IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC75/2022**

BETWEEN	**JUSTIN RICHARD BURKE**
	Appellant
AND	**THE KING**
	Respondent

RESPONDENT'S SUBMISSIONS

10 March 2023

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Issue

1. Mr Shane Heappey was stabbed 14 times during a prearranged "punishment" exercise, orchestrated by members of the Nomads gang. The principal offender, the gang's "enforcer" Mr Webber, pleaded guilty to murder.[1] Mr Burke was tried for murder but convicted of manslaughter. Although he expected Mr Heappey would receive a "mean hiding",[2] his defence was that he did not know Mr Webber would use a knife.

2. Mr Burke appealed unsuccessfully to the Court of Appeal and, on 21 October 2022, this Court granted leave to appeal and approved this question:

> The approved question is whether the Court of Appeal correctly interpreted and applied s 66(2) of the Crimes Act 1961.[3]

Summary of Argument

3. This appeal raises an issue left open in *Edmonds* – i.e. whether manslaughter liability under s 66(2) requires the party to foresee death as the probable consequence of the prosecution of an unlawful purpose. This is not easily dissociated from the position under s 66(1), where it is established by *Renata* that a party who aids and abets an unlawful and dangerous act does not need to foresee death as the consequence of their assistance.[4]

4. The Court of Appeal in this case correctly held that s 66(2) manslaughter requires the same mens rea as the offence of manslaughter itself, and the mens rea required of a s 66(1) party. This preserves the framework of manslaughter principles, and it accords with the purpose of s 66(2), which is to broaden the scope of liability from s 66(1) – not impose a higher standard of foresight than the definition of the crime stipulates. It avoids reconstructing manslaughter by making the mens rea requirement approximate that of murder.

5. *Rapira* is to the same effect. This decision cannot rationally be confined to cases where s 66(2) manslaughter is combined with s 168 murder. Moreover, *Renata* (s 66(1)) and *Rapira* (s 66(2)) coincide with the *Jackson* interpretation of a

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1 Three other offenders, Mr Waho, Mr Sim and Ms Cook, pleaded guilty to causing grievous bodily harm with intent to injure.
2 Court of Appeal Case on Appeal [**CA COA**] 72.
3 *Burke v R* [2022] NZSC 124 ["Leave Decision"]: Supreme Court Case on Appeal [**SC COA**] 5.
4 *R v Renata* [1992] 2 NZLR 346: Respondent's Bundle of Authorities [**BOA**], Tab 1. *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 at footnote 22: **Appellant's Authorities, Tab 1, p 16.** Appellant's submissions at [98]: "… it is settled that liability for manslaughter via s 66(1) does not require *mens rea* as to the victim's death."

materially identical provision in the Canadian Code, and that interpretation has proved satisfactory for some three decades. It enables simple jury directions to be given, uncluttered by fine distinctions between, for example, serious and really serious harm.

6. Concerns about over-criminalising manslaughter cannot be related to penalty. They must arise from perceptions that the "stigma" of the crime is inappropriate for violence at the lower end of the manslaughter spectrum. The concern is hard to understand and should be answered by the proper application of sentencing principles. Reserving manslaughter for cases involving "serious" violence potentially creates a need for low-end violence causing death to be re-labelled and recognised in other ways. It is not satisfactory for group violence causing death to be left to law of assault.[5] The consequence of death is something that must always be marked out.

7. Attempts have been made to rein in the scope of manslaughter by "knowledge of the weapon" or "foresight of the type of violence requirements", or by distinguishing violence that is "fundamentally different" from the scope of the common purpose. These approaches no longer seem valid after *Edmonds* and *Jogee* and were problematic in their application.

8. If a reasonable person could not have contemplated the extent or dangerousness of the violence that caused death, the "supervening act" doctrine will prevent unfair attribution of homicide liability. As currently applied in the UK and Canada, however, it would not absolve someone in Mr Burke's position.

Background

9. Mr Burke came to live in Christchurch at the end of November 2018. He arrived from the North Island, where he was closely associated with the Nomads gang. He aspired to become a patched member in Christchurch and, either shortly before or after Mr Heappey was murdered, he became one.[6] Charmaine

[5] Or the organised criminal group offence, as suggested in *Burke v R* [2022] NZCA 279 ["Court of Appeal Decision"] footnote [68]: **SC COA 47.**

[6] Ms Davidson's evidence was that Mr Burke became involved in the punishment to show Mr Waho that he should be patched: **Court of Appeal Evidence ["NOE"] 171**. Ms Gardner met Mr Burke after the murder and said he told her he was soon going to get his patch: **CA NOE 285**. Mr Burke said he was patched about two days before the murder, but also that

Davidson met Mr Burke before the murder and said he was boasting about becoming a gang member: "boisterous, like he was the man… on a high basically… I'm going to get my patch soon, was his exact words."[7]

10. Mr Burke soon began a relationship with Ms Cook, who was the stepdaughter of Randall Waho, president of the Christchurch chapter of the Nomads.

11. Shayne Heappey was an associate of the gang. He had angered Ms Cook by using a stolen car she thought was hers. He also owed her a drug debt of $300. She asked Mr Waho to intervene. This raised the dispute to a question of respect for the gang and the president's authority.[8]

12. Three meetings were arranged to resolve matters, but Mr Heappey failed to attend. His attitude inflamed other members of the gang. Text exchanges record the rising tension. On the evening of 5 December, Mr Waho warned Mr Heappey: "You said you well be here at 12 Mad [i.e. Nomad]. Make sure you here at seven Mad." And a few hours later: "You best come and seem me or Is [else]".[9] The next day he told Mr Heappey: "Fuck you Mad. You owe 300 to Leonie [Cook] for dat shit. I won't today or or when come around to dat house. You fucked up." Then: "Fuck Mad what you up to my Mad. Are you still with us or not?" [10] That evening, there was a clear indication that Mr Heappey would face punishment at the hands of Mr Webber. He was told to meet "Maddy" [Webber] at 7:30pm as "Maddy wants you". Mr Burke replied "Yeeha I know Mad. Fuck." Ten minutes after the appointed time, he explained: "I can't do it tonight, no excuse mad, I'm not all there tonight Mad, I'll come over tomorrow to see you and Matty [Webber] to collect my punishment."[11] During 7 December, there was more prevarication from Mr Heappey and further inquiries from Mr Waho about when he would present himself.[12]

13. On 8 December, Mr Sim, a patched Nomad, tried numerous times to contact

he did not yet have his patch: **CA COA 38 and 48**. The defence relied on a Facebook post to suggest he was patched before the murder, though Mr Moore's evidence was that he wore Mr Waho's patch in the relevant photograph: **NOE 327-328**. It is clear, however, that Mr Burke was seeking to establish himself within the gang after his arrival in Christchurch.

7 **NOE 285.**

8 Agreed fact 8, **CA COA 127.**

9 **NOE 269.**

10 **NOE 270.**

11 **NOE 171.**

12 **NOE 272-279.**

Mr Heappey. Mr Sim was instructed to collect Mr Heappey and bring him to Mr Sim's house. Ms Cook urged Mr Webber to "COME FUKIN PICK THAT CUNT UP NOW OR I'LL HAVE HIM."[13] Messrs Burke, Webber and Waho met at the house of Mr Sim. Mr Sim gave two or three knives to Messrs Waho and Webber. Mr Burke, in his Police statement, said he saw the knives being distributed and Mr Webber showed him how duct tape was added to the blade so that it did not bend when being used.[14] He described them as knives that flicked open, or "standard pocket knife, fold in half way".[15] The exact timing of this meeting is uncertain: CCTV footage shows Messrs Waho, Burke and Webber at the Bush Inn, between 6:57 p.m. and 7:16 p.m.[16] Mr Sim's house was close by and, on that basis, the Crown contended that Mr Webber received a knife in Mr Burke's presence a matter of hours before the murder.[17]

14. At 8:35pm, Mr Heappey finally responded to Mr Sim and said he had no way to get to Mr Sim's house. At 9:29pm, Mr Sim made arrangements to collect him. By this time, Ms Cook and Mr Burke had taken Mr Webber to Lucan Moore's caravan, and they were now instructed to pick him up again. Mr Moore (who was cross-examined as a hostile witness) said he "clicked on to what they [Messrs Burke and Webber] were up to" and described their mood as "… pretty hypo jumped up, like fuck we're gonna get him, we're gonna get somebody…"[18] He saw Mr Webber holding a knife: he saw this for about "a minute".[19] He said the knife was a little one, a little bit longer than a middle finger.[20] He said that three times that day he had taken weapons away from Mr Webber, but he was afraid to do so now.[21] As Mr Burke and Mr Webber were leaving, Mr Moore said: "Don't fuckin kill him, eh, he's one of our mates".[22] According to Mr Moore, this was said "Loud enough for anyone else to hear that was around

[13] **CA COA 133.**
[14] **CA COA 61-62**.
[15] **CA COA 60-61.**
[16] Agreed fact 53, **CA COA 133**.
[17] The Court of Appeal judgement at [12] indicates that the defence disputed Mr Burke saw Mr Webber receive a knife, but this appears to have been common ground: **SC COA 10-11**. Mr Burke's Police interview was the source of this information and the meeting was acknowledged in the defence closing: **CA COA 289.**
[18] **NOE 305**.
[19] **NOE 310**.
[20] **NOE 309.**
[21] **NOE 307.**
[22] **NOE 311.**

us."[23] Ms Cook, Mr Burke and Mr Webber returned to Mr Sim's house shortly before 11 p.m.

15. On the Crown case, Messrs Burke and Webber escorted the victim outside Mr Sim's house, Mr Webber having closed the curtains.[24] The occupants included Shannon Nicho, who had long-standing connections with the Nomads,[25] and his partner, Tina Murdoch. Both gave evidence that Mr Burke either did not come inside on arrival or went outside with Mr Webber when the victim was removed.[26] A neighbour described hearing two voices: one saying "'Are you freaking out…' or 'You're freaking out', and the other saying "Come here, it's all right, not gonna hurt ya" (the tone was such that the neighbour did not really believe it).[27]

16. Although Mr Burke told Police he did not go outside until later in the assault (he said to check on Mr Heappey), defence counsel in closing realistically accepted he may have been outside from the outset.[28] He suggested it was too dark for Mr Burke to see what was going on (there was somewhat conflicting evidence about outside visibility).

17. In Mr Burke's presence, Mr Webber attacked Mr Heappey with a knife, inflicting 14 stab wounds. These included defensive wounds indicating the victim tried to fend off or grab the knife.[29] It appears Mr Heappey tried to escape back inside. Mr Burke said he was trying to "run away"[30] so Mr Burke grappled with him as he staggered back inside the door.[31] Mr Burke said he "wrestled him to the ground"[32] and acknowledged thinking at that point that he could not look weak "in front of, my own…".[33] He fell on top of the victim and punched and choked him.[34] Mr Heappey was taken to hospital when the occupants

[23] **NOE 313.**
[24] **NOE 90-93.**
[25] **NOE 53.**
[26] **NOE 90, 129-133** (Nicho); **NOE 64** (Murdoch).
[27] **NOE 145-146** (Shannon).
[28] **CA COA 293- 294.**
[29] **NOE 387.**
[30] **CA COA 69.**
[31] **NOE 40** (Murdoch); **NOE 92** (Nicho).
[32] **CA COA 72, line 21.**
[33] **CA COA 76, line 33**.
[34] **NOE 40** (Murdoch); **NOE 92-93** (Nicho); **NOE 237-238** (McCormack); **NOE 319-320** (Moore); **NOE 220** (Jones). **CA COA 77** (elbow blows).

recognised the gravity of his injuries.

18. Mr Heappey was declared dead at about 11:36pm. Three of his wounds were to the chest and one of these, 12cm deep, was the major cause of the blood loss from which he died.[35]

19. Mr Webber acted as the gang's enforcer.[36] Unsurprisingly for such a role, he had a reputation for aggressive and unpredictable behaviour. Mr Burke's defence strategy included reliance on propensity evidence of Mr Webber's violence and volatility, which was said to support the defence case that he acted outside the scope of Mr Heappey's expected punishment.

20. This strategy was potentially double-edged, given Mr Burke's decision to join Mr Webber in a planned violent encounter. Although counsel submitted Mr Burke, as a relative newcomer in Christchurch, did not know Mr Webber or his reputation,[37] Mr Burke's police statement suggested otherwise (and he did not give evidence). Mr Burke was asked whether Mr Webber had been "on the meth that night". He responded: "Course".[38] He was also asked whether it was fair to say that Mr Webber was "mad", and he responded "Yip".[39] Contrasting himself with Mr Webber, he said: "I am not the super violent type of person like this, okay? Not like the other person, okay?"[40] Similarly, Mr Burke said he involved himself in the gang for "the business side of things, not this other bullcrap… that comes with people like, that, like [Mr Webber] and that who just have no control over their life, aye, they didn't care if they go to jail."[41]

21. The Crown case was that it was plain Mr Burke contemplated serious violence (and, as discussed below, this was the unlawful purpose for s 66(2)). At times in his police statement, Mr Burke tried to minimise this, saying Mr Webber was meant to "just, give [Mr Heappey] a bit of a speaking to, maybe a punch or two in the head, just to, you know fall them in line."[42] He said:

35 Court of Appeal decision at [20]: **SC COA 12.**
36 Agreed fact 15, **CA COA 128.**
37 **CA COA 288.**
38 **CA COA 43 line 15.**
39 **CA COA 37, lines 26 - 38 line 1.**
40 **CA COA 72 lines 14-15.**
41 **CA COA 49 lines 1-9.**
42 **CA COA 31, lines 5-7.**

> Basically it was hey, it was just give him a rark up, that's all it was, give him a rark up, just a little, reminder of who he is, and where he is, and what he's a part of, and life goes on, we don't want to hurt him, cos we don't want to lose him, that type of.[43]

22. But he later said that getting a "hiding" was part of being in the gang:[44] "I know how these situations go, normally it's just a mean hiding okay",[45] and that he wanted to "save" Mr Heappey "from getting a mean hiding".[46] Importantly, while he denied knowing Mr Webber would use a knife, he said that "the only reason I stayed around, was because I didn't want [Mr Heappey] to die."[47] By talking to Police he was putting his own life "on the chopping block".[48]

23. On the morning after the murder, Mr Burke visited Mr Moore and showed him the knife he said was used in the attack. Mr Moore described it as a small flick knife.[49] Mr Burke also said he had punched the victim[50] and he displayed his blood-stained boxer shorts.[51] Mr Burke later spoke about the event to Leah Davison, a person he had not met before. Mr Burke told her that he had performed the stabbing[52] and she had the impression he was trying to prove himself to Mr Waho and get patched up.[53]

24. On 13 December, Mr Burke and Ms Cook drove to Dunedin,[54] where Mr Burke remained until his arrest. While in custody, he shared a cell with Andrew McCormack and divulged some details about his role in the attack, including punching and choking the victim.[55] He told Mr McCormack that he had disposed of the knife in the rubbish.[56]

Trial directions and sentencing

25. Mr Burke was charged with murder under sections 167 and 66. To be guilty of

[43] **CA COA 49, lines 14-16.**
[44] **CA COA 64.**
[45] **CA COA 72, lines 6-7.**
[46] **CA COA 72, lines 4-6.**
[47] **CA COA 72, lines 19-20.**
[48] **CA COA 67, lines 14-15.**
[49] **NOE 320.** He apparently said in his earlier statement that it had a thin blade. The pathologist's evidence was that the blade was "a relatively skinny blade with a single back edge". **NOE 384.** His discussion of the possible length of the blade was consistent with Moore's estimate of 20cm. **NOE 385-386.**
[50] **NOE 320.**
[51] **NOE 326-327.**
[52] **NOE 167-168**
[53] **NOE 171.**
[54] Agreed fact 81, **CA COA 136.**
[55] **NOE 236-238.**
[56] **NOE 245.**

reckless murder under s 66(1) and (2) and s 167(b), the Crown accepted it must prove that Mr Burke knew Mr Webber had a knife. For s 66(2), the Crown said the common unlawful purpose was "a plan to punish Mr Heappey being a mean hiding, serious violence for his disrespect for the gang."[57]

Manslaughter – s 66(1) direction

26. The s 66(1) manslaughter direction required the jury to be satisfied that Mr Burke intended to assist or encourage Webber to stab Heappey (implying an expectation that a knife would be available). It apparently reflected the *Hartley* requirement for a s 66(1) party to know they are assisting in the "type" of violence which causes death.

Manslaughter – s 66(2) direction

27. In contrast, for s 66(2) the Court gave the jury two paths to manslaughter including one that *did not* depend on Burke's knowledge of a weapon: "Are you sure that Mr Burke, <u>despite not knowing that Mr Webber possessed a knife</u>, knew that Mr Webber knew that the assault would be dangerous, being likely to cause harm that was more than trivial?"[58]

28. The presence of this pathway has, on the appellant's case, resulted in a miscarriage of justice. In fact, the direction overstated the mens rea needed for Mr Burke's manslaughter liability under s 66(2).[59]

Sentencing

29. The verdict did not reveal which of the question trail pathways had been used to determine guilt. The sentencing Judge proceeded on the basis that Mr Burke was guilty as a party under s 66(2).[60]

30. Mr Burke had been outside with Mr Heappey "and present and involved throughout the murderous attack."[61]

[57] **CA COA 267.**

[58] **CA COA 357** (emphasis added).

[59] It was not necessary for Mr Burke or Mr Webber to know that their attack was dangerous – that is an objective assessment.

[60] *R v Burke* [2021] NZHC 136 ("Sentencing Decision") at [13]: **CA COA 420.**

[61] This implies rejection of Mr Burke's claim that he was inside when the attack started. See para [28] of the Sentencing decision: "You were present and involved throughout the murderous attack. You alone of Mr Webber's co-offenders were present with Mr Webber at the time Mr Heappey was taken outside to be dealt with. You provided the extra presence, which made Mr Heappey's escape and survival less likely. As you explained to the probation officer, the point at which you punched and choked Mr Heappey was when he was trying to 'take off': **CA COA 424.**

31. Mr Burke had not stabbed Mr Heappey but admitted "punching him and putting him in a chokehold in the period he was trying to get into the house."[62] Although not satisfied that Mr Burke "knew for sure" that Mr Webber had a knife when the attack commenced, the Judge said Mr Burke knew Mr Webber's possession of a knife was a "distinct possibility".[63] Mr Burke knew of other circumstances that heightened the danger:

> … you knew Mr Webber to be both the gang's enforcer and a person prone to violence – as you described it to the probation officer he was "often crazy and out of control". You also knew that you were both operating in a meth-fuelled environment.[64]

Court of Appeal

32. Brown and Moore JJ read "that offence" in s 66(2), when applied to manslaughter, as requiring the same mens rea as manslaughter itself. The "secondary party" foresees manslaughter as a probable consequence if he or she foresees the commission of an unlawful act likely to do more than trivial harm.[65] That unlawful act must then be the substantial and operative cause of death. This interpretation: (i) ensured consistency with the legal concept of manslaughter and the liability of a "principal"[66]; (ii) preserved the distinction between manslaughter and reckless murder; (iii) aligned the liability of parties under s 66(1) and (2); (iv) was consistent with the view expressed in *Adams on Criminal Law*; and (v)[67] was consistent with *Rapira* (though the judgment, unlike *Adams on Criminal Law*, treated *Rapira* as having direct application only in a s 168/manslaughter situation).[68] It did not give rise to concerns about

[62] At [11]: **CA COA 419.**

[63] At [14]: **CA COA 420.**

[64] The PAC report records Mr Burke's acknowledgement that he too "was on methamphetamine at the time of the offending": **CA COA at 375**.

[65] Though the formulation at [66](a) extends the defendant's mens rea to the dangerousness of the unlawful act, which ought to be assessed objectively.

[66] Although in common usage, the term "principal" is derived from the common law distinction between principals and secondary parties. The common law theory of "secondary" liability required secondary parties to have the same knowledge of the principal. That rule, narrowly stated in cases such as *R v Uddin* [1999] QB 431, [1998] 2 All ER 744 (referred to in *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299 at [48]: **Appellant's Authorities, Tab 19, p 639**), influenced the strict "knowledge of the weapon" jurisprudence. Section 66 of the Crimes Act made legally irrelevant the distinction between principals and secondary parties and, accordingly, there can be no concept of "secondary" liability in the analysis of s 66(2) liability. *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [177]: **Appellant's Authorities, Tab 16, p 524.**

[67] A purposive approach to criminal statutes is appropriate: *Karpavicius v R* [2002] UKPC 59, [2004] 1 NZLR 156.

[68] Simon France (ed) Adams on Criminal Law (online ed, Thomson Reuters) at [CA 66.28(3)(b)], as at 29 June 2022: To hold that a secondary party under s 66(2) must know that death is a probable consequence would be to require proof of something which is not an element of manslaughter by unlawful act and which is not required of the principal party, who actually causes death, nor of secondary parties under s 66(1)(b)-(d). The correct legal position is stated by the Court of Appeal in *R v Rapira* [2003] 3 NZLR 794 (CA) at [31]-[32]: **Appellant's Authorities: Tab 20, p 657**. See below at [45].

over-criminalising.[69]

33. Mallon J preferred what might be termed the literal interpretation of s 66(2). The killing of a person was an essential ingredient of "that offence" of manslaughter, therefore a s 66(2) party must foresee death as a probable consequence.[70] Mallon J considered the majority had conflated the mens rea for a principal with the mens rea component of s 66(2),[71] a remark which suggests the offence of manslaughter is reconfigured when engaged by s 66(2). *Tomkins,* which implied the need for foresight of death, had been distinguished rather than overruled in *Tuhoro* and *Rapira.*[72]

Manslaughter by unlawful act

34. Manslaughter by unlawful act requires conduct which is:

- An offence (for which the defendant must have mens rea; this will often be a form of assault)
- Objectively dangerous (it must involve harm that is not trivial or transitory – this is considered on the basis of facts known to the accused);[73]
- And which is a substantial and operative cause of death.[74]

35. The crime of manslaughter has never required foresight of the risk of death.[75] It does not involve symmetry between mens rea and the consequences of the offence: the defendant's mens rea is limited to whatever is required to make the unlawful act an offence. [76] Unlawful act manslaughter is a crime of

[69] *R v Rapira*, above, at [65]: **Appellant's Authorities: Tab 20, p 665.**

[70] Court of Appeal Decision at [156]: **SC COA 47.**

[71] At [157]: **SC COA 47-48.**

[72] At [177]: **SC COA 54-55**. Though there was some retreat from the breadth of the language used there. See *R v Renata*, above n 4, at p 349: **BOA, Tab 1**: "… the *Tompkins* judgment was not intended as a complete exposition of the law of manslaughter in New Zealand in cases of joint enterprise. In particular it was not directed at s 66(1)." *R v Hardiman* [1995] 2 NZLR 650 (CA): **BOA, Tab 2**: "… notwithstanding what was said in general terms in *Tomkins*…".

[73] *R v Creighton* [1993] 3 SCR 3 at 44-45: **BOA, Tab 3** . *R v Jogee* [2016] UKSC 8, [2017] 1 AC 387 at [96]: **Appellant's Authorities, Tab 3, p 108**. *R v DeSousa* [1992] 2 SCR 944 at 956-957, 961: **BOA, Tab 4.**

[74] Reflected in the structure of indictments. E.g. *R v Renata*, above n 4, at p 437: **BOA, Tab 1**: "Causing [Nathan's] death by an unlawful act, namely assault, and thereby committing manslaughter."

[75] *R v Edmonds*, above n 4, at footnote 21: "*R v Rapira* [2003] 3 NZLR 794 (CA) at [29] makes it clear that foresight of death is unnecessary and incompatible with the scheme of the Crimes Act. In the case of manslaughter by an unlawful assault, it is sufficient that the assault is intended to cause some, even though minor, physical harm or hurt to the victim: *R v Renata* [1992] 2 NZLR 346 (CA) at 349.": **Appellant's Authorities, Tab 1, p 15-16.** *R v Creamer*: "A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence such as assault…". *R v Creamer* [1966] 1 QB 72 at 82: **BOA, Tab 5.**

[76] *R v Creighton* above n 3, at 44-45: **BOA, Tab 3**. *R v Jogee*, above n 73, at [96] **Appellant's Authorities, Tab 3, p 108**. *R v DeSousa* above n 4, at 956-7, 961: **BOA, Tab 4.**

consequences.[77] It "elevates the crime by reason of its serious consequences while leaving the mental element the same."[78]

The purpose of 66(2)

36. Section 66 of the Crimes Act is derived from Stephen's draft Code. There are similar but not identical parties provisions in several other jurisdictions.[79] It provides:

> s 66 Parties to offences:
>
> (1) Every one is a party to and guilty of an offence who –
>
> a. actually commits the offence; or
>
> b. does or omits an act for the purpose of aiding any person to commit the offence; or
>
> c. abets any person in the commission of the offence; or
>
> d. incites, counsels, or procures any person to commit the offence.
>
> (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 purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

37. Section 66(2) is aimed at the evil of criminal combinations. Its purpose is to deter those who would join a criminal venture, knowing that a crime or other crimes could well happen.[80] Group offending aggravates criminality. Numerous decisions of the Court of Appeal have remarked on the increased risks of criminal joint ventures,[81] whereby – often inflamed by drugs or alcohol – members of the group are affected by "pack hysteria"[82] and events are characteristically unpredictable and uncontrolled. Frequently there will be difficulties proving precisely "who did what" and, in relation to organised gangs, these difficulties are compounded by witness reluctance and hostility. It is also a feature of gangs that the more senior organisers tend to keep themselves

77 *R v Miazga* 2014 BCCA 312, 315 CCC (3d) 182 at [15]: **BOA, Tab 6.**

78 *R v Creighton,* above n 3, at 54: **BOA, Tab 3.**

79 *Edmonds v R*, above n 4, at [22] and [43]: **Appellant's Authorities, Tab 1, p 14 and 21**. The Canadian provision is "expressed in terms that are closely similar to s 66": *Ahsin,* above n 66, at [177]: **Appellant's Authorities, tab 16, p 524.** In Australia see the Criminal Codes: Criminal Code Act 1983 (NT), s 8; Criminal Code Act 1899 (QLD), s 8; Criminal Code Act 1924 (Tas), s 4; and Criminal Code Act Compilation Act 1913 (WA), s 8.

80 *Ahsin v R*, above n 66, at [222]: **Appellant's Authorities, Tab 16, p 534-535**.

81 For example *R v Vercoe* (1996) CRNZ 383: **BOA, Tab 7**; *R v Misitea* [1987] 2 NZLR 257: **BOA, Tab 8**.

82 *R v Vercoe*, above: **BOA, Tab 7.**

remote from the fray. As the Court of Appeal said in *Tuhoro*, where people are prepared to combine for major criminal activity, it is consonant with the intention of the legislature that parties should be held to account on the same basis as the actual perpetrator.[83]

38. Section 66(2) expands the reach of party liability under s 66(1).[84] The starting point is that each is guilty of the crimes that were a known probable consequence of the intended criminal conduct. Section 66(2) may apply where a party does not *do* anything at all except agree to prosecute an unlawful purpose and to assist the other person (with the required foresight of what could well happen). This aspect is "inchoate" and akin to conspiracy. The party does not need to have taken any active steps to advance the unlawful purpose and, in theory, could be remote from the scene. The common purpose need not be a violent one. The section operates as a deeming provision: the party is guilty of the other's offence by operation of law. Section 66(2) assists in cases of group violence where there may be scope for uncertainty about the party's intent, but the evidence establishes they knew the plan involved certain clear risks.[85]

s 66(2) and manslaughter: a purposive interpretation (addressing the second ground of appeal)

39. There is a simple logic to the view that "that offence" must mean actus reus and mens rea, and because there cannot be a murder or manslaughter without a killing, a killing must therefore be foreseen under s 66(2).

40. This, however, distorts the essence of manslaughter which comprises only an intentional unlawful act causing death. In contrast, a purposive interpretation, preserves the integrity of manslaughter principles. On a purposive reading, "that offence" is, of course, manslaughter, but that does not mean a s 66(2) party must know death could well happen through pursuit of the common purpose.

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83 *R v Tuhoro* [1998] 3 NZLR 568 (CA) at 573: **BOA, Tab 9**. Although the Court was discussing the liability of parties for "felony murder" under s 168, the principle is of wider application.

84 *Ahsin v R,* above n 66, at [221]: **Appellant's Authorities, Tab 16, p 534.**

85 At [243]: **Appellant's Authorities, Tab 16, p 540**; *Edmonds v R,* above n 4, at [25]: **Appellant's Authorities, Tab 1, p 15.**

41. The actus reus of manslaughter involves the killing of a person, but that is the required *consequence* of the unlawful act. The mens rea of any party does not need to extend further than the mens rea for the unlawful act. The causation of death need not be foreseen. Thus, the very concept of manslaughter involves some asymmetry between actus reus and mens rea, because death is purely a matter of causation. As the Supreme Court of Canada held in *Creighton* (discussed below) that asymmetry does not conflict with the Charter right to fundamental justice. It is offset by the absence of any minimum penalty for manslaughter; a defendant's culpability for bringing about the consequence of death is reflected in the judicial determination of penalty.[86] In this case, Mr Burke was liable for manslaughter under both aiding and abetting (s 66(1)) and common purpose principles. That offence comprised (i) the planned violent assault and (ii) the resulting death of the victim. For Messrs Burke and Webber, foresight of the second step was unnecessary. The first step was the very thing they intended, and Mr Burke admitted that and participated in it. The infliction of more than trivial or transitory harm was exactly what he foresaw.[87] Indeed, on Mr Burke's own statement, he foresaw a "mean hiding" administered by the gang's enforcer, which involved much greater violence than the minimum required for manslaughter.

42. The literal interpretation of s 66(2) is advanced as the second ground of appeal, and it found favour in some earlier cases.[88] But *Morrison,*[89] *Hardiman,*[90] *Tuhoro,*[91] and *Rapira* explicitly took a purposive approach, construing "that offence" to ensure consistency between parties. *Rapira* took stock of the authorities, which showed: "[j]ust as intention to kill or knowledge that death is likely to ensue is not necessary for the liability of the principal under s 168, it is not necessary for a secondary party."[92] In other words, although s 168 defines

[86] Geoff Hall *Hall's Sentencing* (looseleaf ed, LexisNexis) at [I.5.9(a)]

[87] In this case, the unlawful act aided and abetted was "the very object of the common purpose" – there was no foreseen but unintended offence in addition. *Ahsin v R* permits this use of s 66(2) at [94]: **Appellant's Authorities, Tab 16, p 506.** The position is different in Canada: *Simpson v R* [1988] 1 R.C.S. 3.

[88] Julie Tolmie, "Uncertainty and Potential Overreach in the New Zealand Common Purpose Doctrine" (2014) 26 NZULR 441 at footnote 122: **Te Matakahi's Authorities, Tab 1, p 6**. There is also some academic support for this view – for instance, Professor Orchard argued that s 168 only deals with mens rea, and does not define "the offence" for the purposes of s 66(2). But this was rejected in *Tuhoro*, above n 83, at 572-573: **BOA, Tab 9.**

[89] *The Queen v Morrison* [1968] NZLR 156 (CA): **NZCBA's Authorities, Tab 22.**

[90] *R v Hardiman*, n 72, at 635: **BOA, Tab 2**.

[91] *R v Tuhoro*, n 83, at 573: **BOA, Tab 9.**

[92] *R v Rapira*, above n 68, at [22]: **Appellant's Authorities: Tab 20, p 657**.

an offence resulting in homicide, it is not necessary for a s 66(2) party to foresee death to be liable for "that offence" of s 168 murder. This was a conclusion "compelled by the provisions of the statute and the policy it implements" and consistent with the reading of comparable provisions adopted in Canada and Australia.[93] The reasoning applied to s 66(2) liability for s 168 murder is also valid for s 66(2) liability for manslaughter. There is no principled basis to distinguish between:

42.1 s 168(1) (foresight of death not required for s 168 murder)

42.2 the long-established principle that foresight of death is not required for unlawful act manslaughter.

43. In both cases, the same purposive interpretation is required to give effect to the statutory scheme, with the result that in neither case is the s 66(2) party required to have foresight of death.[94]

44. That was the position reached in *Rapira*, where it was held:

> [31] Under s 66(2) a secondary party is guilty of "every offence" the commission of which is foreseeable as a probable consequence of the prosecution of a common unlawful purpose. An "offence" is defined to include "any act… for which any one can be punished under this Act". The act for which the principal is liable to conviction of manslaughter if death in fact ensues, on the facts of the present case is intentionally causing bodily harm by an unlawful assault. If the secondary party under s 66(2) knows that the infliction of physical harm which is more than trivial or transitory is a probable consequence of the common purpose (here, to rob), then he is guilty of the offence of manslaughter.
>
> [32] It is not necessary for the offence of manslaughter that death be intended or foreseen by a secondary party…

45. In *Rapira*, one of the parties had been convicted of s 168 murder, which does not require knowledge of the likelihood of death. This circumstance does not explain or limit the Court's statements on manslaughter. Murder is otherwise manslaughter aggravated by the additional states of mind defined in s 167. It cannot logically affect a party's liability for manslaughter if an accomplice has

[93] At [22]: **Appellant's Authorities, Tab 20, p 657.** The Court referred to *The Queen v Trinneer*, where the Supreme Court held at 645 there was "nothing in the words of s. 21(2) [the equivalent of s 66(2)] to support the view that foresight of the victim's death as a probable consequence of the robbery, an element expressly excluded in the definition of the offence in s. 202, should have to be found to exist before the respondent could be convicted of such murder by the application of s. 21(2)." *The Queen v Trinneer* [1970] SCR 638: **BOA, Tab 10.** Also *The Queen v Barlow* where "the offence" was read to extend to included offences. *The Queen v Barlow* (1997) 188 CLR 1: **Appellant's Authorities, Tab 29.**

[94] This was also the reasoning in *Jackson* in the passage set out at paragraph [60] below.

(or has not) the further mens rea required for murder under that provision.[95] The logic of *Rapira* does not suggest the orthodox mens rea test only applies when 66(2) manslaughter is combined with another party's s 168 liability.[96] It must also apply when none of the parties is liable for murder, and when the person causing death cannot be identified. *Adams on Criminal Law* correctly treated *Rapira* as expressing the mens rea requirement in all s 66(2) situations.

46. There are further difficulties with a literal interpretation requiring foresight of death under s 66(2):

> This nearly approximates the mens rea for murder under s 167(b) or (d). The effect "would defeat the scheme of culpability provided by the murder/manslaughter distinction."[97]

47. Read purposively, s 66(2) does not require the legal definition of offences to be reconstructed. The literal interpretation, on the other hand, fundamentally changes the character of manslaughter by reversing one of its key aspects – that death need not be intended or foreseen. It is, to say least, "an odd result" if a s 66(2) party must have greater foresight of harm than a "principal".[98]

48. In *Edmonds*, this Court confirmed that manslaughter under s 66(1) does not require a party to have foreseen the risk of death. It treated *Renata* as correctly stating the law under this subsection.[99] The relevant passage of *Renata* states:

> Clearly, where one person unlawfully assaults another by a dangerous application of force, the assailant is guilty of manslaughter if death is caused even in a most unexpected way. Unlikelihood of the result is relevant only to penalty, although it may be of great significance in that regard. No different principle applies to a person who is guilty of the assault as a secondary party under s 61(1)(b),(c) or (d). In all such cases where manslaughter is charged, "the offence" within the meaning of the subsection is culpable homicide being the causing of death by an unlawful act; and if the unlawful act is of a kind that attracts the operation of the law of manslaughter it matters not that the death

[95] *The Queen v Barlow*, above n 93, at 10: **Appellant's Authorities: Tab 29, p 869.**

[96] And was not taken to mean that in *Adams*. See n 68 above.

[97] *R v Rapira*, above n 68, at [29]: **Appellant's Authorities: Tab 20, p 656-657.** *Edmonds v R*, above n 4, at footnote 21: **Appellant's Authorities, Tab 1, p 15-16**. The difficulties with this are no doubt self-evident and include: (i) shrinking a centuries-old offence almost out of existence, so that the broad subject area covered by manslaughter collapses into the demanding mental states for murder (See *Creighton* at 45); (ii) the difficulty of distinguishing the offences so that facts sufficient for murder result in manslaughter verdicts (manslaughter already operates as a compromise option but if the margin between the offences is reduced that far, the effect of the "drop down" becomes negligible); (iii) the stigma attached to murder and manslaughter becomes roughly equal (a point also made in *Creighton*); (iv) the logical conundrum identified by the majority in *Burke* emerges; (v) as discussed below in relation to *Wilson*, a large gap arises in the coverage of the criminal law, which may require the creation of new offences to cover situations where violence causes an unintentional killing.

[98] *R v Rapira,* above n 68, at [30]: **Appellant's Authorities: Tab 20, p 657**.

[99] *Edmonds v R*, above n 4, at footnote 22: **Appellant's Authorities, Tab 1, p 16.**

> was neither intended nor foreseen. … The expression "unlawful act" in the context of the law of manslaughter is not one upon which the present case calls for any attempt at exhaustive definition; but an unlawful assault intended to cause some, even though minor, physical harm or hurt to the victim is undoubtedly within it.

49. A s 66(1) party must know the essential matters constituting the offence. Section 66(2) was intended to widen the net of criminal liability and has a less exacting knowledge requirement (merely knowledge that an offence is a probable consequence).[100] Despite this relationship, the literal interpretation of s 66(2) would make manslaughter far harder to establish under that provision: a 66(1) a party does not need to foresee death, but a s 66(2) party would. Mr Burke's case highlights this anomaly. Under s 66(1) (applying *Renata*), the same planned assault (and nothing more) would make him liable without foresight of death. On the literal reading of s 66(2), the identical conduct *would* require foresight of death. The alternative implication of the literal reading is that *Renata* is wrong, contrary to what was said in *Edmonds*. In other words, to aid Mr Webber in committing "the offence" of manslaughter under s 66(1), Mr Burke would need to know he was assisting a killing.

Edmonds and Ahsin

50. *Edmonds* concluded with the observation that what mattered for the purposes of s 66(2) "was that the appellant appreciated that the ultimate result was probable". There was no need for the Crown to prove he knew "that a stabbing (as opposed to some other form of death-inflicting violence) was a probable consequence of the implementation of the common purpose."[101] This might appear to support the literal interpretation that the victim's death – the "ultimate result" - is what must be foreseen under s 66(2). But the Court had earlier explained that it was proceeding on an assumption which was arguably incorrect – i.e. that the trial Judge correctly considered the appellant could only be guilty if the jury were satisfied that a killing was a probable consequence of the common purpose. That question was reserved "for another day".[102] This caveat was repeated when the Court reviewed the varying approaches to mens

[100] At [25]: **Appellant's Authorities, Tab 1, p 15.**
[101] At [54]: **Appellant's Authorities, Tab 1, p 24-25.**
[102] At [10]: **Appellant's Authorities, Tab 1, p 10.**

rea in party liability for manslaughter:

> [27] Under both the Crimes Act and at common law very limited mens rea (not extending to an appreciation that death is likely) is required to be established against a principal party to justify a conviction for manslaughter. The same is true of a party who is prosecuted as an aider and abettor (under both s 66(1)(b), (c) or (d) and under the Accessories and Abettors Act) and at common law under common purpose liability principles. Whether this is also always the case in New Zealand under common purpose principles is unclear. It certainly is where the principal has been found guilty of murder under s 168, but the practice in other culpable homicide cases has been to require the Crown to show that the secondary party subjectively appreciated that death was a probable consequence of the implementation of the common purpose. **As we have said, it is arguable whether this is correct**, but it is unnecessary for us to address this further in these reasons.

51. The Court went on to hold that there could be no "stand-alone" legal requirement that common purpose liability depended on a party's knowledge that weapons would be involved. It also ruled out a liability test resting on concepts of "fundamental difference associated with the level of danger recognised by the party." What matters is that "the level of appreciated risk meets the s66(2) standard." In view of the earlier qualifications, the level of risk for common purpose manslaughter remained an open question.

52. In *Ahsin*, McGrath J summarised what must be proved for liability under s 66(2), ending with the requirement of "foresight of both the physical and mental elements of the essential facts of the offence."[103] The issue in that case was common purpose liability for murder and the Court did not examine the "foresight of death" issue for manslaughter, left open in *Edmonds*. *Ahsin*, therefore, should not be read as entrenching the need for such foresight when manslaughter is in play.

Interpretation of the equivalent provision in Canada

53. Section 21 of the Canadian Criminal Code 1985 has the same origin as s 66 and provides:

> (1) Every one is a party to an offence who
>
> (a) actually commits it;
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or

[103] *Ahsin v R*, above n 66, at [102]: **Appellant's Authorities, tab 16, p 508**.

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

54. In both s 66(2) and s 21(2), common purpose liability is expressed in very similar terms. The main difference is that the Criminal Code retains the objective standard for knowledge that the offence is a probable consequence.[104] For present purposes, this difference is immaterial: the common issue is *what* must be known, either by the party subjectively or by the hypothetical reasonable bystander invested with the party's knowledge of the circumstances.[105]

55. In *Creighton*, the question was whether the limited mens rea for manslaughter complied with s 7 of the Charter. The Court held that it did and rejected arguments that symmetry between mens rea and actus reus was an aspect of fundamental justice, and that the gravity of manslaughter required objective foreseeability of the risk of death. This left intact the established formula:

> … the test for the mens rea of unlawful act manslaughter in Canada, as in the United Kingdom is (in addition to the *mens rea* of the underlying offence) objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required.[106]

56. Soon afterwards, in *Jackson*, the Supreme Court considered the mens rea for manslaughter in the context of the parties provision, s 21.[107] Jackson took a hammer, gloves and balaclava to an antique shop owned by his lover. Davy went with him. There was a robbery and a murder. Jackson and Davy were convicted of murder.[108] There had been no adequate direction on Davy's liability for manslaughter and, on the evidence, his conduct could be viewed by a jury in several ways. The Supreme Court held that Davy could be liable for manslaughter under s 21(1) (equivalent to s 66(1)) as having aided and abetted

[104] Abandoned in New Zealand on the enactment of the Crimes Act 1961.

[105] In *Tuhoro*, the Court of Appeal did not regard this wording as displacing the relevance of *Trinneer*. The Court held a s 66(2) party can be liable for s 168 murder without foresight of a killing. *Tuhoro v R,* above n 83, at 572-573: **BOA, Tab, 9.**

[106] *R v Creighton*, n 73, at 44: **BOA, Tab 3.**

[107] *R v Jackson* [1993] 4 SCR 573: **BOA, Tab 11.**

[108] Though not under an equivalent of s 168 of the Crimes Act, which highlights the difficulty of explaining *Rapira* by reference to the s 168 murder in that case. Section 202 of the Criminal Code, considered in *Trinneer,* no longer applied when *Jackson* was decided. *R v Martineau:* **Appellant's Authorities, Tab 14.**

an attack that resulted in death. The risk of death need not be foreseen:

> As long as the unlawful act is inherently dangerous and harm to another which is neither trivial nor transitory is its foreseeable consequence, the resultant death amounts to manslaughter.[109]

57. Writing for the majority, McLachlin J continued:

> I conclude that a person may be convicted of manslaughter who aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken…[110]

58. The Ontario Court of Appeal had earlier held that the position was different under s 21(2) (equivalent of s 66(2)) because liability was premised on foresight of what would occur rather than participation.[111] Therefore:

> … where one is said to be a party to manslaughter through s 21(2), it must be shown that one knew or ought to have known that the offence of manslaughter would occur. That offence consists of an act (e.g., an assault) which produces a consequence (death). Foresight only of the commission of the act without foresight of the consequences is not foresight that "the *offence* [manslaughter] would be a probable consequence of carrying out the common purpose".[112]

59. This was to endorse the "literal reading" of the common purpose provision:

> What must be foreseen? Section 21(2) requires foresight of the "the commission of the offence". The offence of manslaughter in the present context consists of an assault which causes death. On a literal reading of s. 21(2), Davy would be guilty of manslaughter if he knew or ought to have known that Jackson, in the course of carrying out the common unlawful purpose (robbery), would assault Mr. Rae and cause his death. On this reading, foresight of death, albeit subjective ("knew") or objective ("ought to have known") is essential to the culpability of the s 21(2) party.[113]

60. The Supreme Court rejected this reasoning, confirming that the mens rea for manslaughter is the same for both aiding and abetting and common purpose liability.

> This leaves the question of the *mens rea* required to sustain a conviction for manslaughter under s 21(2) of the *Criminal Code*. The Court of Appeal held that to be convicted of manslaughter under s 21(2) of the *Code*, the Crown must establish that the accused knew or ought to have known that killing short of murder was a probable consequence of the pursuit of the common unlawful purpose. However, as was previously noted, since the date of the Court of Appeal's decision, this Court has held that manslaughter does not require that a

[109] *R v Jackson*, above n 107, at 583: **BOA, Tab 11.**
[110] At 583: **BOA, Tab 13.** Again, an adjustment must be made for the presence of the words "or ought to have known".
[111] *R v Jackson and Davy* 68 C.C.C. (3d) 385 at 429.
[112] At 425.
[113] At 422.

> risk of death be foreseeable; foreseeability of the risk of harm is sufficient: *Creighton*, *supra.* This Court's decision in *R v Trinneer*, [1970] S.C.R. 638, suggests that there is nothing inherent in s 21(2) which requires a higher *mens rea* than would otherwise be required for a conviction for manslaughter. There the Court held unanimously that an accused could be convicted of constructive murder as a party to that offence under the combination of ss 21(2) and 230 (then s 202 of the *Criminal Code*, without the Crown proving that the accused knew or ought to have known that it was probable death would ensue from the execution of the common unlawful purpose. While it would no longer be possible to convict for murder under s 21(2) without proof of subjective awareness of death R v Logan [1990] 2 S.C.R. 731), the reasoning in *Trinneer*, coupled with *Creighton*, *supra*, suggests that the appropriate *mens rea* for manslaughter under s. 21(2) is objective[114] awareness of the risk of harm. **It must follow that a conviction for manslaughter under s 21(2) does not require foreseeability of death, but only foreseeability of harm, which in fact results in death**.[115]

61. *Jackson* was cited in *Edmonds* as an authority casting doubt on any requirement that death must be foreseen by a s 66(2) party to manslaughter.[116] *Jackson* has four aspects relevant to this appeal:

    61.1 It is an explicit rejection of the literal interpretation, an interpretation which also underpins the minority judgment in *Burke*. Conversely, it is consistent with the reasoning in *Rapira*, where the case was also cited.[117]

    61.2 It avoids the need to re-engineer the concept of manslaughter so that, in a party situation, the mens rea requirement approximates that of murder.

    61.3 It maintains parity between the mens rea for perpetrators and other parties. It avoids the anomaly of requiring foresight of death for a s 66(2) party but not for a person who aids and abets the underlying offence. Instead, a consistent mens rea standard is applied across these relationships.

    61.4 The close similarity of language in the two provisions and similar human rights context implies that s 66(2) should be construed in the same way,

[114] Here, the "objective awareness" requirement is part of the common law gloss on manslaughter and does not follow from the terms of s 21(2).
[115] *R v Jackson*, above n 107, at 586-587: **BOA, Tab 11**. Emphasis added.
[116] *Edmonds v R*, above n 4, at footnote 27: **Appellant's Authorities, Tab 1, p 16**.
[117] *R v Rapira*, above n 68, at [22]: **Appellant's Authorities: Tab 20, p 657**.

barring any considerations of policy applicable to New Zealand but not to Canada (and none is apparent).

Australian Codes

62. The appellant submits that the Australian codes would require someone in Mr Burke's position to foresee an unlawful killing as the probable consequence of the common purpose. This "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."[118] Reliance is placed on the reasons of Dixon and Evatt JJ in the 1936 case of *Brennan*, and on a mischaracterisation of the text of the common purpose provisions.[119]

63. The Code provisions for Queensland, Tasmania and Western Australia state:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

64. In contrast to s 66(2), this stipulates an objective assessment of the probable consequences, "not what the parties may have foreseen".[120] The position is further modified by the availability of a defence of accident.[121]

65. The issue in *Brennan* was the trial Judge's direction that the appellant's involvement as a lookout in the robbery automatically meant he was guilty of the offence found against the principals – i.e. the killing of a caretaker. Unsurprisingly the High Court found this was not correct. Starke J indicated that "in law" death is regarded as a probable consequence in an unlawful act manslaughter.[122] Dixon and Evatt JJ considered there was little practical difference between s 7 (aiding and abetting) and s 8 (common purpose) in this situation. They also remarked that, for Brennan to be liable for manslaughter under s 8, "it must appear that among the probable consequences of

[118] Appellant's submissions at [7].

[119] Appellant's submissions at [87]: "Each [Code]… contains CUP provisions equivalent to s 66(2), save for the addition of the words "or ought to have known". This is true for s 21 of the Canadian Criminal Code, but not the Australian codes.

[120] *R v Keenan* [2009] HCA 1, (2009) 236 CLR 397 at [124]: **BOA, Tab 14.** Under s 66(2), a party is liable "if the commission of that offence was known [i.e. by that person] to be a probable consequence…".

[121] E.g Criminal Code Act 1899 (QLD), s 23. For an illustration see *R v Taiters* [1997] 1 Qd R 333.

[122] *Brennan v R* (1936) 55 CLR 253 at 261: **Appellant's Authorities, Tab 27, p 819**. This appears to mean that manslaughter is deemed to be a probable consequence once there has been an unlawful assault causing death.

prosecuting the unlawful purpose upon which the prisoners had resolved was the death of the caretaker."[123] Comparing the effect of ss 7 and 8:

> The practical result is that the applicant would not be guilty of manslaughter unless he knew that his confederates whom he was aiding and abetting intended to commit at least a common assault upon the caretaker or, supposing that they had not that actual intention, then unless he foresaw that to carry out the plan of shopbreaking they would probably so injure him that death might be likely to result.[124]

66. Three submissions are made about this passage:

66.1 Despite the reference in *Brennan* to the lookout's foresight of likely death, it has since been clarified that the correct test is the objective probability of the offence occurring (a test which the present case would have no difficulty satisfying).[125]

66.2 Requiring a different mens rea standard for sections 7 and 8 raises the logical problems identified earlier in relation to s 66(1) and (2) of the Crimes Act. The conflict this creates was the subject of remark in *Murray v The Queen*, a decision of the Tasmanian Court of Appeal. Crawford J read the *Brennan* obiter as implying that counselling a person to commit "the offence" of manslaughter [under s 7(d)] did not require the counselling of a killing (otherwise, "if one counsels the causing of death, one is counselling murder").[126] The Judge expected s 8 would be read in the same way "and that it would have been held that if an assault was a probable consequence (from which the deceased happened to die) that would have been sufficient in the facts to support a verdict of manslaughter." Yet *Brennan*, had treated the "commission" of the "offence" in s 8 (common purpose) as meaning death must be a probable consequence: "With respect, I cannot understand this

[123] At 264: **Appellant's Authorities, Tab 27, p 822.**

[124] At 265: **Appellant's Authorities, Tab 27, p 823.**

[125] *Stuart v R* (1974) 134 CLR 426: **Appellant's Authorities, Tab 28**. The "offence" meaning only the conduct elements: *the Queen v Barlow,* above n 93, at 10: **Appellant's Authorities: Tab 29, p 869.**

[126] *Murray v The Queen* [1962] Tas SR 170 (CA) at 972: **Appellant's Authorities, Tab 31, p 972.** Dixon and Evatt JJ had observed: "Under this provision [s 7 of the Code] the applicant was liable to conviction for manslaughter if it was established that the plan on which his confederates acted included some physical interference with the caretaker, that in fact death resulted from such an assault, and that he remained on watch for the purpose of aiding them in carrying out that plan and so commit the assault, of that he counselled them to do so." This was distinguished in *Borg v R* [1972] WAR 194 on the basis that killing the victim with a pistol was "an act so far outside the common purpose as to constitute a separate and distinct crime, entirely foreign to the plan", which involved scaring the victim, or possibly "get rough with him", the object being to recover a debt. This appears to resemble OSA reasoning.

distinction."[127]

66.3 There has been some retreat from that distinction in the High Court of Australia. In *Stuart*, Jacobs J observed that Brennan, the lookout, could still be liable for manslaughter on common purpose principles if the probable consequences did not extend to the likely death of the caretaker.[128] These remarks were treated as correct by three of the Judges in *Barlow*, [129] who also held that a s 8 party could be liable for manslaughter on the same basis as the party who caused death.[130] According to "the ordinary rules of interpretation", the word "offence" in paragraphs (b),(c) and (d) of s 7 (aiding, counselling) "must bear the same meaning" as it does in (a) [i.e. doing the act which constitutes "the offence"]. And section 8 [common purpose], "which complements s 7 and extends the net of criminal liability for an offence to the parties who have formed a common intention… reveals no ground for attributing a different meaning to 'offence' in s 8."[131]

67. Because the Australian and Canadian Codes both involve objective probability of "the offence", similar interpretations might be expected. *Jackson* definitively states the position in Canada. But it seems the High Court of Australia has not directly considered whether, in a common purpose manslaughter case under the state Codes, the objective probability of "the offence" must include the consequence of death.

First ground of appeal: knowledge of the "act" that causes death

68. Here the appellant submits that, because Mr Webber killed Mr Heappey by stabbing him, Mr Burke needed to foresee that Mr Webber would do this, or

[127] *Murray v The Queen*, above, at 198-200: **Appellant's Authorities, Tab 31, p 971-973**. George Brandis "The Liability of Parties to Unlawful Killing under the Criminal Code" (1977) 10 UQLJ 1 at 1: **BOA, Tab 21.** At 13: "With reference to s. 8 (the test for which has clearly been established as objective), there has been a rejection of the view adopted in *Brennan* that death must be a probable consequence in order to render an accomplice guilty of manslaughter."

[128] *Stuart v R*, above n 125, at 453: **Appellant's Authorities, Tab 28, p 856.**

[129] *The Queen v Barlow*, above n 93, at 11-12 per Brennan CJ, Dawson and Toohey JJ: **Appellant's Authorities: Tab 29, p 870-871.**

[130] At 10 per Brennan CJ, Dawson and Toohey JJ: "Absent the intention to cause death or grievous bodily harm, the striking of the blow without justification or excuse and the resultant death rendered the striker liable to punishment for manslaughter. As the striking of that blow was an act that rendered the principal offender liable to punishment, Barlow is deemed to have done that act if the requirements of s 8 are satisfied. Was the nature of the blow actually struck such that its infliction was a probable consequence of the prosecution of the relevant unlawful purpose? The jury must be taken to have found that the striking of a blow which was not justified or excused and which caused death was a probable consequence of prosecuting the purpose common to Barlow and the principal offender.": **Appellant's Authorities, Tab 29, p 869.**

[131] At 9: **Appellant's Authorities, Tab 29, p 869.**

foresee "an act of its type".[132] This creates similar difficulties in distinguishing manslaughter and murder – if Mr Burke appreciated that a stabbing was probable consequence of their assault on Mr Heappey, he would be acting with something close to murderous intent. It also conflates "the offence" with the facts or means by which the offence is proved,[133] and overlooks that the relevant offence in Mr Burke's case is not "the offence" committed by Mr Webber (murder), but a lesser included offence. The reasoning proceeds backwards from "what actually happened", and argues these precise acts (or their equivalents) need to have been foreseen. Here, what "actually happened" was murder, so it is illogical to require foresight of the murderous conduct for the lesser offence of manslaughter. The argument blurs the distinction between s 66(1) ("knowledge of essential matters") and s 66(2). Focusing on what happened at the time the critical injuries were inflicted invokes "the sort of thinking which is associated with s 66(1)".[134] Yet even under s 66(1), which depends on the party's participation in the very criminal act, a party generally needs only to know the kind of offence to be committed, among a range of potential offences. They do not need to know the details.[135]

69. The proposed threshold conflicts with the *Jackson* and *Rapira* interpretations of s 21(1) (Canada) and s 66(2) (Crimes Act) reviewed above. The trial Judge in *Rapira* directed that, for murder, foresight of grievous bodily injury was required. For manslaughter, a lesser act sufficed: the s 66(2) party needed only foresight that "one of the group would intentionally strike the victim".[136] These directions were upheld as maintaining an appropriate distinction between murder and manslaughter.[137] Requiring foresight of acts of the type that actually occurred triggers the same problematic distinctions which afflicted the "knowledge of the weapon" jurisprudence. It becomes uncertain, for instance, whether Mr Burke's foresight of a "mean" hiding would include the "type" of violence involved in, say, prolonged punching causing death rather than a few

[132] Appellant's submissions at [39].
[133] Or, as this Court expressed it in *Edmonds* at [54], the issue is whether the ultimate result was probable, "not the exact concatenation of events which in the end brought that result about."
[134] *R v Vaihu* [2009] NZCA 111 at [82]: **Appellant's Authorities, Tab 18, p 625.**
[135] *R v Renata*, above n 4, at 349: **BOA, Tab 1**. (Subject to *R v Rapira*, discussed below). *R v Baker* [1909] 20 NZLR 536.
[136] *R v Rapira*, above n 68, at [17] and [20]: **Appellant's Authorities, Tab 20, p 652-653 and 654.**
[137] At [33]: **Appellant's Authorities, Tab 20, p 657.**

punches, or use of a knuckleduster causing death; or, if the victim fell to the ground and was kicked to death with (i) ordinary footwear or (ii) steel capped boots. These are the kind of "faintly ludicrous" distinctions disapproved in *Edmonds*, yet they are bound to arise on the appellant's approach.[138]

70. Relying on *Vaihu*, the appellant submits that, if Mr Heappey had survived the knife attack, Mr Burke could only have s 66(2) liability for the grievous bodily harm inflicted if the Crown proved he foresaw the risk of really serious harm. Because the victim died from harm of that kind, it is said that Mr Burke cannot be liable for manslaughter unless his foresight was at that level.[139]

71. The first step in this argument is correct but not the second. A fatal attack and an attack the victim survives are fundamentally different things.[140] Liability for a grievous body harm offence requires correspondence between intention and the level of harm inflicted. But manslaughter is different. It does not require mens rea/actus reus parity. Manslaughter is concerned with the consequence of death, which elevates the gravity of the conduct from what may be a much lower level of violence than grievous bodily harm. The comparison is likewise invalid when translated to the situation of party liability. There is accordingly no inconsistency between *Vaihu* and the threshold for common purpose liability for manslaughter expressed in *Rapira.*[141]

Jogee and "overwhelming supervening acts"

72. Although *Jogee* has been extensively referred to in submissions for this appeal, there are several qualifications to be noted:

    72.1 *Edmonds* emphasised:

> [t]he approach of New Zealand courts to common purpose liability must be firmly based on the wording of s 66(2)."[142] Because the statute covered the field, the *Jogee* reorientation of UK common law did not justify leave to appeal in *Urhle*.[143]

[138] *Edmonds v R,* above n 4, at [45]: **Appellant's Authorities, Tab 1, p 22.**
[139] Appellant' submissions [45]-[47].
[140] Reflected also in the sentencing disparity between GBH and GBH causing death: "death following the deliberate infliction of GBH must be a seriously aggravating factor in sentencing." *Everett v R* [2019] NZCA 68 at [23].
[141] This is why party liability for manslaughter may require a "supervening act" doctrine, but not party liability for causing grievous bodily harm.
[142] *Edmonds v R*, above n 4, at [47]: **Appellant's Authorities, Tab 1, p 22-23.**
[143] *Uhrle v R* [2016] NZSC 64, (2016) CRNZ 270: Te **Matakahi's Authorities, Tab 6.**

72.2 *Jogee* has largely removed the significance of common unlawful purposes under United Kingdom law.[144] Such purposes may be evidence of aiding or counselling an offence, but they are no longer an independent basis of liability.

73. Nonetheless, the decision is relevant to the issues in this appeal for at least three reasons.

74. First, *Jogee* pruned away a body of law – formerly influential in New Zealand - which limited the scope of accessory liability by imposing "knowledge of the weapon" requirements, or excluding situations where the manner of death was "fundamentally different" from the common purpose. *Edmonds* had already recognised that these doctrines reflected concerns about over-criminalising murder in ways that were inapplicable here, and which were inappropriate accretions to s 66(2).

75. Second, the "wrong turn" in *Chan Wing-Siu* had caused an inappropriate extension of the law of murder and corresponding reduction of the scope of manslaughter.[145] The United Kingdom Supreme Court reiterated the principles of manslaughter in orthodox terms:

> [96] If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will not be guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: *R v Church* [1966] 1 QB 59, approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and very recently re-affirmed in *R v F (J) and E (N) [2015] 2 Cr App R 5.* The test is objective. As the Court of Appeal held in *R v Reid (Barry)* 62 Cr App R 109, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these.[146]

76. Third, any excessive reach of manslaughter principles would be held in check

[144] AP Simester "Accessory Liability and Common Unlawful Purposes" (2017) 133 LQR 73: **Appellant's Authorities, Tab 39**. This illustrates that the principles of liability in the United Kingdom are "more susceptible to judicial development" than they are under s 66(2), which locks in common purpose liability based on foresight of consequences. *Edmonds v R*, above n 4, at [23]: **Appellant's Authorities, Tab 1, p 15.**

[145] *R v Jogee*, above n 73, at [83]: **Appellant's Authorities, Tab 3, p 106.**

[146] At [96]: **Appellant's Authorities, Tab 3, p 108-109.**

by the concept of "overwhelming supervening acts" (OSA). The Supreme Court explained in the next paragraphs:

> [97] The qualification to this (recognised in *R v Smith (Wesley), R v Anderson; R v Morris*[147] and *R v Reid*) is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.
>
> [98] This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from *R v English*… [148]

77. *Edmonds* anticipated this trend of thought. Under s 66(2), there is "no scope for a liability test which rests on concepts of fundamental difference associated with the level of danger recognised by the party."[149] This Court also envisaged a safety-valve similar to OSA:[150]

> [51] We recognise that there may be cases where the use by one member of a group of a weapon which other members of the group had not known about may conceivably justify the conclusion that the offence committed involved such a departure from the common purpose as not properly to be regarded as occurring in the course of its implementation. But providing the Crown can establish a relevant and sufficient common purpose and a recognition that the offence ultimately committed was a probable consequence of its implementation, it is difficult to conceive of a situation where the nature of the weapon used would be of controlling significance in determining whether the offence occurred in the course of implementing the common purpose.

78. As seen earlier, the Court had earlier reserved its position on whether a s 66(2) party must foresee the probability of death to be liable for manslaughter. Reference to the "offence ultimately committed" must be seen in that light.

79. Given the need for a safety-valve of this kind, the nature and application of the OSA exception are relevant here.

80. The OSA concept is not based on causation.[151] The liability of an accessory does not depend on them having a causal function in the first place, and it is unnecessary to prove their conduct influenced the principal or the outcome.[152]

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147 Such an event was found to have occurred in this case. The Supreme Court observed at [33] that this "may have been a charitable view on the facts".

148 *R v Jogee,* above n 73, at [96]: **Appellant's Authorities, Tab 3, p 108-109.**

149 *Edmonds v R*, above n 4, at [47]: **Appellant's Authorities, Tab 1, p 22-23.**

150 At [51]: **Appellant's Authorities, Tab 1, p 24.**

151 Beatrice Krebs "Overwhelming Supervening Acts, Fundamental Differences, and Back Again" (2022) 86(6) JCL 420 at 4-5: **BOA, Tab 22.**

152 *R v Jogee*, above n 73, at [12]: **Appellant's Authorities, Tab 3, p 88**. See also *R v Grant* [2021] EWCA Crim 1243 at [27]-[40]: **BOA, Tab 13.** Grant and Khan had planned to cause the victim really serious bodily harm. Instead of a face-to-face

In this context, it would be inapt to say (as the appellant submits here) that it was not the planned fight which killed the victim but rather the unexpected use of a knife by another party, amounting to a separate transaction.[153] The accessory's attachment to the criminal venture or – and their responsibility for its consequence - is what matters, not their causal contribution in a but-for sense.[154] Here, Mr Burke's adherence to the common purpose and his acts of assistance formed part of the circumstances in which death was brought about and were sufficiently part of the causal chain.

81. OSA is a best understood as a principle of remoteness, which guards against the unfair attribution of liability. Offsetting the *Jogee* reduction in accessorial liability, this is narrower than the "fundamental departure" rule it replaces.

82. It is also an objective test. Unlike the "fundamental departure" rule, the question is not the defendant's foresight of the resulting violence, but whether "nobody in the defendant's shoes" could have contemplated the extent or

confrontation, on seeing the victim Khan drove at him and killed him. Grant's assistance had not lost material connection with what occurred and the use of a weapon, the car, which would not have been used in a street confrontation, was not an OSA.

[153] *R v Miazga*, above n 77, at [10]-[27]: **BOA, Tab 6.** The Supreme Court of Canada denied leave in *R v Miazga*, 2014 SCC 439. *R v Cabrera* 2019 ABCA184, 442, DLR (4th) 368 at [99]-[100]: **BOA, Tab 14.** The Supreme Court's leave decision in *Strathdee* referred to another aspect of *Cabrera* but did not suggest it had wrongly viewed the use of a knife which was unknown to the other assailants. *R v Strathdee* [2021] SCC 40 at [4]. In *Miazga* at [21] the British Columbia Court of Appeal approved a passage **(BOA, Tab 6**) from *R v KKP* 2006 ABCA 299, 397 AR 318 at [21]: "In this case, it is clear that the appellant was part of a plan to inflict bodily harm on the victim. A temporal and substantive link existed between the planned assault and the subsequent death. In other words, this is not a case of two separate transactions but of one assault from which death ensued. Thus, the appellant has been properly found to be a party to a single transaction that led to death, even though violence escalated to a form he may not have intended." In *R v KKP* the appellant was part of a group which had planned to beat up the victim and leave him in a remote place. Instead, he was stabbed and killed on arrival.

[154] Beatrice Krebs *Accessorial liability after Jogee* (Hart Publishing, Great Britain, 2019) at 118: **BOA, Tab 23**: "under the principle of constructive liability governing UDAM, a party is liable to conviction even though 'his fault [in co(-)committing the base crime] *does not extend to the causing of death* or to the causing of serious injury which he did not foresee and in some cases could not reasonably have foreseen (emphasis added).' [citing Law Commission, *Involuntary* Manslaughter, Consultation Paper No 135 (1994) at [2.42].] "What matters is that he was directly engaged in perpetrating a base crime which, albeit not most immediately at his own hands, led to someone else's death." Also at pp 126-127: "Consistent with the subjectivist theory of criminal law, according to which criminal liability is 'imposed only on people who can be said to have *chosen* to act in a certain way or to cause or risk causing certain consequences' an accessory charged with UDAM on the basis that he had intentionally assisted or encouraged a minor assault that escalated into a fatal attack might want to argue that the very act that was the most direct cause of death was committed by the perpetrator acting *autonomously* in pursuance of a purpose – to kill or inflict GBH – that the accessory did not share and which thus ought to represent a break in the chain of causation. The problem with this analysis is that it focuses on the principal's specific act rather than the underlying base crime. What is required for accessory liability for UDAM is that the accessory intentionally assist or encourage the base crime (which does not need to have been *caused* by this assistance or encouragement, in line with general principles of accessory liability as restated in *Jogee*). Causality is, however, required, on conventional principles of UDAM, between the fatal outcome and the base crime. // It has also been objected that the fatal outcome ought to be attributed to our accessory, since it resulted, most immediately, from one specific act which exceeded the level of force and was *qualitatively different to any act the accessor intended to support,* while any lesser-included act of violence that he still intentionally assisted or encouraged did not actually cause death [citing AP Simester, "Accessory liability and common unlawful purpose", above n 144: **Appellant's Authorities: Tab 42].** This argument sounds compelling; however, it might take too limited a view of what constitutes the base out of which the manslaughter charge is constructed. As explained earlier, in the context of complicity, the unlawful dangerous act' requirement has been treated synonymously with base crime rather than any specific (type of) act. The constructive element in UDAM, in other words, latches onto the criminal event assisted or encouraged, not any particular act. Were it any different, there would be no need for a "supervening act" principle as described in *Jogee* and considered in *Tas.*"

dangerousness of the violence that occurred. The facts in this case illustrate the utility of that approach. Mr Burke seeks to self-define the extent of his liability by saying that the common purpose was only to inflict a mean hiding and Mr Webber's use of a knife went beyond that. That might have succeeded under the subjective "fundamental departure" approach. But on any objective assessment the circumstances were far more dangerous. A reasonable person in Mr Burke's shoes and invested with his knowledge (the circulation of knives that day, the "meth-fuelled environment, the violent ways of his companion) would certainly have recognised that. Mr Burke lived in a world where knives were "part of normal life."[155]

83. After *Jogee*, the English Court of Appeal has twice examined the scope of OSA in the context of group violence.[156] The facts in both cases loosely resemble those in issue here: *R v Tas* concerned a planned attack after a disagreement between two groups at a university hostel; in *Lanning & Camille v R,* there had been a more spontaneous fight at a tube station. The victims in both cases died from stab wounds.[157] The appellants, who did not know their fellow assailants had carried a knife, were convicted of manslaughter in each case.

84. In both appeals, the use of a knife was held to be an escalation of the expected violence, but it was insufficient for OSA to be put to the jury. The Court considered *R v Anderson*[158], on which the appellant relies. Use of a knife was treated as a supervening event in *Anderson* but the Supreme Court, in *Jogee*, considered this "may have been a charitable view on the facts".[159] That remark indicated that, while the principle in *Anderson* was recognised, "its application in that case was not to be taken as binding in other similar situations."[160]

85. The reasoning in *Tas* and *Lanning & Camille* draws a broad distinction between the uncontemplated but commonplace, and the uncontemplated and extraordinary – only the latter will trigger the OSA defence. It is unlikely that

[155] CA COA at 61-62.
[156] See also *R v Harper* [2019] EWCA Crim 343; [2019] 2 Cr App R. 1.
[157] *R v Tas* [2018] EWCA Crim 2603, [2019] 4 WLR 14: **BOA, Tab 15**. *Lanning v R [2021]* EWCA Crim 450: **BOA: Tab, 16.**
[158] *R v Anderson* [1966] 2 QB 110 (CCA): **Appellant's Authorities, Tab 10.**
[159] *R v Jogee*, above n 73, at [33]: **Appellant's Authorities, Tab 3, p 94.**
[160] *R v Tas*, above n 157, at [33]: **BOA, Tab 15.**

the unexpected use of a weapon, such as a knife, will qualify as an OSA where group violence is intended.[161] Dr Krebs remarks:

> As the [*Lanning & Camille*] Court explained, "'*in today's social climate'*[162] where 'knives are produced in situations of this kind with a high degree of frequency leading to serious injury or death', it did not follow that simply because C was unaware that L carried a knife '*nobody in the defendant's shoes could have contemplated*' a stabbing might happen. This clarifies that OSA looks to the wholly unexpected, not from the defendant's point of view (as the F[undamental] D[ifference] R[ule] did, but ultimately from the perspective of general life experience (which is then attributed to someone in the defendant's position). And even then, the wholly unexpected needs to be so momentous as to consign the accessory's deeds to history – a taxing two-limbed test.

86. Other writers have observed:

> Although every case turns on its own facts, it is likely to be rare in practice that D1's use of a weapon (and particularly a knife, following *Tas*) would be sufficient to justify leaving the OSA issue for the jury's consideration.[163]

87. The position is similar in Canada. Causation for the purposes of manslaughter is not interrupted by the fact that "someone brought a knife to a fist fight" and the victim was stabbed, not beaten to death.[164] Use of a knife during a fist fight or beating is treated as an escalation of violence rather than an intervening act.[165] Ignorance that another participant has brought a knife does not make their act of stabbing a separate transaction.[166] The timing of the fatal wounds is immaterial; they may precede the actions of another party.[167] The intrusion of an unrelated person who causes bodily harm will also be attributable to those who initiate an attack if the intervention is reasonable foreseeable, "in the sense that the acts and the harm that actually transpired flowed reasonably" from their conduct.[168]

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[161] D Omerod and K Laird *Smith Hogan and Omerod's Criminal Law* (16th ed, Oxford University Press) at 6.4.2.4 at 219-223: **BOA, Tab 24.**

[162] The phrase "in today's social climate" was used in the Crown's submission in that case. The Court preferred to say: "… bearing in mind that knives are produced in situations of this kind with a high degree of frequency leading to serious injury or death, the judge was entitled to conclude that there was an insufficient factual basis for a jury to conclude (adopting the language from *Jogee* at [97], that *"nobody in the defendant's shoes could have contemplated"* that the production and use of a knife in the joint attack might happen."

[163] Karl Laird, David Ormerod, Rudi Fortson "Reflections on Jogee: overwhelming supervening act" (2021) 4 Arch. Rev 7: **BOA, Tab 25.**

[164] See n 153 above.

[165] As above.

[166] *R v Miazga*, above n 77, at [20]-[21]: **BOA Tab 6**. *R v Strathdee* 2020 ABCA 443 at [43]. Affirmed *R v Strathdee* 2021 SCC 40. "We agree with the Court of Appeal that there is no basis for the view that the stabbing of Mr. Tong was a distinct act outside the scope of the group attack" at [2].

[167] *R v Cabrera*, above n 153, at [101]: **BOA, Tab 14.**

[168] *R v Maybin*, 2012 SCC 24, [2012] 2 SCR 30 at [30]-[40]: **BOA, Tab 17.**

88. In *Markby*, the High Court of Australia observed that if "the use of the weapon, even if its existence was unknown to the other party, is rightly regarded as no more than an unexpected incident in carrying out the common design the inactive participant may be convicted of manslaughter."[169] In *Varley v The Queen*, the High Court considered that, in executing a plan to "rough-up" the victim and force him to disclose the location of certain money, the use of a baton in causing death could be seen as no more than an unexpected incident in carrying out the common design. This was so, even on the assumption that the appellant did not know the baton was available or of its intended use. Some of the assailants in *Varley* were policemen, which might make a baton seem a likely weapon – but no more so than a knife in the hands of a gang-enforcer.[170]

Concerns about over-criminalising manslaughter

89. The versatility of the offence has generally been seen as a virtue in the scheme of the criminal law. Cases of manslaughter "vary infinitely" in their gravity: "That is the utility of the offence. It enables the law to express forcefully its regard for human life, at the same time allowing the particular circumstances to be reflected in the penalty imposed."[171]

90. In some decisions, there has nevertheless been an apparent reaction against the breadth of the offence. This takes at least two forms:

    90.1 Creating a rule that manslaughter should be reserved for cases of "serious" violence only.

    90.2 Applying concepts of remoteness and causation in such a way that a party must have knowledge of the weapon used, or foresee the "type" of violence that caused death (an approach that has been touched on above).

91. There is no lower limit for the punishment of manslaughter and, in theory, even discharge is available.[172] Attempts to restrict the scope of party liability must

[169] *Markby v The Queen [*1978] HCA 29, (1978) 140 CLR 108 at 112-113: **BOA, Tab 18.**

[170] *Varley v The Queen* (distinguishing *R v Anderson*, above n 158, [1966] 2 QB 110 (CCA): **Appellant's Authorities, Tab 10**). *Varley v The Queen* [1977] 51 ALJR 243 (HCA) at 246: **BOA, Tab 19**. Cf *R v Pahau* [2011] NZCA 147 at [56]: **BOA, Tab 20.**

[171] *Wilson v R* [1992] HCA 31, (1992) 174 CLR 313 at 342, per Brennan, Deane and Dawson JJ: **Appellant's Authorities, Tab 37, p 1092.**

[172] See *R v King* [2012] NZHC 3072 for an example of a non-custodial sentence. Some cases may call for no penalty, or a symbolic

therefore originate in concerns about the stigma of a manslaughter conviction, rather than exposure to penalty. Accordingly, the question of stigma must first be addressed.

The stigma of manslaughter

92. This issue featured prominently in *Creighton*. A minority of the Supreme Court of Canada held that the gravity of manslaughter – the stigma that attaches to it – required a minimum mens rea of foreseeability of death. Writing for the majority, McLachlin J responded to that thesis by observing:

> To the extent that stigma is relied on as requiring foreseeability of the risk of death in the offence of manslaughter, I find it unconvincing. The most important feature of the stigma of manslaughter is the stigma which is <u>not</u> attached to it. The Criminal Code confines manslaughter to non-intentional homicide. A person convicted of manslaughter is not a murderer. He or she did not intend to kill someone. A person has been killed through the fault of another, and that is always serious. But by the very act of calling the killing manslaughter the law indicates that the killing is less blameworthy than murder. It may arise from negligence, or it may arise as the unintended result of a lesser unlawful act. The conduct is blameworthy and must be punished, but its stigma does not approach that of murder.
>
> To put it another way, the stigma attached to manslaughter is an appropriate stigma. Manslaughter is not like constructive murder, where one could say that a person who did not in fact commit murder might be inappropriately branded with the stigma of murder. The stigma associated with manslaughter is arguably exactly what it should be for an unintentional killing in circumstances where risk of bodily harm was foreseeable…
>
> It would shock the public's conscience to think that a person could be convicted of manslaughter absent any moral fault based on foreseeability of harm. Conversely, it might well shock the public's conscience to convict a person who has killed another only of aggravated assault – the result of requiring foreseeability of death – on the sole basis that the risk of death was not reasonably foreseeable. The terrible consequence of death demands more. In short, the mens rea requirement which the common law has adopted – foreseeability of harm – is entirely appropriate to the stigma associated with the offence of manslaughter. To change the mens rea requirement would be to risk the very disparity between mens rea and stigma of which the appellant complains.[173]

In step with the breadth of the offence, the sentences for manslaughter are flexible:

penalty: Geoff Hall *Hall's Sentencing* (looseleaf ed, LexisNexis) at [I.5.9(a)(ii)]

[173] The last sentence appears to mean that if manslaughter was recalibrated to require foresight of death, the stigma would come very close to that of murder.

> An unintentional killing while committing a minor offence, for example, properly attracts a much lighter sentence than an unintentional killing where the circumstances indicate an awareness of risk of death just short of what would be required to infer the intent required for murder. The point is, the sentence can be and is tailored to suit the degree of moral fault of the offender.[174]

93. This, it is submitted, puts the issue of stigma in its proper perspective. A manslaughter conviction does not unfairly stigmatise those who plan or join a violent attack and death results, albeit in a manner that may not have been foreseen. Culpability will be reflected in the punishment.[175]

94. The objectives of deterrence and accountability for death were also important in *Creighton*:

> …the need to deter dangerous conduct which may injure others and in fact may kill the peculiarly vulnerable supports the view that death need not be objectively foreseeable, only bodily injury. To tell people that if they embark on dangerous conduct which foreseeably may cause bodily harm which is neither trivial not transient, and which in fact results in death, they will not be held responsible for the death but only for aggravated assault, is less likely to deter such conduct than a message that they will be held responsible for the death, albeit under manslaughter not murder. Given the finality of death and the absolute unacceptability of killing another human being, it is not amiss to preserve the test which promises the greatest measure of deterrence, provided the penal consequences of the offence are not disproportionate. This is achieved by retaining the test of foreseeability of bodily harm in the offence of manslaughter.[176]

Reserving manslaughter for "serious" violence

95. Around the time that *Creighton* was decided, the High Court of Australia arrived at a different outcome by addressing the degree of danger required for manslaughter. In the United Kingdom, Canada and New Zealand, an unlawful act manslaughter requires death to be caused by an objectively dangerous act – i.e. one that is likely to cause at least some (more than trivial) harm.[177] This means that a person may potentially be convicted of manslaughter for an act which was neither intended nor likely to cause death, a situation the High Court

[174] *R v Creighton*, above n 73, at 48: **BOA, Tab 3.**

[175] See, for example, *Solicitor-General v Kane* CA 154/98, 23 September 1998, where it was said at p 9: "The loss of a life is invariably serious. As indicated many times over in the judgments of this Court, the sanctity of life is a fundamental value and society demands that the taking of a life be met with the appropriate condemnation. But, again, what is appropriate by way of sentence must be related to the circumstances of the particular offence and the particular offender. Recognition of the sanctity of life and the expression of society's condemnation at the taking of life is not necessarily reduced if the particular circumstances warrant a more lenient sentence than might otherwise be thought appropriate."

[176] *R v Creighton*, above n 73, at 56: **BOA, Tab 3.**

[177] *R v Lee* [2006] 3 NZLR 42 at [137]-[138]: **Appellant's Authorities, Tab 5, p 182**.

disfavoured in *Wilson v The Queen* (a one-punch killing case).[178] The High Court did not adopt a threshold of grievous bodily harm or the risk of inflicting really serious harm, as that would bring manslaughter "perilously close to murder in this respect". Instead, the Court held that the act must be one which exposed a person to an appreciable risk of "serious harm", as judged by a reasonable person.[179] "Cases of death resulting unexpectedly from a comparatively minor assault… will be covered by the law as to assault."[180]

96. The minority considered that modifying the dangerous act standard would expose a gap in the law, which would inevitably require filling:

> One principle which stands higher than all others in the criminal law is the sanctity of human life. If manslaughter by an unlawful and dangerous act were limited to cases where the act in question exposed another or others to grievous bodily harm, there would be a need for the law to hold at the same time that, where a person deliberately and without lawful justification or excuse causes injury to another which is not trivial or negligible and that other dies as a result, the crime of manslaughter is committed. There would be a need because the law does and should regard death in those circumstances with gravity.[181]

97. Vindicating that remark, the Victorian legislature modified the *Wilson* test in 2014 by confirming that a "one punch" killer acts dangerously for the purposes of manslaughter.[182] Western Australia,[183] Queensland[184] and the Northern Territory[185] have created statutory offences which cover, in various ways, the situation in which assault has caused death.[186]

98. The *Wilson* "serious harm" threshold might be seen as a "half-way house" between the traditional "some harm" threshold for dangerousness and a

[178] *Wilson v R*, above n 171: **Appellant's Authorities, Tab 37.**

[179] The case originated in South Australia, where the elements of manslaughter were defined by the common law.

[180] *Wilson v R*, above n 171, at 334: **Appellant's Authorities, Tab 37, p 1084.**

[181] At 334: **Appellant's Authorities, Tab 37, p 1084.**

[182] Crimes Act 1958 (Vic), s 4A (inserted 2014). Andrew Hemming "Please mind the gap: An assessment of fatal "one punch" provisions in Australia" (2015) 39 Crim LJ 130: **BOA, Tab 26**. In New Zealand, one punch manslaughters typically attract starting points of five to six years' imprisonment. *Blackler v R* [2019] NZCA at [27].

[183] In 2008, Western Australia replaced s 281 of the Criminal Code (WA) with s 12 of the Criminal Law Amendment (Homicide) Act 2008 (WA). This is an assault causing death provision with a maximum penalty of ten years imprisonment. A person may be criminally responsible even if they do not intend or foresee death and even if the death was not reasonably foreseeable.

[184] In 2014, Queensland inserted s 314A of the Queensland Criminal Code 1899 (QLD). This is an offence of unlawful striking causing death with a maximum sentence of life imprisonment. It excludes the defence of accident.

[185] In 2012, the Northern Territory inserted s 161A of the Criminal Code Act (NT) by s 4 of the Criminal Code Amendment (Violent Act Causing Death) Act 2012. This is a strict liability "violent act causing death" offence with a maximum penalty of six years imprisonment.

[186] In 2020, the New Zealand Government successfully resisted a private member's "Coward Punch" Bill on the grounds that the law of manslaughter adequately covered such situations. (17 June 2020) 746 NZPD 18681 (Crimes (Coward Punch Causing Death) Amendment Bill – First Reading). The negative vote is at 18694.

"foresight of death" mens rea requirement. But the experience in Australia suggests that a move in this direction accomplishes little more than a change in terminology. If the lower end of the manslaughter spectrum is removed, it merely creates the need for ad hoc statutory replacements to fill the "gap" created. As foreseen in *Creighton*, the law of assault is usually insufficient to mark a death caused by intentional bodily harm.

Requiring foresight of the type of violence that caused death

99. *R v Hartley* exemplifies this approach. Four men drove around Wanganui and assaulted other men on three separate occasions. On the second occasion, one of them pulled out a knife and killed a person. There was no evidence that Hartley knew of this knife before it was produced. He was convicted of manslaughter as a s 66(1) party.

100. The Court of Appeal allowed his appeal, quashing the manslaughter conviction and substituting a conviction for common assault. Although it directly concerned s 66(1), subsection (2) was referred to as if it required foresight of death: it was "available to deal with those cases where death is the probable consequence of the common enterprise whether specifically intended or not."[187]

101. In effect, the Court of Appeal considered the concept of unlawful act manslaughter was too broadly drawn when applied to parties. There must be "questions of degree" when death was caused by an unknown weapon, and it must be accepted there were "extreme circumstances" in which liability for manslaughter is inappropriate - "the question is how those extreme cases can be differentiated from cases like the present."[188] The Court regarded knowledge of the knife "a convenient proxy for the need for the Crown to prove under s 66(1) that the appellant aided or abetted etc in respect of offending of the type which actually occurred."[189] The unexpected use of a knife was likened to a "supervening event".[190] *Renata* was explained as a case in which death was

[187] *R v Hartley*, above n 66, at [54]: **Appellant's Authorities, Tab 19, p 640**. Though see *Pahau*, above n 170, at [49]-[50]: **BOA, Tab 20.**
[188] *R v Hartley*, above n 66, at [17]-[19]: **Appellant's Authorities, Tab 19, p 634-635**.
[189] At [19]: **Appellant's Authorities, Tab 19, p 635**.
[190] At [54]: **Appellant's Authorities, Tab 19, p 640**.

caused by the type of violence the parties contemplated (no weapons involved); the language of *Rapira* was confined by the fact that, in that case, there was a common purpose to use weapons.

102. It is doubtful that the thinking in *Hartley* survives intact some later developments in the law:

    102.1 In *Edmonds*, *Renata* was cited for the proposition that "very little mens rea" was needed for a party to manslaughter under s 62(1).[191] It was not suggested that this was true only when death was caused by the kind of violence foreseen. There is now no "stand-alone" requirement of knowledge of a weapon under s 66(2).

    102.2 *Jogee* has removed the English law relied on in *Hartley*. *Chan Wing-Siu* was a "wrong turn" and the "fundamental difference" rule no longer applies in the United Kingdom.

    102.3 Post-*Jogee*, the unexpected use of a knife in a *Hartley* situation would probably not qualify as a supervening act.

103. In group violence situations, it may not be possible to prove who used the knife and who knew of the knife.[192] If knowledge of a weapon is used in a *Hartley* way to exclude manslaughter, this may have the unpalatable consequence that a victim's death passes unmarked by any conviction for the homicide. This is also a potential problem with restricting manslaughter to cases of "serious" violence under both subsections.

Simplicity of jury directions

104. It is "essential for cases involving party liability to be put to juries in a way which is as simple, and in language which is as concrete, as possible."[193] Explaining party liability in accordance with the established principles of manslaughter provides a simple framework for assessing mens rea and harm elements. In *Creighton*, this was seen as another reason to retain the bodily harm test:

[191] *Edmonds v R*, above n 4, at footnote 22: **Appellant's Authorities, Tab 1, p 16.**
[192] As was the case in *R v Miazga*, above n 77, at [12]: **BOA, Tab 6.**
[193] *Ahsin v R*, above n 66, at [241] per William Young J: **Appellant's Authorities, Tab 16, p 540**.

> Finally, the traditional test founded on foreseeability of the risk of bodily harm provides, in my belief, a workable test which avoids troubling judges and juries about the fine distinction between foreseeability of the risk of bodily injury and foreseeability of the risk of death – a distinction which, as argued earlier, reduces to a formalistic technicality when put in the context of the thin-skull rule and the fact that death has in fact been inflicted by the accused's dangerous act. The traditional common law test permits a principled approach to the offence which meets the concerns of society, provides fairness to the accused, and facilitates a just and workable trial process.

105. Positing an intermediate standard of harm, such as the half-way house of "serious harm", invites a new layer of definitional uncertainty. Juries would need to locate the conduct below foresight of death and foresight of grievous bodily harm, but above harm that is transitory or trivial.

106. The appellant proposes even finer distinctions. Agreed fact 8 reads:

> Mr Waho, Mr Sim and Ms Cook were convicted of being parties to causing grievous bodily harm to Mr Heappey, with intent to injure him. Their involvement related to their actions to locate Mr Heappey and 'punish' him for his disrespect to the gang with a physical beating or 'hiding'.[194]

107. Throughout the trial, the defence position was that Mr Burke's liability was at the same level as the other three, and he would have pleaded guilty to the same grievous bodily harm offence.[195] The Court refused a defence request to direct on an additional included offence of being a party to causing grievous bodily harm with intent to injure (a course prohibited by s 110 of the CPA).[196]

108. The appellant maintains that none of this implies acceptance of a plan to inflict "serious" violence. This is hard to reconcile: grievous bodily harm means "really serious harm" and the Sentencing Act 2002 treats s 189(1) of the Crimes Act as a "serious violent offence". It seems the appellant pitches the level of violence in this case below "grievous" harm and below some alternative notion of "serious" harm.

109. This is novel and confusing. And it is unnecessary. It leaves a gap at the lower levels of culpability which is currently fairly and proportionately met by New Zealand sentencing law. There should be a simple formula involving mens rea for the underlying offence and the "some harm" test for dangerousness,

[194] Agreed fact 8, **CA COA 127.**
[195] **CA COA 184 and 186** (Defence opening); **CA COA 282** (Defence closing); **CA COA 334** (Summing up of Osbourne J at [155]).
[196] **CA COA 250-252**.

applicable to both s 66(1) and (2). This is no more than the combined effect of *Renata* and *Rapira*, and it mirrors *Jackson* – evidently a serviceable approach in Canada for the last 30 years at least. It would remove the kind of complexities seen in the directions for this case.

Section 243 of the Criminal Procedure Act 2011

110. The "mean hiding" in this case was the kind of violent retribution which binds criminal gangs and also makes them formidable instruments of crime.

111. In the Court of Appeal, Mallon J considered that a manslaughter verdict was inevitable on the facts, even if the jury must be sure, under s 66(2), that Mr Burke knew it could well happen that Mr Heappey would die.[197] There was no injustice in a manslaughter conviction.[198]

112. A conviction would also have been inevitable if the s 66(1) direction required mens rea for the underlying assault and had not stipulated (erroneously, it is submitted) that the jury must be sure that Mr Burke intended to aid Mr Webber in stabbing the victim.

113. A "serious harm" threshold applied to either subsection would inevitably be found satisfied on these facts as well.[199]

The meaning of "probable consequence" in s 66(2)

114. This issue was not the subject of decision in the Court of Appeal and formed no part of the appellant's case there, or in this Court. Despite this, the interveners submit it gave rise to error in the interpretation of s 66(2). No leave to raise the issue was sought or granted.

115. It is not clear to the respondent that this initiative lies within the grant of leave. For that reason, the response will be stated in summary.

[197] On the basis of the rising anger at Mr Heappey's disobedience, Mr Heappey's violent tendencies, his possession of a knife some hours earlier and the use of methamphetamine.

[198] Court of Appeal Decision [185]: **SC COA at 48**.

[199] In *R v Pahau* (the predecessor of *Edmonds* in the Court of Appeal), the Court invoked a "serious harm" threshold and indicated at [50] that it was unnecessary to prove the other parties carried "any weapon". On the facts "there was sufficient evidence for the jury to infer that likelihood [of serious harm] without also having to infer that the party had actual knowledge of a weapon subsequently used." In any event, the presence of a knife could be inferred from the circumstances: "The starting point is that they were all patched members of a gang which carried weapons." *R v Pahau*, above n 170, at [56]: **BOA, Tab 20.** That is similar to the rationale in *Tas* and *Lanning & Camille* – the deployment of weapons is common in some forms of confrontation and its occurrence cannot be treated as an OSA.

116. In *R v Gush,*[200] the Court of Appeal considered that "probable consequence" meant an event that "could well happen".[201] There were various objections to reading the phrase to mean "more probable that not". As the High Court of Australia had already noted, it would mean, for instance, that liability would be avoided where a killing was within a party's contemplation and their "complicity was clear enough", but "he thought it rather less likely than not that the occasion for the killing would arise."[202]

117. Again, this was to interpret s 66(2) purposively.[203]

118. In *Ahsin*, this Court remarked that the "could well happen" interpretation had been followed in a considerable line of appellate cases.[204] It did not require reconsideration in that case. Likewise, in *Uhrle,* this Court referred to the interpretation while declining an application for leave to appeal.[205] The High Court of Australia adopted the same reading in *Darkan v R*.[206]

119. This Court has twice declined to revisit the *Gush* interpretation. There is nothing to suggest, on the facts of this case, the issue needs to be considered in a different light.

10 March 2023

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M F Laracy / F Sinclair / L C Hay
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant.

[200] *R v Gush* [1980] 2 NLZR 92 (CA)
[201] At 94, line 16.
[202] *Johns v The Queen* (1980) 54 ALJR 166; 28 ALR 155 (reproduced in *Gush* at 95-96).
[203] *Ahsin v R,* above n 66, at [100]: **Appellant's Authorities, Tab 16, p 507-508**.
[204] At [101]: **Appellant's Authorities, tab 16, p 508**.
[205] *Uhrle v R*, above n 143, at footnote 6*:* **Te Matakahi's Authorities, Tab 6, p 139.**
[206] *Darkan v R* [2006] HCA 34, 228 ALR 334: **Appellant's Authorities, Tab 6.**