable" is defined in the online Oxford Dictionary to mean "likely to happen or be the case". This definition requires a higher degree of expectation that an event will occur than is captured by the phrase "could well happen".[34] It is submitted, "could well happen" is an imprecise and lesser test than the words "probable consequence" require. To the layperson – including jurors – it will be equated with possibilities as opposed to probabilities.

55 As Professor Tolmie observes:[35]

> It is important that the standard – probable consequence – is not diluted in the case law in either its definition or its application, so as to require foresight of a lower risk than the phrase might otherwise suggest.

56 In *Reddy v R* the Court of Appeal held that "could well happen" is a well settled way to explain the term probable to the jury. It concluded that "could well happen" does not mean more probable

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[34] Tolmie, above n 10 at 463.
[35] Tolmie above n 10 at 464.

than not and that any challenge would need to be directed to the Supreme Court.[36]

57 In *Ahsin v R* the question trail referred to "could well happen" but the Judge gave oral directions that this was a real or substantial risk.[37] The defence argued the Judge should have stuck to the words of the statute as the words in the alternative test could operate unfairly in the context of gang associations.

58 On appeal, this Court held: [38]

> [100] Counsel's criticism is directed at established law on the requirements of s 66(2). In *R v Gush*, the Court of Appeal, construing the words "probable consequence" in the provision purposively and in their context, held that they meant an event that could well happen rather than one which is more probable than not. In *R v Piri*, Cooke P reiterated that "the words do not require proof that the accused thought that the result which in fact eventuated was more likely than not". He added that while no single formula is "preferable or adequate", the degree of foresight required to be proved may be referred to as "a real risk, a substantial risk, something that might well happen".
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> [101] These decisions have been consistently followed since in New Zealand. The Judge's direction in this case is entirely in accordance with them and the present case does not require reconsideration of this aspect of the law.

59 In *Uhrle v R* this Court held there was no justification for a reconsideration of the analysis in *Ahsin*.[39]

60 The point was raised again in *Stretch v R*, where counsel argued the jury should have been directed that probable consequence means a real or substantial risk and it is not enough that the offence is a possible consequence, it must be a likely outcome.[40] Counsel argued there was greater reason to challenge the test than in *Ahsin* as the Judge had undermined the statutory test by referring to it as unintelligible.[41]

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[36] *Reddy v R* [2011] NZCA 184, [2011] 3 NZLR 22 at [49]: DLANZ Auth Tab 5.
[37] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [98]: App Auth Tab 16.
[38] At [100].
[39] *Uhrle v R* [2016] NZSC 64, (2016) CRNZ 270 at [5]: DLANZ Auth Tab 6.
[40] *Stretch v R* [2020] NZSC 128 at [6]: DLANZ Auth Tab 7.
[41] At [8].

61 The Court rejected this argument finding that the applicant was making the same argument that the Court rejected in *Ahsin*, to the effect that "the formulation that is used in the jury direction fails to distinguish between "possibility" and "likelihood". The Court in *Stretch* went on to say:[42]

> [9] In effect, the applicant is making the same argument that this Court rejected in *Ahsin*, to the effect that the formulation that is used in the jury direction fails to distinguish between "possibility" and "likelihood". We do not consider there is a proper basis for distinguishing *Ahsin* from the present case. Nor are we persuaded that an argument that *Ahsin* should be overruled on this point has sufficient prospects of success to justify the grant of leave. The Court would not normally overrule a previous decision, especially one that reflects a longstanding test (as is the case here), unless there was evidence that the current law is causing difficulty in its administration or injustice in its outcome. Neither appears to be demonstrated in this case.

62 However, both *Uhrle* and *Stretch* were judgments directed to the question of leave. In neither case did this Court have the benefit of hearing full argument on the issue of the correct approach to "probable consequence".

63 Professor Tolmie argues by re-interpreting the statutory reference the Courts have generated undesirable incoherence in the criminal law.[43] For example, in *R v Waho,* the Court of Appeal held that while "could well happen" was the standard direction in cases, the test was whether the accused knew the infliction of harm was "a probable consequence, not a possible consequence". [44]

64 The standard question trail for s 66(2) refers to "a real or substantial risk".[45] This is closer to the notion that this is seen as a likelihood or expected to occur by the alleged secondary party but still short of it.[46] Given the above, there is a risk of injustice arising

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[42] At [9].
[43] Tolmie, above n 10 at 463.
[44] *R v Waho* CA319/04, 27 April 2005 at [30] – [31]: DLANZ Auth Tab 8.
[45] Courts of New Zealand question trails under parties, conspiracies and attempts published on courtsofnz.govt.nz.
[46] Tolmie, above n 10 at 463.

from juries assessing the degree of foreseeability as closer to possibility than probability.

65 Te Matakahi respectfully submits that a trial Judge should direct the jury:

> Knowing something to be a probable consequence means that the secondary party knew the offence was a likely outcome on the facts known to him or her at the time.

Application of s 66(2) in this case

66 Given their erroneous interpretation of s 66(2), it was inevitable the majority in the Court of Appeal would dismiss the appeal. And although Mallon J correctly interpreted s 66(2), she ultimately misapplied it, stating:[47]

> [185] ... a manslaughter verdict was inevitable on these facts if the jury had been directed that they needed to be sure that Mr Burke knew it could well happen that Mr Heappey would die. Mr Burke was prepared to join the common plan and help with it, knowing the risk that Mr Webber, a gang enforcer operating in a meth-fuelled environment, would take a knife to the hiding Mr Heappey was to be given for disrespecting the gang president. In those circumstances, he must have known of the risk that Mr Webber would kill the victim. I agree with the Crown's submission that there was no injustice in a conviction of manslaughter on these facts.

67 Mallon J erred in coming to this conclusion. A proper application of the correct interpretation of s 66(2) should have resulted in the appeal being granted.

68 During sentencing the Judge found the Crown had not proved the appellant knew Mr Webber had a knife.[48]

69 In the United Kingdom the Committee on the Reform of Joint Enterprise expressed concern that the courts are too ready to infer an awareness of the risk of incidental offending by the party, from what the party knew at the time.[49]

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[47] *Burke v R*, above n 1 SC COA 57 at [185].
[48] *R v Burke* [2021] NZHC 136 CA COA 420 at [14] .
[49] House of Commons Justice Committee Joint Enterprise: Eleventh Report of Session 2010-12 (HC 1597 17 January 2012) vol 1 at [27]: DLANZ Auth Tab 9.

70 Professor Tolmie suggests similar concerns are raised by judicial comments implying an inference of subjective foresight is readily drawn from the fact the alleged party is part of the joint enterprise and what it considers to be logically foreseeable from the pursuit of that.[50] This is further exacerbated in gang violence cases by the prosecutor expressing the common purpose in broad, generic terms, so that any type or level of violence is deemed foreseeable.[51]

71 There is a tendency through "hindsight bias", to view events to be more predictable than they actually are, with such bias resulting in courts determining that because harmful outcomes were predictable to the court, they must have been personally predicted by the accused.[52]

72 In *Ahsin v R*, Elias CJ noted the particular risk in a case where parties are members of a gang of guilt by association[53] and held:[54]

> The question of probable consequence is not one for objective assessment after the event but depends on the actual knowledge of each accused when prosecuting the common intention.

73 Section 66(2) requires a subjective assessment – each party to the enterprise must personally recognise the risks involved in the common plan.

74 In reaching the decision that her Honour did with respect to the inevitability of a manslaughter verdict, Mallon J inferred that the appellant *must have known* Mr Webber would kill the victim,

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[50] Tolmie, above n 10 at 462 citing the comments in *R v Ma'u* [2008] NZCA 117 at [69] "An inference of foresight will quite readily be drawn; voluntary participation in a criminal enterprise ordinarily permits just such an inference.": DLANZ Auth Tab 10.

[51] In *Edmonds v R* above n 18 at [49], this Court held the common purpose that is left to the jury is largely for the prosecutor to define but the higher the level of violence of the alleged common purpose (and thus the closer it is to the offence eventually committed), the more difficult it may be to establish that particular defendants formed the intention to prosecute that common purpose, but the easier it will be to infer that such defendants (that is, those who did form that intention) knew that the ultimate offence was a probable consequence of its implementation.

[52] Tolmie, above 10 at 462.

[53] *Ahsin v R*, above n 37 at [33].

[54] At [22]

without any real evidence that he actually possessed this knowledge.

Conclusion

75 A secondary party must foresee that death, nothing less, is a probable consequence of the prosecution of the common purpose in order to be guilty of manslaughter under s 66(2) of the Crimes Act 1961.

76 Additionally, in cases involving s 66(2) the trial Judge should direct the jury:

> Knowing something to be a probable consequence means that the secondary party knew the offence was a likely outcome on the facts known to him or her at the time.

77 The majority in *Burke* did not correctly interpret and apply s 66(2), nor did Mallon J correctly apply the section.

23 February 2023

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