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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 75/2022
[2023] NZSC Trans 3

JUSTIN RICHARD BURKE
Appellant

v

THE KING
Respondent

Hearing: 20–21 March 2023

Court: Winkelmann CJ
Glazebrook J
O'Regan J
Williams J
Kós J

Counsel: J R Rapley KC, S M Grieve KC, S J Bird for the Appellant
M F Laracy, F R J Sinclair, L C Hay for the Respondent
C B Wilkinson-Smith, A M Simperingham for Criminal Bar Association of New Zealand Incorporated as the Intervener
R J Stevens and E E McClay for Te Matakahi, Defence Lawyers Association of New Zealand as the Intervener

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CRIMINAL APPEAL

MR RAPLEY KC:

E ngā Kaiwhakawā o Te Kōti Mana Nui, tēnā koutou. Ki te mana whenua o tēnei wāhinga o Tūāhuriri, tēnā koutou. Maukatere maunga. Rakahuri awa. Tākitimu waka, tēnā koutou. Anei a James Rapley mātou ko Ms Grieve KC, ko Mr Bird, ngā rōia mō te kaipira, Mr Burke. Please the Court, Rapley, Ms Grieve, and Mr Bird for Mr Burke.

WINKELMANN CJ:

Tēnā koutou.

MS LARACY:

Tēnā koutou, e ngā Kaiwhakawā, ko Ms Laracy māua ko Mr Sinclair, ko Ms Hay, e tū nei mō te Karauna. May it please the Court, Ms Laracy, Mr Sinclair, and Ms Hay for the Crown.

WINKELMANN CJ:

Tēnā koutou.

MR WILKINSON-SMITH:

E ngā Kaiwhakawā, tēnā koutou katoa. Wilkinson-Smith and Mr Simperingham, your Honours, for the Criminal Bar Association as one of the interveners

WINKELMANN CJ:

Tēnā kōrua.

MR STEVENS:

Tēnā koutou. May it please the Court. Stevens and Ms McClay for the interveners Te Matakahi – Defence Lawyers Association of New Zealand.

WINKELMANN CJ:

Tēnā korua. For the, sorry, Defence Lawyers Association?

MR STEVENS:

Yes, your Honour. Te Matakahi, yes.

WINKELMANN CJ:

Thank you. Now, Ms Laracy, is it correct that the victim's family are here today? I understand that they are, and I acknowledge your presence.

Mr Rapley, so as we look at the days ahead, I thought it would be helpful to you to indicate that we intend that – we don't see this matter running for more than a day and a half. I don't know if that coincides with your estimate, but it seems to me it would be perhaps counterproductive for the hearing to proceed for two full days, and we wondered if counsel had organised any kind of time allocations.

MR RAPLEY KC:

We haven't organised any time allocations because we thought – well, I thought two days would be well and truly long enough, but I should've thought we'd take, you know, most of perhaps this morning for the appellant's case.

WINKELMANN CJ:

Yes.

MR RAPLEY KC:

There are two grounds. I will argue the first ground and Ms Grieve will argue the second ground.

WINKELMANN CJ:

Right, so you thought midday?

MR RAPLEY KC:

Yes.

WINKELMANN CJ:

Right, and then –

MR RAPLEY KC:

Perhaps lunchtime. Lunchtime I would've thought. Lunchtime.

WINKELMANN CJ:

That's past this morning.

MR RAPLEY KC:

Yes, sorry.

WINKELMANN CJ:

I'm sorry. You're speaking – some of us are obviously very literal-minded about…

MR RAPLEY KC:

Yes, that's correct.

WINKELMANN CJ:

1 o'clock.

MR RAPLEY KC:

Yes.

WINKELMANN CJ:

I think someone had indicated to the interveners half an hour each? Yes, right, so that would take us to 3.15 which would have the Crown starting this afternoon.

MS LARACY:

Yes, Ma'am. As the Court pleases.

WINKELMANN CJ:

All right, well shall we get underway?

MR RAPLEY KC:

Thank you. So just outlining what I'd like to cover for ground 1. I'm dealing with an overall statement, but I'd like to cover a number of things, in particular, some basic propositions before moving on to the importance of subjective knowledge, and then the actus reus in this case. So I start off with some basic propositions before moving to the importance of subjective knowledge, which is something that the Crown have focused on, the actus reus in this case. Then once that has been established, moving to what Mr Burke had to foresee as a real risk and then look at some examples from cases by going through *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 and *R v Chan Wing Siu* [1985] AC 168 (PC) and *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 245 and *Hartley* and the like.

Then I'd like to, as part of ground 1, discuss with the Court the material difference between grievous bodily harm and lesser violence as encompassed in the common purpose, to then focus on the fact that actual bodily harm, which we say is injury, that actual bodily harm did not cause death, and that will bring into play *Edmonds* and *Hartley* and a discussion of that. Looking at the common law, and then perhaps end on the relevance of pre-*R v Jogee* [2016] UKSC 8, [2017] 1 AC 387 common law. I mention *Jogee* as well.

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So from the outset, can I say that the ground 1, a key point is that Mr Burke's foresight of less serious violence which did not cause death did not constitute foresight of the greater violence which caused death. So since the actus reus of manslaughter under section 160(2)(a) is an unlawful act which causes death, foresight of non-fatal violence, here the physical beating or hiding, was not foresight of an unlawful act which caused death and therefore not foresight of the essential elements of manslaughter.

GLAZEBROOK J:
Can I just check?

MR RAPLEY KC:
Yes.

GLAZEBROOK J:
Let's assume that, and I'm just checking what your argument is, not making a comment.

MR RAPLEY KC:
Yes.

GLAZEBROOK J:
Can I just check if, in fact, he knew about the knife and knew that it might be used –

MR RAPLEY KC:
Yes.

GLAZEBROOK J:
– was that enough, would that have been enough, ie, are you picking up on those cases which say that death was caused by a different and totally different act, which is what I sort of understood from your submissions?

MR RAPLEY KC:
Yes, I am and different type of act.

GLAZEBROOK J:

Different type of act than he was anticipating?

MR RAPLEY KC:

Correct.

GLAZEBROOK J:

So let's assume that he was anticipating just an ordinary fight.

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

And the victim had the misfortune to hit his head on a hard corner and die because of that, what would you say then?

MR RAPLEY KC:

He'll be guilty.

GLAZEBROOK J:

It was the same part of the –

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

Yes, okay, thank you, thank you.

MR RAPLEY KC:

So he foresaw an assault, the type of act, and *the* act that caused death.

GLAZEBROOK J:

Yes.

MR RAPLEY KC:

And therefore he is liable for it and similarly he's –

WINKELMANN CJ:

Sorry, are you saying that if in this scenario if he had planned the assault, agreed the assault –

MR RAPLEY KC:

Yes.

WINKELMANN CJ:

– and in the course of the assault the person has slipped, fallen and hit their head and died, then that would be sufficient for section 66(2)?

MR RAPLEY KC:

Yes, for ground 1.

WINKELMANN CJ:

Yes, so you're not saying that foresight of death is a legal requirement, you're saying it's factual?

MR RAPLEY KC:

So that is our ground 2 which is an alternative argument.

WINKELMANN CJ:

No, can you answer my question, what are you saying on ground 1?

MR RAPLEY KC:

Yes, so on ground 1 I'm saying that Mr Burke, there's the common unlawful purpose, and then the probable consequence offence that occurs. If it's assault and he foresees assault and assault, as in the punch or whatever it might be, causes death, then he would be liable for manslaughter. Similarly, if it's a group attack, as many of the others that we've seen with weapons, and whether it's a knife or a bat or whatever and he knows of those weapons, and –

WINKELMANN CJ:

When you say it's your other ground of appeal, is Ms Grieve going to argue that even in that situation you had to have foresight of death?

MR RAPLEY KC:

Yes.

WINKELMANN CJ:

So that's not your overall case then? I'm just confused.

MR RAPLEY KC:

Well there are alternative arguments and alternative grounds and we –

WINKELMANN CJ:

But I'm not understanding why you have to argue. What Justice Glazebrook said to you is not part of ground 1 is it?

GLAZEBROOK J:

Yes, so I think my understanding was that's what you said that is ground 1.

MR RAPLEY KC:

Yes it is.

GLAZEBROOK J:

It has to be the same type of act that's part of the common purpose that causes death.

MR RAPLEY KC:

Yes, exactly right, as Sir Robin Cooke says in *Chan Wing Siu,* and in other cases, it's the type of act that has to cause death and here –

WILLIAMS J:

It might have been better to argue those in reverse order?

MR RAPLEY KC:

Well –

GLAZEBROOK J:

Yes.

WILLIAMS J:

Anyway we're here now.

MR RAPLEY KC:

All right, well I see the Crown have had that argument as they've reversed them.

KÓS J:

There is an incongruity.

MR RAPLEY KC:

Yes, there is.

KÓS J:

In those two outcomes?

MR RAPLEY KC:

Yes, and so the case which I suggest is for ground 1 is founded on the common law and it's founded on the wording of the statute and is either ground 1 or ground 2 if either of those grounds are upheld things, convictions should be quashed, and I accept that the two arguments are different and alternative.

GLAZEBROOK J:

Yes, perhaps you will need later to say why the conviction should be quashed rather than a retrial on the proper basis on ground 1. Ground 2, of course, is different I think.

MR RAPLEY KC:

Yes, yes, I will. Thank you, I'll deal with that.

GLAZEBROOK J:

And again, sorry, that wasn't a – I didn't mean to make a comment in respect of that, just asking you to –

MR RAPLEY KC:

Address it.

GLAZEBROOK J:

– elucidate a bit more later.

MR RAPLEY KC:

Thank you, thank you. So on ground 1 the basic proposition which is just to sort of establish some ground works is that section 66(2) of course requires foresight of the essential physical and mental elements of the essential facts of the offence and *Ahsin* says that at 102(e) and the offence here is manslaughter and that is a culpable homicide that is not murder so we all know that, section 171, but the actus reus of a culpable homicide is a killing of a human being, section 158, by an unlawful act, 160(2)(a). So the unlawful act must cause death and we know that as well from *R v Myatt* [1991] 1 NZLR 674 (CA) and *R v Lee* [2006] 3 NZLR 42 (CA) and, of course, we'll come to it in a moment but here the unlawful act suggests is the stabbing, which is grievous bodily harm, and that's what I'll move to now, the actus reus in this case. The jury found Mr Webber killed –

KÓS J:

Just before you do that?

MR RAPLEY KC:

Yes.

KÓS J:

You just mentioned *Ahsin* at 102(e) and that raises a point that doesn't really seem to have come up in submissions, which is that there is a difference between the way in which the question trail posed by Justice Osborne asked the question, and the way in which the majority asked the question at 66. So, the majority say that you can have liability for manslaughter under section 66(2) if the unlawful act was known by the secondary party to be a probable consequence for prosecution. The question trail put it differently.

The question trail asks whether Mr Burke knew what Mr Webber knew, so it involves almost a double mental element.

MR RAPLEY KC:

Yes.

KÓS J:

So without asking you to address that point now, I just want to flag that as a question I had because there is a difference between the, the majority upheld Justice Osborne but in different terms.

MR RAPLEY KC:

Thank you.

WINKELMANN CJ:

Actually I should say I think it would help us all if you took us to the question trail because –

GLAZEBROOK J:

He has, I think….

WINKELMANN CJ:

Yes.

MR RAPLEY KC:

So if we go to –

GLAZEBROOK J:

And *Ahsin* actually.

MR RAPLEY KC:

If we go to the question trail and that's in the number 2 Court of Appeal casebook, and if we scroll down, if we go to 346, you'll see it starts at 346 for a murder. If we scroll –

KÓS J:

356 is the page we need.

MR RAPLEY KC:

So if we go to page 348 please and I can hopefully do this with the ClickShare. The first question –

WINKELMANN CJ:

This is murder as an assisting party?

MR RAPLEY KC:

Yes.

KÓS J:

It's 356 Mr Rapley.

WINKELMANN CJ:

I think he wants to start with murder as an assisting party.

MR RAPLEY KC:

That's the first question they must answer of course is: "Are you sure Mr Webber killed Mr Heappey by stabbing him?" The importance there is the stabbing and it has to be, of course, a homicide and then once we move to manslaughter there'll be two alternatives and, as your Honour says, as a joint party under 66(2) as an alternative we have the first question, which is question 16, and the reason I took your Honours to question 1, page 348, is because the unlawful act which caused the death was therefore Mr Webber's stabbing so there can be no other act which…

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……the reason I took your Honours to question 1, page 348 was because the unlawful act which caused the death was therefore Mr Webber's stabbing. So there can be no other act which was suggested as causative of death. The reason I say that and work our way through it, is because the Crown,

I suggest, are wrong to say, in their submissions, paragraph 80, that the planned fight killed the victim. So the Crown say the planned fight killed the victim and they will go on to say, not the unexpected use of a knife by another party, and they say that at paragraph 82, and the Crown also say: "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," and I say no, because the jury found the common purpose was to inflict a mean hiding and were told so. So at 16: "Are you sure there's a shared understanding or agreement to inflict a physical beating or hiding?" and –

WINKELMANN CJ:

Sorry, can you just repeat the sentence you said before? You say no because the jury found…?

MR RAPLEY KC:

That the common purpose was to inflict a mean hiding. So they found him guilty so they've moved past question 16.

WILLIAMS J:

Assuming they're following?

MR RAPLEY KC:

Yes, true. Then 17: "Are you sure that Mr Burke and Webber" –

GLAZEBROOK J:

Did you say you'd moved past it or that's just on the basis of question 16? Sorry.

MR RAPLEY KC:

So on 16, if –

GLAZEBROOK J:

They were just asked about a hiding and they obviously answered that yes?

MR RAPLEY KC:

If they didn't, they would've found him not guilty.

GLAZEBROOK J:

Exactly.

MR RAPLEY KC:

Yes, correct. So they have decided that the shared understanding of common goal was a physical beating or hiding, and that was how the Crown pitched their case and that was what's important, is how it was pitched in relation to Mr Waho, Ms Cook, and Mr Sim for the sentencing and you'll remember I refer to that, or we refer to that in our submissions. But once we move from 16, we go to 17: "Are you sure that Mr Burke and Mr Webber had agreed to help each other and participate to achieve their common goal?" Again these questions were accepted by the defence. That wasn't an issue.

Then 18: "Are you sure Mr Webber's stabbing" – so again, that's the unlawful act that caused death – "was committed in the course of carrying out his and Mr Burke's common goal?" That's temporal, and then they move to the next one: "Are you sure that Mr Burke knew it was a probable consequence of carrying out the common goal that Mr Webber would assault Mr Heappey?" The answer to that, of course, is yes, because that was what they were planning to do. "Are you sure that Mr Burke knew that Mr Webber was in possession of the knife at the time of the assault?" So there's the first question, but then it goes to: "Are you sure that Mr Burke knew that Mr Webber knew" – and that's your Honour's point – "the assault would be dangerous, being likely to cause harm that was more than trivial?" Should have been: "Should have Mr Burke knew that the assault would be dangerous, being likely to cause harm that was more than trivial?"

O'REGAN J:

But that question is only posed if the jury found that Mr Burke knew Mr Webber was in possession of the knife, so that was correct, wasn't it?

MR RAPLEY KC:

That was correct, but then there's an alternative. If he doesn't know –

O'REGAN J:
So you're taking us to 22 now which assumes he didn't?

MR RAPLEY KC:
Yes, correct.

O'REGAN J:
Right.

MR RAPLEY KC:
This is the key: "Are you sure that Mr Burke, despite not knowing that Mr Webber possessed a knife, knew that Mr Webber knew the assault would be dangerous, being likely to cause harm that was more than trivial?" The reason we take issue with that is because the common purpose was going to involve harm that was more than trivial, always.

KÓS J:
We're assuming here, as we have to, I think, for the purpose of this appeal, the jury went down this track as opposed to 66(1). We actually don't know.

WINKELMANN CJ:
We're assuming it because the Judge made that finding in the course of this sentencing.

MR RAPLEY KC:
Yes he did, as the thirteenth juror, yes, yes.

GLAZEBROOK J:
But that more goes to the question of re-trial I think, doesn't it?

WINKELMANN CJ:
Well it also means that this is the pivotal question for our purposes.

MR RAPLEY KC:
Yes.

O'REGAN J:

So this is the key point, isn't it?

MR RAPLEY KC:

Yes, it is, yes, it is Sir and if all 12 of you answered "yes", find him guilty of murder, of manslaughter, and so it's odd because it was posed, were they sure that he had a knife, but even if they weren't sure they were able to continue going through it. So, in the submissions –

WINKELMANN CJ:

That's sort of looking at something like recklessness in 22 is it, whether Mr Burke knew that Mr Webber was reckless?

O'REGAN J:

Well he didn't need to for manslaughter.

GLAZEBROOK J:

And I'm not quite sure what it is.

O'REGAN J:

He just needed to know there was an unlawful act.

MR RAPLEY KC:

No, so it's the knew, knew, correct, yes.

GLAZEBROOK J:

Well you just say that it doesn't, that's not, it's a different – that death didn't result from the foreseen harm which was more than trivial harm.

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

It might have done had the victim unexpectedly knocked his head and died unexpectedly from a one punch scenario?

MR RAPLEY KC:

Yes, and so I say that –

GLAZEBROOK J:

On ground 1 that is?

MR RAPLEY KC:

Yes, so the unlawful and dangerous act, which was a stabbing here, is an infliction of grievous bodily harm, we say, and so the lesser harm of an assault didn't cause death. So as to the directions in the submissions at paragraph 15 we go through that in detail with these questions 1, 16, 17, 18, 19 and 20.

So, paragraph 16 set out some submissions on those directions that the common goal, which a jury found proven, did not encompass serious violence, still less really serious violence, and that was the point that your Honour made earlier and which *Ahsin* and other cases talk about depending on where the common purpose is pitched. If it's pitched lower, which here was an assault, physical assault or hiding, and I think it's really important to remember and put in context this was an intra-gang punishment.

So, in some of these other cases we've seen, whether it's *Edmonds o*r others, they are rival gangs fighting each other where different considerations and factors are likely to occur and as Mr Burke said, and it's really important factually, what we do know is for a $300 debt or dispute, which is trivial in the extreme, and a car and Mr Heappey knew he was going to be given a hiding or assault, and you will have seen in the text messages, and everyone agrees factually, he sent a text message saying he wasn't up for it that night and could he do it another night please, as in could he have his – so it's a discipline and that is very important in this case and Mr Waho, he was originally to go to Mr Waho's house, and Mr Webber was to meet as well, and it was just those two, and we see that from the text, Mr Burke didn't even feature, and, of course, what then happened is we all know tragically is Mr Heappey didn't continue in these, engaging with Mr Waho, and then they looked for him and eventually he was found and Mr Sim brought back to this house. Again factually he was

brought back to a house, as we say, with another gang member, Mr Nicho, and his partner and a baby and another child, and they're all watching TV.
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So, what I'm saying is in these cases where they're having an inter-gang fight is completely different than going to discipline someone at someone's home when the others are having dinner and watching TV and the like. So what's important about that is that that puts in context, I suggest, the common purpose and what was expected, and so that's why when I was talking about the actus reus here, that the Crown tries to conflate the stabbing with the common purpose of a physical beating or hiding, and they're plainly different.

WINKELMANN CJ:
So you say that the jury had to be directed either that he foresaw the use of a knife or some other form of GBH?

MR RAPLEY KC:
Yes.

WINKELMANN CJ:
Taking the kind of zoomed out – he doesn't have to foresee the total detail, but he has to foresee –

MR RAPLEY KC:
The type of offence.

WINKELMANN CJ:
The type of thing.

MR RAPLEY KC:
The type of offence which as, your Honour, Cooke says in *Chan Wing Siu*, says the type of offence. So the type of offence, and as we say in our submissions, if the deceased had survived, then the charge would have been causing

grievous bodily harm with intent to cause grievous bodily harm. So the common –

WINKELMANN CJ:

The essential problem with that, though, that a beating can be GBH.

MR RAPLEY KC:

And that would be the act that causes – the act causes death. So in some of these other cases like *R v Renata* [1992] 2 NZLR 346 (CA), I think it is, where they physically assault the victim and then he dies from physical assault.

WINKELMANN CJ:

Okay, so what would be the direction you say the Judge should have given at 22 if we disregard the fact that you might re-write the whole thing but the critical direction?

MR RAPLEY KC:

Yes. Well –

GLAZEBROOK J:

Is that just a re-wording of question 22 or 16 and 22, is it?

MR RAPLEY KC:

Yes, so 21 also would need to be: "Are you sure that Mr Burke knew that Mr Webber was in possession of a knife at the time of the assault?" At 20 we've got that there.

GLAZEBROOK J:

Or would you have to change the common purpose to GBH or not?

MR RAPLEY KC:

No, because the Crown can –

GLAZEBROOK J:

So, the common purpose can be just a hiding –

MR RAPLEY KC:

Yes, it can.

GLAZEBROOK J:

But the foresight has to be of GBH, is that the…

MR RAPLEY KC:

Yes, yes.

WINKELMANN CJ:

So, can I just ask you the question again? Can you tell us what questions you say should have been asked?

MR RAPLEY KC:

So, the jury were never asked whether Mr Burke foresaw a real risk that Mr Webber would stab Mr Heappey or otherwise cause really serious harm. So, rather than: "Are you sure that Mr Burke knew that Mr Webber" remove the "knew" there "the assault would be dangerous being likely to cause harm, are you sure that Mr Burke foresaw a real risk," so, there's the probable consequence, "a real risk that Mr Webber would stab Mr Heappey or otherwise cause him really serious harm" which is the GBH.

WINKELMANN CJ:

Well, in your own case that would be wrong though, wouldn't it, because there's no other serious harm that caused his death. The stabbing did?

MR RAPLEY KC:

The reason I put that in there, and the Crown are critical of foreseeing a stabbing, but it's not the foreseeing the precise, perhaps, way and this is what others have got concerned about with sort of knowledge of weapon directions, where you know there's a bat and someone pulls out a gun which is the classic, or a knife, or whatever, but it's –

WINKELMANN CJ:

This is not that kind of case.

MR RAPLEY KC:

No.

WINKELMANN CJ:

There's not a kind of an array of weapons?

MR RAPLEY KC:

No.

WINKELMANN CJ:

It's just the knife and nothing else?

MR RAPLEY KC:

And in this case that would probably do.

WINKELMANN CJ:

Because in some cases, for instance, where people are armed with a variety of weapons you might say: “Use a weapon?”

MR RAPLEY KC:

Yes, correct.

KÓS J:

So you're on very slippery ground here though because you have a meth-fuelled enforcer and the Judge finds that your client at least appreciated a distinct possibility he was carrying a knife, how could he not have foreseen the possibility, even putting aside the knife, how could he have not foreseen the possibility of grievous bodily harm? I mean, the common plan wasn’t so precise as we’re going to get from a gentle beating, and you'll hit him twice, and I'll hit him twice, and then we’d send him home, it had always the possibility of getting completely out of hand.

MR RAPLEY KC:

Well, it's subjective foresight and we had ought to have known pre-1961, and some Australian States still have that, and I suggest the Crown want that with their submissions on *Jogee*, and actually say that objectively it's not the defendant's foresight of resulting violence but whether nobody in the defendant's shoes could have foreseen the acts. A reasonable person in Mr Burke's shoes, and invested with his knowledge, would have, and they say that at paragraph 82 and I say that's introducing or re-introducing ought to have known back into the act.

WILLIAMS J:

Well unless you can infer from context and him being in gangs all his life to use his words.

MR RAPLEY KC:

Yes, correct.

WILLIAMS J:

That he certainly knew that because he probably witnessed it happen.

MR RAPLEY KC:

And that's a factual enquiry for the jury. So, here we have he's only been with this gang for a week but as against that, as your Honour says, he's been in gangs all his life. But he also says: "I've been giving hidings all the time when I was in the gang and nothing like this happens. We don't do this to each other. He was going to earn us a living. He was selling drugs for us. What? No one gets killed for $300. This is crazy," and that's why I say there's a difference between an inter-gang two rivals.

WILLIAMS J:

But this was just as much about the command and control structure as it was about the debt, in fact more so?

MR RAPLEY KC:

Except Mr Waho, and as Mr Burke says in his interview, was furious that this had happened. It ruined the gang, it broke them up.

WILLIAMS J:
You mean the killing?

MR RAPLEY KC:
Yes.

WILLIAMS J:
Yes, of course.

MR RAPLEY KC:
And so it seems clear that Mr Waho –

WILLIAMS J:
So you're saying Mr Waho didn't –

MR RAPLEY KC:
He's the president. He didn't authorise that.

WILLIAMS J:
No, of course not but you're using Waho's anger after the event as it indicated that no one expected, is that your point?

MR RAPLEY KC:
Correct, yes, yes.

WILLIAMS J:
And of course the children watching TV (inaudible 10:38:03)

MR RAPLEY KC:
Yes, Mr Waho spoke to Mr Heappey on the phone when Mr Heappey arrived at Mr Sim's place and so the –

WINKELMANN CJ:

But the point is that's not the case you had to meet because he didn't die of the beating, he died of stabbing?

MR RAPLEY KC:

Correct.

GLAZEBROOK J:

Yes, I thought your point was much simpler. The common purpose was a hiding.

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

And that's no more than a hiding. He actually died of the stab wound, that is conceptually different from a hiding, and therefore nothing to do with foresight or anything to do with that because manslaughter, all you need to do is to intend the unlawful act don't you?

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

I mean you don't need to foresee any sort of harm coming from the unlawful act. I mean the unlawful act might be that you don't put your indicator on when you're turning a corner.

MR RAPLEY KC:

Yes, and the unlawful –

KÓS J:

Except the dangerousness gloss the common laws impose so you do have to anticipate at least some harm.

GLAZEBROOK J:

Well if you're driving a car of course you can anticipate there could be some harm but…

MR RAPLEY KC:

Yes, and so you're exactly right, your Honour, it's a short point.

GLAZEBROOK J:

I just thought it was a much simpler point than you're making. Obviously, it's a bit, it's a bit –

WINKELMANN CJ:

It is a simple point. You've confused –

GLAZEBROOK J:

If you've actually got 10 different weapons it becomes a slightly – because you're not going to say you have to anticipate the stabbing, rather than the beating with the baseball bat, so I can –

WINKELMANN CJ:

If I may say Mr Rapley I think you confused it with the GBH edition. I think your point is that –

MR RAPLEY KC:

Stabbing.

WINKELMANN CJ:

It was a stabbing and there was…

MR RAPLEY KC:

Yes.

WILLIAMS J:

I think you were trying to use a principled approach by saying foresight of GBH is the widest the circle can go –

MR RAPLEY KC:

Yes.

WILLIAMS J:

– and you walked yourself into some soggy ground at that point.

WINKELMANN CJ:

Can I ask you, on the subject of soggy ground, I'm still not clear in my mind why you regard your second ground as an alternative – as an additional ground, because it doesn't seem to me it's truly alternative. There's nothing inconsistent about those arguments. You don't, it's an additional point whether the risk of death has to be foreseen also?

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MR RAPLEY KC:

Alternative on the basis if we're in ground 2, that subsumes ground 1. Because if you have foresight of death then necessarily you'll know there's a knife or –

O'REGAN J:

Well, they're alternatives in the sense that you only need to succeed on one of them.

MR RAPLEY KC:

Yes, correct. Sorry, my…

WINKELMANN CJ:

All right, thanks.

GLAZEBROOK J:

And the directions would be different under ground 1 and ground 2.

MR RAPLEY KC:

Yes, yes they would.

O'REGAN J:

So in this case though where the only GBH act was stabbing, you're saying the direction, given the facts of the case, should have been did he foresee there was a substantial risk of a stabbing.

MR RAPLEY KC:

Yes.

O'REGAN J:

Is that your case?

MR RAPLEY KC:

Yes it is.

O'REGAN J:

Right.

MR RAPLEY KC:

Yes it is, and this was a case that required that factually, that's clear, and the Crown conceded at trial that for murder that there needed to be knowledge of the knife.

KÓS J:

Is this an argument that the stabbing was an overwhelming supervening act on the part of Mr Webber?

MR RAPLEY KC:

That's what the Crown are suggesting but my concern with overwhelming supervening act is that's not what the test is in the section 66(2) and has a risk of importing an objective aspect to it –

GLAZEBROOK J:

Well isn't it just the common purpose was to give him a hiding, and he died from a stab wound that wasn't the common purpose? Don't you have to go back to was the common purpose that you give him a hiding and that if necessary you

use the knife, or foresight of a knife perhaps, and I'm not entirely sure what you say the direction should be on the knife, whether knowledge is quite sufficient. It might be in these sort of volatile type circumstances, like I take a gun to a robbery, I don't intend to use it, nobody thinks I will use it, but there's certainly a risk.

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

Seeing you've got it, that you –

MR RAPLEY KC:

Yes you have and so if your common purpose there is a robbery, and you know they're armed, or they've got a gun, then under section 66(2) two or more people form a common intention to prosecute an unlawful purpose, armed robbery, 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 that common purpose, so temporarily during it. If the commission of that offence, and here it's manslaughter, or discharging the firearm it would be. That's what the Australian cases *R v Keenan* [2009] HCA 1, (2009) 236 CLR 397 talks about, that the, what the act that happened was the discharging of the firearm – it's *Gillard v The Queen* [2003] HCA 64, 219 CLR 1, *Gillard* is that case where there was the hitman, and so in the prosecution of the common purpose if the commission reference was known to be a probable consequence of the prosecution of the common purpose, and "known" is subjective, and that's why I say, and as referring to in *Ahsin*, Chief Justice Elias said at 22: "The question of probable consequence is not one for objective assessment after the event but depends on the actual knowledge of each accused when prosecuting the common intention."

So, again, factually there may be disputes, as was pointed out, but that's part of what needs to be done. In *Chan* –

GLAZEBROOK J:

She was in the minority, I think, but I wouldn't have thought that was a controversial proposition.

MR RAPLEY KC:

No, and majority agreed with that paragraph at paragraph 104, footnote 72. No, you're quite right your Honour.

WINKELMANN CJ:

So what else did you want to take us to Mr Rapley, or have you finished?

MR RAPLEY KC:

Well, I don't want to labour the point, but…

O'REGAN J:

The wording of section 66(2), on the basis of this case we're saying the common purpose was to give the hiding, right, and the Crown case is that Mr Burke knew it was a probable consequence of prosecuting the purpose, giving the hiding, that a manslaughter would occur. They just have to prove that it's a probable consequence that manslaughter would occur. It doesn't say anything about how manslaughter would occur, does it?

MR RAPLEY KC:

Yes, and it's interesting that you phrase it that way Sir, because in some of these other cases, and I think it's Professor Smith gives the example, but there's a robbery and robbery and then the probable consequence is a rape. So we say was it a common purpose to the robbery and did the secondary party foresee there'd be a rape. Now for murder we say well did he foresee that there would be a murder, but we don't say here, because it does say the commission of that offence, we don't say "and did he foresee that there would be a manslaughter" because – but that's strictly speaking what is required.

O'REGAN J:

A culpable homicide that didn't have the necessary intent to be murder.

MR RAPLEY KC:

Exactly, and so –

GLAZEBROOK J:

But even on that basis these questions don't answer that.

MR RAPLEY KC:

Exactly.

GLAZEBROOK J:

Sorry, the question trail doesn't ask the jury to answer that question.

MR RAPLEY KC:

You're right, your Honour, and I agree, and so you would say, well, the liability for a culpable homicide requires foresight of the essential physical elements, and essential facts of the offence, which are unlawful –

WILLIAMS J:

Aren't your two propositions connected? He, his common purpose, the common purpose was a hiding.

MR RAPLEY KC:

Yes.

WILLIAMS J:

And a mean one. He didn't buy into a stabbing, right?

MR RAPLEY KC:

Correct, yes.

WILLIAMS J:

Or he could cast it wider, he didn't buy into the use of a weapon.

MR RAPLEY KC:

Yes.

WILLIAMS J:

That would be enough.

MR RAPLEY KC:

Yes it would be.

WILLIAMS J:

Now once he doesn't buy into it, how can he foresee it?

MR RAPLEY KC:

Exactly.

WILLIAMS J:

Isn't that, you know, this is not hard. Your submissions take two sentences.

MR RAPLEY KC:

Yes they do.

GLAZEBROOK J:

Well no, that's conflating the two grounds.

WINKELMANN CJ:

There is something in Justice O'Regan's question which I don't think you've addressed, which is picked up by Ms Tolmie in her article, which is at what level of generality – what is the offence, is it the offence that actually occurs, or is it the category of offence, and that's what you've not responded to that Justice O'Regan was asking you.

MR RAPLEY KC:

Well that's why I tried to suggest it was the type of offence. The type of offence, which would be a grievous bodily harm, because effectively stabbing –

WILLIAMS J:

Yes, that's right, and you've got –

MR RAPLEY KC:

Stuck.

WINKELMANN CJ:

Then you've got –

WILLIAMS J:

You got criticised for doing that too.

WINKELMANN CJ:

But is it against your interests to do that, because isn't your point that it has to be the kind of, something, it has to be something akin to what actually occurred as opposed to just the, you know, the statutory reference.

GLAZEBROOK J:

But I think the difficulty comes where there are three weapons that you know about, and somebody happens to be killed by the baseball bat as against the knife.

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

And you'd concede, I think, in those cases as, as I think the cases would say, that you're actually looking, that there it really doesn't matter which of the weapons was used because if you knew they were available, or even one of them was there. This is not that case.

MR RAPLEY KC:

No it's not.

GLAZEBROOK J:

So it's much simpler.

MR RAPLEY KC:

Exactly, and I agree. So if there was a baseball bat and a knife and a hammer, I would, which (inaudible 10:49:12) I wouldn't be saying he has to know that there will be a stabbing. But once you look –

WILLIAMS J:

Well you wouldn't get very far if you did.

GLAZEBROOK J:

No.

MR RAPLEY KC:

Once you've got weapons –

WINKELMANN CJ:

I think that case is actually one that Justice Asher had.

MR RAPLEY KC:

Yes it was.

WINKELMANN CJ:

It was a multiple weapons, that he directed a knife –

MR RAPLEY KC:

Yes he did, and –

O'REGAN J:

But can we just go back to what a manslaughter had to be, for the principal offender there just had to be an unlawful act of any kind –

MR RAPLEY KC:

Which caused death.

O'REGAN J:

Well, which, and death resulted from it.

MR RAPLEY KC:

Yes.

O'REGAN J:

But the act that the person had to undertake was just any unlawful act. The Crown didn't have to prove any intention or even foresight that death would result from it.

MR RAPLEY KC:

For the principal?

O'REGAN J:

For the principal on a manslaughter charge.

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MR RAPLEY KC:

Correct, but the unlawful act, for the principal the unlawful act wouldn't be an assault, it would be the stabbing, which is why I go back to my GBH.

O'REGAN J:

Well it could have been any unlawful act though couldn't it?

MR RAPLEY KC:

It could have been but it has to be *the* unlawful act because it has to be by –

O'REGAN J:

Well that just goes against the conversation you just had with Justice Glazebrook though. That you're saying it has to be *the* unlawful act that caused death so in the baseball bat and knife case it had to be the knife. That's not right, is it?

GLAZEBROOK J:

No, I think you say the type of – the unlawful purpose was a hiding, wasn't even necessarily a hiding that would result in GBH, and this is only for ground 1 as I understand it?

MR RAPLEY KC:

Yes, yes.

GLAZEBROOK J:

So, there's no question of foresight of death for ground 1?

MR RAPLEY KC:

So that's why I say well there's gradations of assault within our Crimes Act, assault and then grievous bodily harm at the top, of course, and then actual bodily harm which is injury, 189.

WINKELMANN CJ:

Well Justice Cooke addressed this issue, didn't he, and he said the defendant can't take advantage of advantageous circumstances so the fact that there are three weapons available would be an advantageous circumstance you had to prove that he knew there would be a particular weapon.

MR RAPLEY KC:

Yes but –

GLAZEBROOK J:

But if no knowledge of any weapon whatsoever then you say death by a weapon is different from a hiding?

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

That's the simple argument, isn't it?

O'REGAN J:

Yes, but I mean the Canadian cases are against you on that, aren't they? The Supreme Court of Canada said all you had to do, all that had to be – the foresight only needed to be that it was probable that an unlawful act would

occur, full stop, because it wasn't necessary in a manslaughter case for the Crown to prove any foresight of the consequence of the unlawful act.

MR RAPLEY KC:

Yes, and that's *R v Jackson* [1993] 4 SCR 573, yes, and that's ground 2, Ms Grieve's going to deal with but…

O'REGAN J:

But doesn't that affect your argument as well?

MR RAPLEY KC:

So, you still have to foresee though I suggest the unlawful act and that's why the unlawful act here is a stabbing, or the unlawful act is a shooting if you don't know about these weapons, which effectively the unlawful act causing really serious harm which is a factor of my GBH.

O'REGAN J:

But you'd need really serious harm for a murder conviction, you don't need it for a manslaughter conviction.

MR RAPLEY KC:

No, but if he has only foresight of an assault, of course, the assault didn't cause death even though, I mean –

GLAZEBROOK J:

The unlawful act that he agreed to take part in did not cause death. That's the simplest argument.

MR RAPLEY KC:

Yes, that's a –

O'REGAN J:

Yes, but it didn't need to if he had foresight of something else occurring. I don't think we should confuse what the common purpose was and what foresight he had.

MR RAPLEY KC:

Yes, so foresight of a –

O'REGAN J:

The common purpose was the hiding, everybody agrees on that.

MR RAPLEY KC:

Yes.

O'REGAN J:

The question is, did he know that it was a probable consequence of that, that the principal offender would commit the requirements for a conviction of manslaughter.

MR RAPLEY KC:

Yes.

O'REGAN J:

And that was simply performing an unlawful act.

MR RAPLEY KC:

Foresight of a stabbing or foresight of an equivalent type of violence.

KÓS J:

Well let's –

O'REGAN J:

Well that's imposing a different level of proof for the party than the principal.

MR RAPLEY KC:

And I say to that so it should because it's a secondary party who actually doesn't do the act, unlike section 66(1) who aids and abets or assists or hands over the knife, or whatever it might be, and has to intend, because remember section 66(1) was reckless or intention, and we've gone intention, so has to intend that happens. Here Mr Burke could have actually counselled against it

and said, make sure you don't do that, and the cases talk about that, and the articles talk about that, Simester talks about that, so it's agreeing to participate in something with your confederates, but subjectively having foresight that something could well happen, probable consequence, but actually not being involved in it or doing anything active in it in any sense. So, if that's the situation where inchoate liability is being extended, parasitic liability, secondary liability, on foresight alone, then there needs to be some sort of limit, limiter and –

WILLIAMS J:

Well that's why it seems to me that the common purpose is an important factor in –

GLAZEBROOK J:

Yes, that's what I would have thought.

WILLIAMS J:

– the nature of that foresight.

MR RAPLEY KC:

Yes, correct.

WILLIAMS J:

It's going to not be definitive because there will be other circumstances, but it's a good start once you accurately describe what that common purpose is.

MR RAPLEY KC:

And Justice William Young said that in *R v Vaihu* [2009] NZCA 111 and *Edmonds* that if it's pitched low, which it was here, as an assault –

WILLIAMS J:

Then it's much harder to get –

MR RAPLEY KC:

Then it's much harder to get up there and we know it's different from the question trail, because they're saying it's different, the stabbing and the like.

If it's pitched high, which there was an argument about that, and there was a bit during the trial about where they were going to pitch it, or if they're going to say there was a new common purpose formed, or something changed, then it might be harder to establish the common purpose, but easier to establish foresight of the ultimate offence. So –

KÓS J:

Well you keep saying "foresight is the ultimate offence". If we look at the words at section 66(2), which is always helpful, we have the first part of it is concerned with the common purpose, and then each of the other persons is party to every offence committed by any one of them, "if the commission of that offence was known to be a probable consequence." Now that offence in section 66(2), the commission of that offence, is not the offence committed by the primary offender, in the sense of what he is charged with or was being convicted of. The offence here is manslaughter, which is a subsidiary consequence of the unlawful act that killed Mr Heappey. So what has to be appreciated is not necessarily what the offender, principal offender has been charged and convicted of, but rather the offence with which this person is said to be party.

MR RAPLEY KC:

Yes and so the, he has to foresee a culpable homicide.

KÓS J:

Yes.

MR RAPLEY KC:

That is a killing, by an unlawful act, and –

KÓS J:

Well that's the question.

O'REGAN J:

We'll let Ms Grieve make that…

MR RAPLEY KC:

Yes.

WINKELMANN CJ:

So the question you're answering here is whether it's simply the category of offence, manslaughter, or the fundamental nature of the killing that has to be the foresight of?

GLAZEBROOK J:

Well on this argument you don't have to foresee death, it's only on your ground 2 that you say death has to be foreseen? As I understand it.

MR RAPLEY KC:

Yes, correct.

WILLIAMS J:

Here you're talking about use of a weapon, let's say we categorise that as widely as possible, you say the common purpose helps inform foresight. An exception might be, he only bought into a hua of a beating, as they said, but everybody knew that Mr Webber nuts out.

GLAZEBROOK J:

And perhaps that he had a knife.

WILLIAMS J:

Yes.

WINKELMANN CJ:

So if it was just the category of offence, manslaughter, all you would need to say, prove is that they'd agreed to assault him, and that would be enough. Wouldn't it?

GLAZEBROOK J:

Well not on ground 1, you say, because on ground 1 –

WINKELMANN CJ:

No, no –

O'REGAN J:

It's essentially what the Judge directed.

WINKELMANN CJ:

Yes, on Justice O'Regan's analysis it was just a category of offence and all we have to prove is that they, the person, you don't have to prove foresight of death if, on this narrow view, so all you'd have to prove is that they agreed to the assault and he died as a consequence of it.

MR RAPLEY KC:

But he didn't die from assault. In the Crimes Act we've made a distinction –

WINKELMANN CJ:

I know that.

O'REGAN J:

There wasn't an assault. I mean –

GLAZEBROOK J:

No, your argument is that it's different in kind from what was required and foreseen, because what was agreed and foreseen was a hiding, and if he'd died from the hiding, i.e. knocked his head and unexpectedly died, then yes manslaughter, but because it was a different in kind act, a stabbing, then both because that wasn't part of the common purpose, and it wasn't foreseen, that's the end of it.

MR RAPLEY KC:

Yes.

WINKELMANN CJ:

Yes, so what I'm putting to you is the most extreme argument against you which is that all you need, you don't need to foresee the likelihood of death, you don't

need to foresee the likelihood of death, you do not need to foresee the type of act which causes death. All you have to do is foresee that an unlawful act will occur, and then there is death. That's the most extreme version of it.

MR RAPLEY KC:

Yes, and I say that it's not right.

WINKELMANN CJ:

Right.

GLAZEBROOK J:

Sorry, I didn't realise you were putting the most extreme version.

1100

MR RAPLEY KC:

If we go to *Ahsin*. Some examples. In *Davies v DDP* [1954] AC 378, we cite, in the appellant's authorities at 790, and that was where there was a fist fight between youths –

WINKELMANN CJ:

This is at page 790 of the appellant's –

MR RAPLEY KC:

790. So I'll see if I can bring that up. There's an example given here. I just need to find it. Here, it says, in the second paragraph which begins "my Lords", and it says six lines down: "In particular, I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault." So that example, that was endorsed in *Chan Wing Siu*, but that example was given in the *Edmonds* transcript, which we filed, by the Solicitor-General, Mr Collins QC at the time, and *R v Anderson* [1966] 2 QB 110

(CCA) which is another – and so we're saying this is steeped in common law pre-*Jogee* and that's important because *Chan Wing Siu* –

WINKELMANN CJ:
What are you referring us to, Mr Rapley?

MR RAPLEY KC:
I'm now referring to *Anderson.*

WINKELMANN CJ:
What page is that at?

MR RAPLEY KC:
Which is page 299. I'll just see if I can bring that up.

KÓS J:
Davies looks to me as if Lord Simonds is thinking of murder, not manslaughter. It's hard to know what to make of that passage.

MR RAPLEY KC:
Yes, but I would suggest the same would apply because foresight of the act which causes death is required and so I'd say the same principles would apply.

In *Anderson* and *Morris* which is the case where a knife was used, at the bottom –

WILLIAMS J:
Morris did you say?

MR RAPLEY KC:
Yes, it's called *Anderson* –

O'REGAN J:
Anderson and *Morris*.

MR RAPLEY KC:

Yes, *Anderson* and *Morris*, there's two of them.

GLAZEBROOK J:

299, did you say?

MR RAPLEY KC:

Yes, at 299, there's a trial Judge's direction given at the top, and so –

O'REGAN J:

These cases have now all been superseded by *Jogee*, haven't they?

MR RAPLEY KC:

Well –

O'REGAN J:

Didn't *Jogee* say this is old history now?

WINKELMANN CJ:

In England.

MR RAPLEY KC:

Well, it does, yes, it does, but that doesn't mean they're not relevant for us because we have section 66(2) and section 66(2) aligned with –

O'REGAN J:

Yes, but we don't have the common law which talked about only a possibility and the need to stop overcriminalisation. I mean, this is what Justice Young talked about *Ahsin*, wasn't it, that – or in *Edmonds*, I think it was.

MR RAPLEY KC:

Yes, but these are manslaughter cases that I'm taking your Honours to and the common law in *Chan Wing Siu*, and there, joint enterprise, secondary party liability aligned with and was similar to our section 66(2), so even though *Jogee* has changed the law in England, and *Jogee* doesn't apply here as this Court

said in *Uhrle v R* [2016] NZSC 64, (2016) CRNZ 270, I'm not quite sure how to pronounce that, but U-H-R-L-E.

WINKELMANN CJ:

Uhrle.

MR RAPLEY KC:

Uhrle. So I suggest the cases pre-*Jogee* are still important for us and in *R v Anderson* and *R v Morris* which Lord Parker, Anderson and Morris were charged with murder and Anderson was armed with a knife which Morris didn't know about.

WINKELMANN CJ:

This is a murder case?

MR RAPLEY KC:

It is, as was ours, and Anderson was seen punching the victim and at trial the jury were directed they could convict Morris of manslaughter, even if he did not know about the knife, so very similar. They felt satisfied that M took part in the intention and plan to attack, and the Court of Appeal held that where two persons embark, I'm trying to find where that is, on a joint enterprise each was liable for the acts done in pursuance of that joint enterprise and go on to say: "But that, if one of the adventurers went beyond what had been tacitly agreed as part of the common enterprise, his co-adventurer was not liable for the consequences of the unauthorised act," and *Morris*' conviction for manslaughter was quashed.

O'REGAN J:

Can you just tell us where that is in the case?

MR RAPLEY KC:

I'll just have to find that.

WINKELMANN CJ:

Well it starts at 120 I think, 120C: “Mr Caulfield, in his attractive argument…”

MR RAPLEY KC:

Yes. And they review the authorities, Lord Parker does, and 294 - no sorry my mistake - so…

GLAZEBROOK J:

Are you looking at the argument that was put on –

MR RAPLEY KC:

I'm looking for wholly out of –

GLAZEBROOK J:

– basis of the cases at the end of 118 and 119 actually which is 299 and 300?

MR RAPLEY KC:

I was looking for the quote that says “wholly out of touch” which…

WINKELMANN CJ:

Wholly out of touch, were you looking for a quote that says “out of touch?” We should be able to search that. It's at page 120 of the report.

MR RAPLEY KC:

Yes, yes, thank you, your Honour. So, Lord Parker there is going through the case law. He said: “The principal was wholly out of touch with the position today. It seems to this Court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common designed to suddenly form the intention to kill and has used a weapon and act in a way which is no party to the common design could suspect that is something which would revolt of conscience of people today.” 1110

KÓS J:

It's interesting that he explains that later on as being an overwhelming supervening act analysis, which is really consistent with your argument on ground 1, which is it's outside the scope of the common purpose.

MR RAPLEY KC:

Yes, yes, and not foreseen, yes, quite.

O'REGAN J:

But it was also described in *Jogee* as being an extremely, I think the word used was "charitable" view of the fact?

MR RAPLEY KC:

Yes, because there might have been some suggestion he was aware of the knife earlier.

O'REGAN J:

Yes.

MR RAPLEY KC:

Another case that I wanted to take your Honours to if I could and it's *R v Lovesey* [1970] 1 QB 352 (CA), it's an old one that you'll be familiar with.

WINKELMANN CJ:

What page is that?

MR RAPLEY KC:

It's page 805.

WINKELMANN CJ:

805?

MR RAPLEY KC:

Eight zero five, hopefully I've got it right. So before I bring you to – that *Lovesey* is a robbery of a jewellery shop and the jeweller died and in that case there was an invitation to substitute a manslaughter verdict, when that was refused, and

at 805, I'm just looking for where it says where the victim's death, yes, where it says Mr Buzzard, so we're at E, just below: "Mr Buzzard has invited us to consider the substitution on count two of a verdict of manslaughter under section 3 of the Criminal Appeal Act, 1968. It is clear that a common design to use unlawful violence, short of the infliction of grievous bodily harm, renders all the co-adventurers guilty of manslaughter for the victim's death is an unexpected consequence of the carrying-out of that design. Where, however, the victim's death is not a product of the common design but is attributable to one of the co-adventurers going beyond the scope of that design, by using violence which is intended to cause grievous bodily harm, the others not responsible for that unauthorised act."

O'REGAN J:

That's just not correct is it? On section 66(2) the common design is one thing, the other thing is, what did you predict was a likely consequence of carrying out the common design, and this conflates the two of them. This says if it's not part of a common design that's the end of the game, whereas section 66(2) says, the common design can be to commit crime A but if the commission of crime B was known to be a probable consequence then you're liable for crime B.

WINKELMANN CJ:

Do you have an answer to that Mr Rapley?

MR RAPLEY KC:

Yes, yes, so well common design I understand there is wider being referred to as the…

GLAZEBROOK J:

Well if it's unauthorised it's not foreseen, is that the really easy answer?

MR RAPLEY KC:

Yes, the key point of it, yes.

WILLIAMS J:

So if the common design is armed robbery –

GLAZEBROOK J:

Well it might be if –

WILLIAMS J:

– then there are weapons, right?

MR RAPLEY KC:

Correct, yes.

WILLIAMS J:

So, obviously foreseeable?

MR RAPLEY KC:

And they foresee, yes,

WILLIAMS J:

That's the point.

WINKELMANN CJ:

Because there is a reading of section 66(2), isn't there, which is that it's intended to capture everything that is done almost predictably in the course of carrying out the common design. So when you're carrying out a common design which is criminal adventure you know that different things are going to happen, so if it's predictable it's probably going to happen in the course of carrying out the common design, then it falls within section 66(2). So there is a sense in which the common design is critical in shaping what can probably…

MR RAPLEY KC:

Be foreseen or anticipated.

GLAZEBROOK J:

But on a subjective rather than objective basis you say?

WINKELMANN CJ:

Yes.

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

So, it's not what we think might be predictable but what Mr Burke thought was predictable from the common design?

O'REGAN J:

But in this case the common design was the robbery of the jewellery shop.

MR RAPLEY KC:

Yes, it was.

O'REGAN J:

So the question wasn't, shouldn't have been what was the common design, the question should have been, what was known to be the probable consequence of carrying out the common design?

MR RAPLEY KC:

Yes.

O'REGAN J:

Was it murder or manslaughter?

MR RAPLEY KC:

Yes, yes.

O'REGAN J:

So isn't this just asking the wrong question?

WILLIAMS J:

That depends on how you describe the common design. If the common design is robbery of the jeweller's shop with weapons, I mean you have to be accurate about what your common design is, you're not, I wouldn't have thought, articulating a crime, you're articulating the nature of the plan.

MR RAPLEY KC:
Yes.

GLAZEBROOK J:
And then the probable consequence from that, which you concede if the plan is with weapons, then a probable consequence in that it may well happen that somebody uses those.

WILLIAMS J:
Absolutely.

WINKELMANN CJ:
So do you have any comment on that?

MR RAPLEY KC:
Well –

GLAZEBROOK J:
Sorry, you were probably distracted by –

WILLIAMS J:
Should be a time limit on our submissions. Mr Rapley.

MR RAPLEY KC:
In our submissions, when we're talking about *Anderson*, at paragraph 77, I won't go through it, there's a footnote which talks about, it's 118: "Older English cases confusingly use the concept of the 'common purpose' to denote what secondary party is liable for, rather than what secondary party agreed to," and "P's" – principal's – "collateral offence was then conceived as 'falling within' the common purpose."

WINKELMANN CJ:

Is that in a footnote in 299 to *Anderson*?

MR RAPLEY KC:

A footnote in, sorry, my submissions, in our submissions. 118 at page –

WINKELMANN CJ:

Footnote 118?

MR RAPLEY KC:

Yes, footnote 118. Paragraph 76 and 77 talks about the common law cases that we're just going through now, and a reference to Professor Stark talking about *Chan Wing Siu* and the intellectual honesty in it where: "It was no longer pretended that the collateral offence was *within* the common purpose, even conditionally." But our –

WINKELMANN CJ:

I mean, it seems to me that it's not necessarily confusing on what I said before which is that the law says it is within the common purpose, that you intend the probable consequences of your actions, so the common purpose is that you're going to do this and you know that's probably going to happen that these other things are going to happen in the course of doing it, so it's quite easy to say that is within the common purpose.

MR RAPLEY KC:

It's in there, yes.

O'REGAN J:

But, I mean this is why we have to focus on section 66(2), not on the common law.

MR RAPLEY KC:

Section 66(2), yes.

O'REGAN J:

Because the common law is a bit all over the place, and pre – particularly in the cases before *Chan Wing Siu*. So I just think it's a bit of a dangerous game here to ask us to apply this law to section 66(2).

MR RAPLEY KC:

Yes.

O'REGAN J:

Where there isn't any confusion about what the differences between the common purpose and the probable consequence.

MR RAPLEY KC:

What we were trying to do with going back in time to the common law was to look at the different gradations of violence to see how it's developed and for some, for a long period of time, picked up by Sir Robin Cooke in *Chan Wing Siu*, taken into *R v Tomkins* [1985] 2 NZLR 253 (CA) and *R v Hamilton* [1985] 2 NZLR 245 (CA) and others as it went through, and *Edmonds* and *Ahsin* and it's long-standing, and so we've got that there, and to suggest that this principle of party liability, *Ahsin* still endorses *Chan Wing Siu*. It says it's good law and it applies and Sir Robin Cooke talks about –

GLAZEBROOK J:

Do you want to take us to that case? If that's your –

WINKELMANN CJ:

Can I just ask, in *Lovesey*, they declined to substitute the verdict of manslaughter?

MR RAPLEY KC:

Yes, from my understanding, yes. So if we look at *Ahsin*, the point I was just making, and that's at 506, I'll see if that's right, at paragraph 92. I'll just pull that up and hopefully you can see that. Reads that: "The Court of Appeal found support in the description of joint enterprise liability in the judgment of the Privy Council…by Sir Robin Cooke," and it explains: "The principle of party liability

encapsulated in s 66(2) in the following way," and so what I was trying to suggest there was that our section 66(2), even though I take your point about the common law and changes in – it certainly has changed now, at the time, was the same as ours.

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O'REGAN J:

Yes, but that was only clarified in *Chan Wing Siu* and the cases you've been taking us to are prior to that where the confusion reigned.

MR RAPLEY KC:

Sir Robin Cooke in my view, in my submission Sir would be that, you know, gathered that together from *Anderson* and *Lovesey* and *Davies* and brought them together into *Chan Wing Siu*.

O'REGAN J:

Remember that in *Jogee* the Supreme Court said this *Chan Wing Siu* was the wrong turn and the common law was actually completely different.

MR RAPLEY KC:

Yes they did, and they had the luxury of doing that. With the common law we've got section 66(2) so I do say that we can't do what *Jogee* did and shouldn't do that. So I wondered whether, as long as the Court would like me to do it, I was going to address the topic of material difference between GBH and lesser violence encompassed in the common purpose, I'm unsure whether the Court needs to hear me on that or wants to hear me on that.

O'REGAN J:

I think we know that.

MR RAPLEY KC:

All right.

KÓS J:

At some point, Mr Rapley, I want to understand how your argument leaves a distinction here between secondary liability for manslaughter and liability for culpability for reckless murder. If for, in the situation Mr Burke was required to foresee a real risk of death –

WINKELMANN CJ:
That's the second ground.

KÓS J:
Well arising of ground 2 I think.

MR RAPLEY KC:
So if Mr Burke foresaw real risk that he might use a knife, or there might be stabbing –

KÓS J:
And nonetheless continued in the common purpose.

MR RAPLEY KC:
Yes, yes.

KÓS J:
Isn't that 167(b)?

MR RAPLEY KC:
It still has to have the elements for a murder of intentional killing or causing grievous bodily harm, and reckless as to death ensued, and so if it wasn't proved that he foresaw that, and the jury must have found wasn't, then it's not guilty of murder, but if he foresees a GBH, which would – but without that intent of recklessness as to whether death ensued, then he's foreseeing serious violence and therefore he's liable for manslaughter. But if he's only foreseeing –

WILLIAMS J:
Is that you backtracking out of the weapon?

MR RAPLEY KC:

Well no, no, I'm trying to answer this. So the weapon, knowledge of the weapon is knowledge of serious harm, isn't it, serious –

WILLIAMS J:

Yes, but you recall we discussed this in and you were tapdancing on the edge of those two.

MR RAPLEY KC:

I was, and in this case I would suggest that all that would be required is what we talked about earlier, foresaw a stabbing.

WINKELMANN CJ:

Well I find it hard to understand your arguments. You seem to be arguing against your second ground, and is it best just to let Ms Grieve handle that?

MR RAPLEY KC:

Yes.

WINKELMANN CJ:

I'm not quite understanding why you're arguing against your second ground.

MR RAPLEY KC:

What I'm just trying to argue and suggest –

GLAZEBROOK J:

You say at the least he had to foresee a stabbing.

MR RAPLEY KC:

Correct.

GLAZEBROOK J:

And he may have had to foresee death, but it's fine for you, for your –

WINKELMANN CJ:

It's your fallback position, yes, and so the gravamen of Justice Kós' question is probably best answered by Ms Grieve then.

O'REGAN J:

But if he foresaw a stabbing he would have been guilty of murder.

MR RAPLEY KC:

Not if he didn't think he was going to –

O'REGAN J:

Well 14 stab wounds in the chest, I mean…

WINKELMANN CJ:

Well that's 14 stab wounds.

MR RAPLEY KC:

But then he foresees 14 stab wounds so if he foresees a real likelihood of a stabbing, then for murder he has to also have that murderous intent, doesn't he, and he has to foresee –

O'REGAN J:

Well reckless –

MR RAPLEY KC:

– grievous bodily being harm or reckless as to whether death –

O'REGAN J:

Well that's obviously grievous bodily harm, isn't it.

MR RAPLEY KC:

Yes, yes.

O'REGAN J:

So it would be a pretty heroic argument to say I foresaw a stabbing but I didn't foresee that the person who did it was reckless as to whether it was going to kill the person that received it.

WINKELMANN CJ:

But that would be the direction he'd have to foresee, that the act would be done with the relevant intent?

GLAZEBROOK J:

Yes.

MR RAPLEY KC:

Correct, which is what, the direction that was given for this case.

GLAZEBROOK J:

Yes.

MR RAPLEY KC:

So we're just about at the break but if I could just take you to Professor Simester's article which encapsulates our argument for this ground and it's 1136 of the appellant's authorities. So under the heading: "Escalation and the importance of presence" you'll see: "Or perhaps such a case could be manslaughter? So the Supreme Court affirms:" and so this is talking about *Jogee*, this article: "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 be not guilty of murder but guilty of manslaughter" and it goes on to say further down: "But that truth does not permit us to bypass the requirement that secondary parties must have encouraged *the (type of) act that caused death*, and that they must have done so intentionally. Of course, one might argue that an unlawful and dangerous act, sufficient for manslaughter, was included in the greater act of inflicting GBH. *But that lesser act did not cause death*." And so I know that's jumped around a little bit but that's what we're saying here is that the lesser act of assault didn't cause death

and that's the point that the stabbing, the greater act of stabbing, is what caused death. I'm just wondering whether it's an appropriate time for adjournment.

WINKELMANN CJ:
Yes, and will you then hand over to Ms Grieve?

MR RAPLEY KC:
Yes.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.49 AM

WINKELMANN CJ:
Ms Grieve.

MS GRIEVE KC:
Yes, thank you, your Honours. Before I get started, can I just ask whether or not your Honours have received the cases which were filed, some last week and some yesterday? There's *Mitchell v The King* [2023] HCA 5 and *R v Hughes* [2013] 1 WLR 2461, and also the Court of Appeal's decision in *Jackson*?

GLAZEBROOK J:
Yes, we got an email about that.

WINKELMANN CJ:
Yes.

MS GRIEVE KC:
Yes, thank you. So, as your Honours are aware, the second ground is that liability for manslaughter requires the defendant to foresee a real risk of an unlawful killing, and we submit that that approach is grounded in the words of

section 66(2) and is appropriate in terms of wider policy considerations about where to draw the line for common purpose liability in manslaughter cases.

So where a person's formed a plan to do something unlawful, we say that before they should be held criminally liable for an act which they did not do themselves, did not assist in or encourage and might even have discouraged, that they must foresee a risk of death.

So I want to deal with the issues really under two umbrellas. First is the statutory interpretation argument, and that's the wording of section 66(2) and "offence" in that section, and as part of that, I'll go through the *Tomkins* line of authorities, the Australian, Canadian cases, and then the section 168 murder cases here and *R v Rapira* [2003] 3 NZLR 794 (CA) which then flow through into the majority's reasoning. Second, I'll deal with the policy aspects that the majority also refers to here which is essentially the point that why should the secondary party have to foresee death when the principal doesn't have to, and the other aspects about reckless murder and manslaughter blurring that distinction.

So starting with the statutory interpretation point, we say, and this is our submissions at 84 to 86, that the "offence" in the section must mean a culpable homicide. We say that's firmly grounded in the wording of section 66(2), and so the issue is what exactly does that mean in terms of what has to be foreseen for the offence of manslaughter. We say that that has to be the statutory elements of the offence, so that is the actus reus and a mens rea of the principal, and it appears that the Crown accepts that logic as well but says that they prefer a purposive approach and ours is a literal reading. But obviously, as defined, the offence of manslaughter is a culpable homicide, section 171, without any of the murderous intents prescribed by sections 167 or 168, and of course, section 160(2)(a) provides that a culpable homicide must include a killing by an unlawful act.

So we say that that's why, on its plain reading, every element to establish the offence must be foreseen by the secondary party. So that is the actus reus and

the mens rea of the offence committed by the principal with the actus reus including the unlawful act which is the assault but also the consequence, which is the death, because without that, it's not a culpable homicide. So the point that we differ with the Crown on is that we say – and the majority, is that we say that the foresight must be of all of the actus reus, not just the part of the actus reus that the principal must have mens rea for.

KÓS J:

So in that distinction between the question trail and the majority's approach in paragraph 66 that I drew attention to you before, you say the question trail is more right but it's still not correct?

MS GRIEVE KC:

Exactly.

KÓS J:

Yes.

MS GRIEVE KC:

Yes. So Professor Orchard, and it's in our bundle at 1150, I won't take you to it now, but Professor Orchard in 1997 in his *New Zealand Law Journal* article referred to this issue, and you would've seen that that comes up in a number of the cases that are referred to, and he says that it's the apparently clear terms of section 66(2) which seem to require this, or seem to require that before anyone can be a party to either murder or manslaughter, a killing has to be foreseen.

Now, as I've said, the Crown turns this as a literal approach, but what we say is that there's nothing strained or added to the words of the section to get to this. The word that section 66(2) uses is "offence". It doesn't refer to the acts of the principal, for example, which it could have done because it does that in section 160(2)(a). So we say that this must mean that it designates the entire offence, not just the act or the conduct which the principal does, so that – we say that's a clear interpretation on the face of the section and it would take

something pretty clear in terms of Parliament's intent to suggest that only part of the actus reus of the offence has to be foreseen, and –

O'REGAN J:

Well, hang on. You're asking for something more than the actus reus, aren't you?

MS GRIEVE KC:

Not more than the actus reus –

O'REGAN J:

Of the principal?

MS GRIEVE KC:

Of the principal, but not more than the actus reus of the offence and that's where we say that the secondary party position should be different from the principal.

O'REGAN J:

But the actus reus of the offence is intentionally doing an unlawful act, isn't it?

MS GRIEVE KC:

Causing death.

O'REGAN J:

Well that's the consequence of the unlawful act –

MS GRIEVE KC:

Yes.

O'REGAN J:

But it doesn't have to be intended?

MS GRIEVE KC:

Not by the principal.

O'REGAN J:

No.

MS GRIEVE KC:

But we say the secondary party is in a different position from the principal because of 66(2). So the case of *R v Hughes* that I filed, I won't take you to it, but I refer to it briefly at page 2472 paragraph 26.

GLAZEBROOK J:

Paragraph 26?

MS GRIEVE KC:

Paragraph 26. That case involved a statutory provision where causing death while driving uninsured and unlicensed was an offence and the Court had to interpret whether or not causation should be looked at broadly.

WILLIAMS J:

Can you just tell me what paragraph in your submissions please?

MS GRIEVE KC:

Paragraph 26.

WILLIAMS J:

Of your submissions?

MS GRIEVE KC:

Sorry, no, this isn't in my submissions, no.

WILLIAMS J:

Oh, right.

MS GRIEVE KC:

Paragraph 26 of that decision and so the Court looked at that broadly in terms of the causation requirement noting that it is a statute creating penal provision of considerable severity and that an offence creating a form of homicide with

the stigma of a conviction for killing someone falls to be construed with a degree of strictness in favour of the accused. Now, I accept, of course, that that was dealing with causation rather than mens rea as we've got here but I do make the point that we are talking about liability for the killing of someone and so we would expect that if something is to be carved out of what we say is the clear words then that would be done clearly.

Now, the Crown say that the purposive approach of 66(2) is to broaden the net effectively so you've got 66(1) but you broaden the net through 66(2) and the Crown says that it shouldn't impose a higher standard of foresight than the principal crime stipulates. Well we say in response that 66(2) already fulfils that purpose of broadening the net from 66(1), that's the purpose of it, and beyond that this purposive approach seems to be based on the perceived need that the foresight should only be as required by the principal and that there is a need for symmetry between them which we say is not right and I'll come to those points later. But we say if you're looking at the purpose of 66(2) there has to be a balancing between the purpose that you might look at for the crimes more generally covered by the Crimes Act and where you are drawing the line for a secondary party.

So just now going to the New Zealand cases and where this approach comes from in terms of the offence as a culpable homicide *R v Hartley*, a different *Hartley* from the 66(1) case, but *R v Hartley* [1978] 2 NZLR 199 (CA) in 1978, which is page 1015 of our bundle and the relevant points at 1017, that was a gang raid resulting in a killing. The trial Judge directed that the secondary parties could not be found guilty of manslaughter where the principal was found guilty of murder and the Court of Appeal said that: "A jury might still find that although a probable consequence of the common purpose had included culpable homicide there was no anticipation of the killing done with murderous intent" and so manslaughter was open.

WINKELMANN CJ:

Where's that in what number of the…

MS GRIEVE KC:

That's at page 1017 of our bundle.

WILLIAMS J:

Right, there are two Hartleys, tab 33?

MS GRIEVE KC:

Sorry, Sir I don't have –

O'REGAN J:

It's the 1978 one.

MS GRIEVE KC:

Yes, it's the 1978 one.

O'REGAN J:

Page 1017.

MS GRIEVE KC:

Page 1017 and it's – sorry 1016, it's just down the bottom there.

UNIDENTIFIED MALE SPEAKER:

What line?

MS GRIEVE KC:

About line 48: "But if, in a case such as this, murder were proved against the principal offender a jury might still find that although a probable known consequence of the common purpose had included culpable homicide there was no anticipation of a killing done with murderous intent."

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Although a probable known consequence of the common purpose had included culpable homicide, there was no anticipation of a killing done with murderous intent.

WINKELMANN CJ:

That's on 1017?

MS GRIEVE KC:

Sorry, 1016, at the bottom. And then after that we come to –

KÓS J:

Sorry, how is that point for you?

MS GRIEVE KC:

Because it refers to a culpable homicide but no anticipation of a killing done with murderous intent.

KÓS J:

And the next sentence?

MS GRIEVE KC:

In those circumstances it's likely that they could properly be convicted of manslaughter. So there if they foresaw a culpable homicide, ie, a death without murderous intent, it would be manslaughter.

KÓS J:

I see.

O'REGAN J:

It's capable of being read otherwise, isn't it?

KÓS J:

Yes, it is.

O'REGAN J:

That they didn't foresee a homicide.

MS GRIEVE KC:

Potentially, potentially.

O'REGAN J:
Yes.

MS GRIEVE KC:
But that then –

WINKELMANN CJ:
Well, it doesn't exclude that possibility, does it?

O'REGAN J:
No.

MS GRIEVE KC:
Yes, yes, and that's right, if there was something else that they foresaw then it might have been referred to more specifically. That is the earliest reference to this interpretation and then *Tomkins*, and that's Justice Cooke as he was then, which is page 810 at the bundle, and so he refers to section 66(2) quotes at there and then, this is top of the page 810, it says: "Reading that section together with the definitions of 'Crime' and 'Offence' in s 2(1) of that Act and the provisions of s 160 as to culpable homicide, we think the act constituting the offence for the purposes of s 66 is rightly to be seen, simply and broadly, as culpable homicide."

And then he goes on to refer to joint enterprises around line 30 "guilty of the murder if he intentionally helped or encouraged it. He will also be guilty of it if he foresaw murder by a confederate … as a real risk. But if he knew only that at some stage in the course of the carrying out of the criminal plan there was a real risk of a killing short of murder, he will be guilty of manslaughter."

So that is then the terminology that's carried through into the subsequent cases and there was then what we say is a longstanding practice of trial judges directing that foresight of death was required for manslaughter and we've referred to those cases. In the bundle there's *R v O'Dell* CA46/86, 28 October 1986, that's page 1053, *Doctor v R* CA366/92, 20 July 1993, page 1061, there's

then *R v Hirawani* CA134/90 30 November 1990, another case, not in our bundle, that's a 1990 Court of Appeal case, a gang fight where there were manslaughter convictions and it was uncertain who struck the fatal blow, and then *R v Te Moni* [1998] 1 NZLR 641 (CA) and I'll come to *Te Moni* in a bit more detail later because, of course, that's referred to in the majority's decision here and by Justice Mallon in some detail but the point here is that the *Te Moni* case approved the *Tomkins* approach.

O'REGAN J:

So, you're saying these cases all say that what had to be foreseen was a killing?

MS GRIEVE KC:

Yes.

WINKELMANN CJ:

What paragraph of your submissions are those listed at, those cases?

MS GRIEVE KC:

Paragraph 86.

WINKELMANN CJ:

Thank you.

KÓS J:

I confess I have real trouble with the submission, Ms Grieve, in the context of the example given by Justice Glazebrook before which is a general affray with punching and one punch causes the deceased to fall back.

MS GRIEVE KC:

Yes.

KÓS J:

Now if all are involved in the act of punching but there is one identifiable puncher that causes the fatal fall, I'm not certain I see why the others aren't secondarily

liable for manslaughter along with the puncher and, secondly, what happens if he can't identify the fatal puncher?

MS GRIEVE KC:

And this is the point that the Crown raises, of course, and I suppose the first one is, should the secondary party who's part of a plan, not assisting or encouraging because, of course, if you assist or encourage then you're liable for doing that knowingly, but should the secondary party who hasn't done any of those things, can't be seen to have encouraged or assisted, be liable on the same basis and that's why section 66(2) requires foresight which is different from what's required for a principal and for what's required for a section 66(1) party, so it comes down to what we say is a difference in the bases for the secondary liability. So, that's the first point.

In terms of the second point, which you say well you can't identify the principal and, of course, that would be an issue in some cases, but the corollary of that is that you hold everyone liable for manslaughter where they have signed up to a plan to fight or punch and they didn't expect anything else and they didn't assist or encourage in anything else and you can't identify the principal so all of them are liable. So, you might get schoolboys, for example, who decide to go and beat up another rival gang of schoolboys and they all go along and for whatever reason because you go along when you're young and stupid and they don't expect anything more but they are all liable –

KÓS J:

Sure, but I mean the schoolboys is rather emotive. If the schoolboy is identifiable and issues the punch that causes the death –

MS GRIEVE KC:

Yes.

KÓS J:

– then they are down?

MS GRIEVE KC:

Yes, and we say that's manslaughter –

KÓS J:

Absolutely.

MS GRIEVE KC:

– and that's harsh so, yes, that's how it works but we say there should be a differentiation between someone who doesn't do it, doesn't go along with it, doesn't help, in fact they might even say: "Come on, let's get out of here" and someone who either does it and takes the consequences of that or someone who assists. We say that, in principle, it should be a different requirement because you are not the person doing the act causing death.

GLAZEBROOK J:

How do you assist? I don't quite understand this, because we're looking at an affray where everybody is punching and we don't know who administered the fatal punch but they were all punching, so I don't quite understand who's not assisting in that circumstance.

MS GRIEVE KC:

Yes, well that would depend on the evidence, I suppose, about whether assistance under section 66(1) could be established or not but for –

WILLIAMS J:

Well, it's assistance with the necessary foresight under section 66(1).

MS GRIEVE KC:

Yes, yes, and knowledge that they're assisting in the act.

WILLIAMS J:

In that well the necessary intent, yes, which may be problematic but that's a question of fact.

MS GRIEVE KC:

Yes, but for a section 66(2) party there isn't a case of, or there usually isn't going to be evidence that they – because if there is evidence of them knowingly assisting then they would be charged under section 66(1) and it would be easy to establish that. But where there isn't evidence of that, they've only – we're talking about situations where all that can be established against that party is that they have joined a common unlawful purpose to do something unlawful but whatever happened, for whatever reason it escalates, and the question must be, did they foresee it and we say that must be death because otherwise they're liable for manslaughter having agreed to a much lower unlawful act.

KÓS J:

But you say that applies to section 66(1) as well so the principal doesn't have to foresee death but causes it, then goes down –

MS GRIEVE KC:

Yes.

KÓS J:

– but you say under section 66(1) as well as (2) the secondary –

MS GRIEVE KC:

No.

KÓS J:

No?

MS GRIEVE KC:

No, different, a different basis for liability. One is aiding and abetting and one is on the basis of the plan and so and I think it's *Ahsin* –

KÓS J:

But they're only abetting the punch that causes the death?

MS GRIEVE KC:

Yes, yes.

KÓS J:

So, do they need to foresee death and –

MS GRIEVE KC:

No, because foresight doesn't – isn't prescribed by the words of the statute and so it's a judicial gloss on – the mens rea for a section 66(1) party is from the law and, as we see in *Ahsin* set out clearly, it's knowing, knowledge of the act and intention to do the act.

KÓS J:

Which here is to be the punch, not the consequence?

MS GRIEVE KC:

Yes, yes. They're in a slightly different mens rea for them as compared with the principal but they are in the same boat, if you like, that they don't have to foresee the consequence because they are participating in the act.

1210

So, first before I turn to the Australian cases I make the point that there hasn't been any clear sort of exposition about why that reasoning in *Tomkins* and that line of authority is incorrect. It hasn't, as I think Justice Mallon noted, it hasn't been over-ruled or there hasn't been a suggestion that it's been wrongly decided and so then we say the Australian Code States with similar wording support this approach. So, first *Brennan v R* (1936) 55 CLR 253, so the Code States have similar wording to us other than –

WINKELMANN CJ:

Can I just ask you, you said that the footnote, that the list of cases you were referring to was in your paragraph 86 but I don't see it there. I just thought I only asked you because I wasn't wanting to take a note of them all.

MS GRIEVE KC:

Sorry, no, sorry, the 86 is the – paragraph 93, yes. So the New Zealand cases that we deal with, yes, are in 93 but these are the later ones but I think we've referred to –

WINKELMANN CJ:

They're at footnote 141 are they?

UNIDENTIFIED MALE SPEAKER: (12:11:33)

Yes, yes.

WINKELMANN CJ:

Thank you.

MS GRIEVE KC:

So, in terms of the Australian cases, the first one is *Brennan*, that was 1930s, 1936, and that's at page 811 of our bundle. So, that was a robbery of a jewellery store where the caretaker was killed in the course of it. Brennan was the person who stayed outside on watch whereas the other two went in. All three were charged with murder but convicted of manslaughter and the trial Judge had directed that, if satisfied that Brennan was a party to the robbery, it necessarily followed that he was guilty of the offence found against the principals, whether that was manslaughter or murder, and the High Court held that was a misdirection, and whether or not that followed was a jury question about the nature of the plan, and in the course of that case the Court considered both sections 7 and 8 of the relevant Code.

Section 7 is the equivalent of our section 66(1) and 8, and our section 66(2), and at 822 of our bundle, this is the decision of Justices Dixon and Evatt, they refer to, the second paragraph: "Manslaughter is a form of homicide. It cannot be committed unless death is caused and by an unlawful act. Thus, to establish under section 8 that the applicant was guilty of manslaughter, it must appear that among the probable consequences of prosecuting the unlawful purpose upon which the prisoners had resolved was the death of the caretaker." So,

that was then confirmed by later Australian cases including *The Queen v Barlow* (1997) 188 CLR 1, another High Court of Australia case –

KÓS J:

So if that's right the one punch manslaughter couldn't be prosecuted – a one punch death couldn't be prosecuted as manslaughter?

MS GRIEVE KC:

Against the secondary party no.

WINKELMANN CJ:

Under section 66(2)?

MS GRIEVE KC:

Yes, exactly. So, no, it couldn't be so then –

WILLIAMS J:

And there's no way the surrounding people would be caught under section 66(1) you would assume?

MS GRIEVE KC:

Well, if there was evidence of assistance, so and –

WILLIAMS J:

Assistance for what?

MS GRIEVE KC:

Well, assistance in the punishment would have been the act. So in *Brennan* I think because he was in the car waiting outside it also fell to be determined on a section 66(1) basis so he was –

WILLIAMS J:

Right, so aiding in the case that we've been talking about.

MS GRIEVE KC:

Yes.

WILLIAMS J:

The one punch manslaughter, aiding a puncher renders the aider under section 66(1) guilty of manslaughter?

MS GRIEVE KC:

Yes.

WILLIAMS J:

So, is that the answer to the first question Justice Kós asked about whether in these sorts of situations everyone walks?

MS GRIEVE KC:

I think it was the answer to what we say is a distinction between –

WILLIAMS J:

I'm talking about section 66 – well if section 66(2) doesn't catch them –

MS GRIEVE KC:

Yes.

WILLIAMS J:

– does section 66(1) catch those who assist by joining in the punching or keeping guard or whatever?

MS GRIEVE KC:

Yes, it would, if there was evidence of that. So turning to –

GLAZEBROOK J:

What would the evidence be when you just have a melee and everybody's punching, and they've agreed that's what they're going to do? Which I realise is mixing up section 66(2) and section 66(1), but…

MS GRIEVE KC:

Yes, so that would be both – yes. Well, it would either be all section 66(1) parties are joint principals or – and so it would depend on the evidence, but if intentional assistance or encouragement could be established, then you wouldn't need to resort to section 66(2).

KÓS J:

I mean in a way, Ms Grieve, the way Lord Parker put it in one of those cases we were looking at before, it was *Anderson*, about whether the public conscience would be revolted by the consequences. In a way, what we're grappling with here, the question I think is whether there is such a gap, then, in culpability that the public conscience would be revolted by the fact that someone who has participated in something, which has led to the death of a person, simply walks off with a conviction for assault.

MS GRIEVE KC:

I would say there that participation is the keyword, Sir, because if they have participated, yes, then they are a section 66(1) party, but if they have signed up to a different, lower common plan, then they are in a different position, and that's where I say –

KÓS J:

Should they be entitled to expect that the plan will be executed perfectly according to the initial discussion which is probably pretty – it's not going to be, as I said before, let's all give him two punches and send him home.

MS GRIEVE KC:

Yes, and that's where foresight comes in, because that is a question of subjective foresight on the evidence and again, weapons, it's easy because once you've got that or you've got arming up texts or things of that nature, then you could say, well look, it's obvious from the circumstances that that secondary party would have the foresight of that escalation. So we're really talking about the case where you don't have that and you have got a very low common purpose, and you are caught by agreeing to that for a death that you didn't assist with or participate in.

WINKELMANN CJ:

Or foresee.

MS GRIEVE KC:

Or foresee. Yes, and the other point that I should just make, of course, is that the section 66(2) parties, of course, would be dealt – if they can't be convicted of manslaughter on the evidence, they could be convicted to the extent of their foresight of included offences, so assault with intent to injure or injuring with intent, and some of those have significant penalties as well.

KÓS J:

Sure.

WINKELMANN CJ:

So it's not a case of walking free.

MS GRIEVE KC:

No.

O'REGAN J:

But looking at the headnote of *Brennan*, at the end, it said: "But on the evidence the conclusion was open that the applicant aided and abetted the other two…and he knew that included…some" – oh, so yes, that's section 66(1), yes.

MS GRIEVE KC:

It's section 66(1), yes.

O'REGAN J:

So that's your point, sorry.

MS GRIEVE KC:

So that's why I say it's a case which engages both. So moving to *Barlow* –

WILLIAMS J:

Can you remind me, because it's been a while now, directions where you've got joint principals, and no one knows which one, in which the jury is told you don't need to know as long as you're satisfied there's one of them, can you talk to me about that situation where you've got joint principals in the circumstances you were just talking about before?

MS GRIEVE KC:

Yes, so my learned junior has just helped me with that, but –

WILLIAMS J:

I can tell.

MS GRIEVE KC:

So if there are joint parties, sorry, joint principals or parties, and the direction would be that the jury doesn't have to work out who's done what as long as there is a principal –

WILLIAMS J:

As long as there is *a* principal and you're satisfied the others are parties.

MS GRIEVE KC:

Yes, because of course, for section 66 –

WINKELMANN CJ:

(1).

MS GRIEVE KC:

– (1) or (2), there has to be a principal.

WILLIAMS J:

Of course.

WINKELMANN CJ:

And section 66(1) says that you're a party if you're a principal.

MS GRIEVE KC:

Yes.

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KÓS J:

So that would mean in the melee situation that you're certain that one of the defendants is the puncher?

MS GRIEVE KC:

Yes, yes. So, yes, or one or other, you might have alternative, yes.

KÓS J:

Absolutely, but if there's a possibility that the person to deliver the fatal punch isn't in the dock –

MS GRIEVE KC:

Yes.

KÓS J:

– you have a problem?

MS GRIEVE KC:

Yes, potentially.

O'REGAN J:

Is that right? I think as long as there is a principal that's enough, isn't it, it doesn't matter that they're not in the dock?

WINKELMANN CJ:

That's how you direct, yes.

MS GRIEVE KC:

Well, yes, there would have to be a principal –

O'REGAN J:

Well because you don't know whether they're in the dock or not because you don't know.

MS GRIEVE KC:

It doesn't matter, yes, it doesn't matter whether or not the person can be identified, I suppose, is the point.

WINKELMANN CJ:

And that's why section 66(1) says: "Everyone is a party to and guilty of an offence who actually commits the offence or does" et cetera and that's why you direct the jury that it doesn't matter whether they're simply aiding or abetting or did it.

MS GRIEVE KC:

Yes. Right, so now turning to *Barlow* which is the High Court of Australia case 1997, a prisoner was assaulted in jail, suffered injuries from which he died and this was a case where it was alleged that Barlow was not involved in the assault but was part of a common purpose to kill. The three others were convicted of – three other prisoners convicted of murder and Barlow of manslaughter and the issue was whether, when the principal is convicted of murder, whether or not the secondary party can be convicted of manslaughter because Mr Barlow argued that it was murder or nothing. The majority found that he had been properly convicted of manslaughter because the jury were taken to have found that the assault causing death was a probable consequence.

So, again, the Court discussed the meaning of offence in section 8 of the Queensland Code and held at, and this is page 864, so having referred to the trial Judge's direction the Court then said: "Pursuant to this direction, it was open to the jury to convict Barlow of manslaughter if *the striking and resultant death* of the victim were unlawful and were a probable consequence of the plan" and then at page 169 there's a further discussion of that, and that's 869, and this is referring to the meaning of offence in section 8, and this is the second or third paragraph: "The secondary party is deemed to have done an act or made an omission but only to the extent that the act was done or the omission was

made in such circumstances or with such a result or with such a state of mind (which may include a specific intent) as was a probable consequence… Those circumstances, that result and that state of mind are factors which, either together or separately but in combination… define an offence of a particular 'nature'." So then turning to the principal: "Thus the unlawful striking of a blow by a principal offender will constitute an offence the nature of which depends on whether the blow causes bodily harm or grievous bodily harm or death and on the specific intent…" So then interpreting section 8 in this way and applying it to the facts, it was not only the striking of the victim but also the result of death, the absence or justification for which that made the striker guilty and therefore the secondary party further down. Now the Crown in their submissions suggest that there is some uncertainty or retreat from the Australian position. We're unclear exactly –

WILLIAMS J:

Well the question is whether if the principal were guilty of manslaughter. So what happens to *Barlow* then?

MS GRIEVE KC:

If the principal is guilty of manslaughter?

WILLIAMS J:

Yes, because this is relatively easy.

MS GRIEVE KC:

Yes.

WILLIAMS J:

Barlow is getting something lesser.

MS GRIEVE KC:

Yes.

WILLIAMS J:

But if the principal is a manslaughterer, would the same principal have applied?

MS GRIEVE KC:

Well, given this reading of "offence" as including not just the act but its consequences, circumstances et cetera.

WILLIAMS J:

Yes, I mean it's a general proposition, you're right, but it was an easy general proposition given the circumstances. Would it have been stressed –

MS GRIEVE KC:

Yes.

WILLIAMS J:

– if the principal was a manslaughterer?

MS GRIEVE KC:

Yes. It refers to *Brennan* of course which is the earlier case where the others were convicted of murder. Oh, sorry, no, they were manslaughter as well in *Brennan*. All three were manslaughter in *Brennan*. So it follows through and the Court in *Barlow* refers to other cases as well. So that takes me to the Canadian cases which, as your Honours have noted, are against us in terms of the Supreme Court's view, and again, the test there is a partly subjective, partly objective test, "you ought to have known". This is the case where Mr Jackson took a hammer to an antique shop owned by his lover. Mr Davy went with him, and there was a robbery and a murder, both convicted of murder, and varied evidence about the role that Mr Davy had played, but the trial Judge had not adequately directed on manslaughter and the Court of Appeal directed a new trial discussing the issue of what had to be foreseen for manslaughter.

The Court of Appeal held that death had to be foreseen. The Supreme Court overruled that finding that death was not required for manslaughter under their equivalent which is section 21(2). So I'm going to come back to the Supreme Court's reasoning about that, but I want to take your Honours to the

Court of Appeal's reasoning first, and the reason for doing that is I say that it's more elaborate as to the meaning of "offence" and it engages with this argument which the Supreme Court doesn't do. So page 422 of the Supreme Court's decision – sorry, the Court of Appeal's decision.

KÓS J:
Sorry, where do we find this?

MS GRIEVE KC:
This was the additional case that was sent yesterday.

O'REGAN J:
It was emailed in this morning.

KÓS J:
Thank you.

WINKELMANN CJ:
So we have to get our emails up, do we?

MS GRIEVE KC:
So there's letters on the right-hand side, so this is page 422. Half way through (d) where the Court of Appeal says: "…next inquiry. What must be foreseen? Section 21(2) requires foresight of 'the commission of the offence.' The offence of manslaughter in the present context consists of an assault which causes death."

WINKELMANN CJ:
Sorry, I'm just behind you. This is *R v Jackson* (1991) 68 CCC (3d) 385 and Davy? I was busy trying to find your email.

MS GRIEVE KC:
This is *Jackson* sorry.

WINKELMANN CJ:

What page?

MS GRIEVE KC:

Page 422. Sorry, I think on the electronic version, it's 38 of the PDF, if you're looking at that. I have a hard copy.

WINKELMANN CJ:

Right, got it.

MS GRIEVE KC:

So this is the Court setting out the issue. What has to be foreseen for commission of the offence, refers to: "The offence of manslaughter in the present context" – I'm at paragraph (d) and (e) – "consists of an assault which causes death," and the Court refers to a "literal reading" of section 21(2) saying: "Davy would be guilty of manslaughter if he knew or ought to have known that Jackson, in the course of carrying out the…(robbery), would assault Mr Rae and cause his death." Then the Court goes on to discuss that in quite some detail considering the various authorities, and that's over the next few pages.

But at page 424 which will be several pages on, probably 40, is it? 40. This is at (b), paragraph (b) at the top of the page –

GLAZEBROOK J:

What page are you now, sorry?

MS GRIEVE KC:

Sorry, page 424.

GLAZEBROOK J:

Thank you.

MS GRIEVE KC:

And actually it's the last paragraph starting "In my view, once it is established", and I might just ask your Honours to read that, from "In my view, once it is

established", over the page, all the way through to paragraph (e) just to work through the reasoning.

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So the Court here engages in this interpretation as looking at the offence of manslaughter and what is required, the assault producing the consequence, and then goes on to refer to *Brennan* concluding in this case over at page 427G which is the paragraph starting "in summary" the Court of Appeal says: "I am satisfied that s 21(2) speaks in terms of foresight of the probable commission of an offence. The facts which must be foreseen… depend on the definition of the offence… Where that offence is manslaughter, the foresight requirement must relate to both factual components of that crime, the doing of an unlawful act, and the resultant death from that act."

KÓS J:

Is this then establishing a higher or a different – focusing on the actus reus, so is this establishing a different actus reus for a party as opposed to a principal offender in a manslaughter case?

MS GRIEVE KC:

No, so we say it's the same actus reus, the actus reus of manslaughter is comprised of the unlawful act and the consequence causing death but the principal only has to foresee part of the actus reus and we say that that shouldn't be the same for a secondary –

KÓS J:

All right, yes, you're quite right. Does this authority explain why a different mens rea applies?

MS GRIEVE KC:

It does, Sir, and I might –

KÓS J:

Where does it do that?

MS GRIEVE KC:

I might go to that now because – and that is at page 424 and at 428. So at 424, second paragraph, the Court says there: “The opinions expressed in these authorities fail to distinguish between liability based on participation in the actual crime charged (s 21(1)) and liability for incidental crimes in which the party does not participate but which flow from a common unlawful design to which he or she was a party” and then sets out the different premises for the liability there noting that for section 21(2): “There is no participation in the act which caused death but rather foresight that another would commit such an act” and so culpability flows from that foresight.

And then further on discussing the same point at 428, and this is the last paragraph of 428H, the Court acknowledges the inconsistency between the section 21(2) party which is the section 66(2) equivalent and the aider and abettor noting that section 21(2) requires foresight of death whereas the section 66(1) equivalent requires only an intention to assist or encourage bodily harm short of death. “As I have endeavoured to explain, the inconsistency is a product of the different bases on which accessorial liability is imposed” and again referring there to actual participation by the aider and abettor as distinct from foresight which is the basis for section 21(2).

WILLIAMS J:

Well he doesn’t quite come out and say that because that's kind of a description more than a reason but presumably underlying that is that, if you had not directly participated either as principal or the party, then it should be harder to convict you?

MS GRIEVE KC:

Yes, exactly.

WILLIAMS J:

It's a moral call in the end?

MS GRIEVE KC:

Yes, and the Simester articles that we refer to had a talk about that as well, that you might be someone that actually says, please don't do it, stop, but –

WILLIAMS J:

Well, you might not.

MS GRIEVE KC:

You might not, but –

WILLIAMS J:

That's a factual point.

MS GRIEVE KC:

Yes, it is.

KÓS J:

Well, that's a withdrawal, isn't it?

MS GRIEVE KC:

Yes, probably. Probably dependent –

WINKELMANN CJ:

But the Judge's explanation here is really explaining why there's a different statutory scheme because isn't the judge simply relying upon the statutory requirements?

MS GRIEVE KC:

Well…

WINKELMANN CJ:

Or is that not the case? That's how I read it.

MS GRIEVE KC:

I think the Judge is justifying the approach because the Court works through, distinguishes some of the other authorities in Canada, and then talks about

Brennan as justifying the approach and I think this reads as justifying the inconsistency on the basis of the different bases.

WINKELMANN CJ:

I think yes, but since it's based on a statutory interpretation, it must be justifying why the statute imposes a different standard.

MS GRIEVE KC:

Yes, and I suppose that comes down to what we're saying about the academic discussion about why the different standard exists in the statute and where it came from.

WILLIAMS J:

Or how you should read the different standards, because it is perfectly possible to read it the other way.

MS GRIEVE KC:

When you say the other way…?

WILLIAMS J:

Well, the way the Crown advances it. It's certainly possible to read "offence" as if all it does is mirror the offence that the principal must be guilty of. You can read it that way.

MS GRIEVE KC:

But we still say that –

WILLIAMS J:

You say it shouldn't be read that way, but in the end, whether you read it one way or the other, comes down to a call about culpability and deservedness.

MS GRIEVE KC:

Yes, and that's what we say the purposive approach has to take into account. Not just, we're trying to get as many people as we can for manslaughter. It has to be where do we draw the line, because that's what section 66(2) addresses.

WINKELMANN CJ:

Don't you say it can't be read that way? Because the offence is manslaughter, so it has to be manslaughter in two elements –

MS GRIEVE KC:

We do, but we can also see where the Crown is coming from in saying, well, you have to take a purposive approach and of course that purposive approach comes through from the Canadian line of authorities through to the section 168 murder cases in New Zealand where they define the offence narrowly as a murder under section 168 rather than going back to it's a culpable homicide with the intent set out either in section 167, section 168, or the intent – or the rest is manslaughter. So that is probably all I need to take you to on *Jackson*, but I'll just go briefly –

KÓS J:

Apart, perhaps –

O'REGAN J:

I think you need to take us to the Supreme Court.

MS GRIEVE KC:

Sorry, no, I'm about to do that. Sorry, the Court of Appeal in *Jackson*. I'm not going to try to –

WILLIAMS J:

There is that small matter.

MS GRIEVE KC:

Sorry, the Court of Appeal's decision, but I will take you to the Supreme Court's. So that is page 198 of the Crown bundle.

GLAZEBROOK J:

Which bundle, sorry?

MS GRIEVE KC:

The Crown's bundle. So, sorry, the paragraph I'm referring you to is 198. It starts at 185, but it's the last paragraph there which is – and it goes over to the other page, but it's the last paragraph saying – and I'll ask you to read that, last paragraph on that page and the first paragraph of the next page.

GLAZEBROOK J:

Of what page, sorry?

MS GRIEVE KC:

198.

KÓS J:

Well, that's simply reaching the other moral call that Justice Williams identified.

MS GRIEVE KC:

Yes, so –

KÓS J:

Which is justified on, amongst other things, by *R v Creighton* [1993] 3 SCR 3, the consideration that manslaughter has no minimum penalty.

MS GRIEVE KC:

And that's a principal manslaughter case, but then the Court refers here to *The Queen v Trinneer* [1970] SCR 638 as well which applies it to manslaughter.

KÓS J:

Sorry, to a secondary party?

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MS GRIEVE KC:

So a secondary party, to manslaughter, and *Trinneer* is then the one that we see come through in the New Zealand cases so that was a section 168 equivalent case and in fact I might take you to that as well while we're here. So, that's 180 of the Crown bundle.

WINKELMANN CJ:

Sorry, what number of the Crown bundle?

MS GRIEVE KC:

Page 180, and it's the last paragraph at the bottom of that page through to the next paragraph on the following page. So the reference there to the offence is to "murder as defined in s 202", which is the equivalent of our section 168 and the Court there says: "I can find nothing in the words of…" the s 66(2) equivalent "… to support the view that foresight of the victim's death as a probable consequence…" has required, "… an element expressly excluded in the definition of the offence of murder in s 202."

So the criticism that your Honours have probably seen in the cases, which Professor Orchard makes here, is that that is attempting to define murder by reference to sections which really only define mens rea. They don't define the offence of murder because the offence of murder is a culpable homicide just like the offence of manslaughter, and that's again the Orchard article at page 1151 which is his objection and then those points come through –

KÓS J:

Can you take us to that?

MS GRIEVE KC:

Sure, 1151.

O'REGAN J:

That's of your bundle?

MS GRIEVE KC:

Of our bundle. So, over the page Professor Orchard refers to *Brennan* first of all and *Stuart v The Queen* (1974) 134 CLR 426, which are the Australian cases, and then goes on to refer to *Trinneer* and that's in that left-hand column on that page which he then notes is relied on here by the Court of Appeal in *R v Hardiman* [1995] 2 NZLR 650 (CA) and earlier *R v Morrison* [1968] NZLR

156 and he makes criticisms of that and says that the offence referred to is treated as murder as defined in the equivalent of section 168 and this is I'm looking at now the last paragraph of that left-hand column: “The only aspect of murder “defined in” s 168 is the mens rea which will suffice in certain cases… s 168 can apply only where there has been a culpable homicide: even murder “as defined in” s 168 requires the unlawful killing of a human being. For that reason the judgment in *Trinneer* does not answer the objection that the offence of murder cannot be foreseen unless a killing is foreseen.”

Then following that argument through that was made here in the next Court of Appeal case dealing with this which was *R v Tuhoro* [1998] 2 NZLR 568 (CA) and the Court of Appeal addressed those criticisms made by Professor Orchard because appellant counsel there had suggested that *Hardiman* should be revisited and the Court upheld the approach, the earlier *Hardiman* approach based on *Trinneer* effectively using the same approach by defining murder as section 168, having though discussed in quite some detail the policy reasons behind section 168, and so the Court in *Tuhoro* noted that it was departing from the *Tomkins* approach which applied to section 167, but that that approach was appropriate to section 168 murder.

WILLIAMS J:

When was *Tuhoro* decided?

MS GRIEVE KC:

1997.

WILLIAMS J:

We have that, I presume?

MS GRIEVE KC:

That’s –

WILLIAMS J:

I can check for myself if it’s there. It is there.

MS GRIEVE KC:

Yes, 1997. Sorry, 1998 is the Court of Appeal decision, and that is also in the Crown's bundle. Crown's bundle at page 568. Oh sorry, 162. Not even close. So I'll just take you to the passage in *Tuhoro*.

O'REGAN J:

It's actually 162 of the Crown bundle.

MS GRIEVE KC:

Yes, 162, my mistake, Sir. So at page 167 is where the Court – or just 166 and 167, the Court refers there to the *Trinneer* approach and to the criticism, refers to Professor Orchard's views and says that while they "command respect we are of opinion that the construction given… by [*sic*] *Trinneer*… more correctly gives effect to the purpose of both provisions." Then at the end of –

WINKELMANN CJ:

When they say "both provisions", what do they mean by that?

MS GRIEVE KC:

That's my question, your Honour, because –

O'REGAN J:

It's sections 168 and 66(2), yes.

MS GRIEVE KC:

Yes, I presume they mean those two provisions, but they only really deal with the policy underlying section 168, and they refer to that, and then at line 44, refer to – sorry, line 43: "The *Hardiman* construction on the other hand makes such parties liable on a footing equivalent to that affecting principals… under s 168(1)(a). That result is achieved by regarding s 168(1)(a) as deeming the set of circumstances there defined to be a species of murder."

That's what we say is the issue because you can't deem section 168 murder to be a species of murder without first going to culpable homicide, and the Court

in *Tuhoro* notes the competing approaches between *Tomkins* and this approach. This is line 10 of page 171. The Court says: "In *Tomkins* 'the offence' referred to in s 66(2) was seen as culpable homicide whereas the *Hardiman* approach is that the offence is murder within s 168(1)(a)."

So there, it appears the Court is aware of the point and has gone down the *Trinneer*, *Hardiman* path on the basis of the policy reasoning underlying section 168.

WINKELMANN CJ:

Sorry, what line were you at? Is it 171? I was just trying to find the passage you referred us to.

MS GRIEVE KC:

Page 171.

O'REGAN J:

Line 7.

WINKELMANN CJ:

Thank you.

MS GRIEVE KC:

Yes. Then the same approach is taken in *Rapira*, which I'll come to when I discuss the majority's approach, but the relevance of this approach of course is that we say that it carries through the error in definition, and of course, Justice Mallon traverses these cases in some detail in the minority judgment. 1250

Just as an aside, the commentary in *Adams* makes the point clear where it says that this is the commentary to 167, but it says sections 167 and 168 need to be read along with the definitions of "homicide" and "culpable homicide" in sections 158 and 160 and, "it must be borne in mind that nothing can be murder

under section 167 or 168 unless it is a “homicide” as defined in section 158 and a “culpable homicide” as defined by section 160.”

So that then brings me to the majority decision here so I'm just conscious of time, your Honours, I'm probably going to go over the 1 o'clock if –

WINKELMANN CJ:
How much do you think?

MS GRIEVE KC:
Probably half an hour.

WINKELMANN CJ:
Okay.

MS GRIEVE KC:
Depending on the questions. I mean, we've dealt with –

WINKELMANN CJ:
Yes. I think what we’ll do is come back at two but you’ve still got nine minutes to go.

MS GRIEVE KC:
Yes, I'll keep going. So I want to start with the reasoning against us and the majority here at 59 so and dealing – because I'll deal separately with the policy, the section 66(1) and principal point, I'll first try to break down the majority reasoning based on the offence interpretation. So at 59 the majority says the offence is the unlawful act by the principal offender which is an act “likely to do more than trivial harm” and so “… the secondary party need only foresee the risk of an unlawful act… likely to do more than trivial harm.” So we say that that error, same error, underlies the approaches as in the section 168 cases.

WINKELMANN CJ:
What paragraph in there are you at?

MS GRIEVE KC:

Still I'm summarising the effect of 59 but –

WINKELMANN CJ:

59, thank you.

MS GRIEVE KC:

So it says: "A secondary party under section 66(2) is liable for the commission of the offence if that offence was known to be a probable consequence. Where that offence is manslaughter a principal commits it by doing an unlawful act likely to do no more than trivial harm and for the reasons discussed a principal doesn't have to foresee death so –

KÓS J:

If your argument is right, why do we have the qualification "likely to do more than trivial harm"? We can assume that death is more than trivial harm.

MS GRIEVE KC:

Yes, well that qualification is necessary, I suppose, to rule out accidental or de minimis type situations so – but it doesn't –

KÓS J:

Well death is never de minimis.

MS GRIEVE KC:

No but it doesn't – that qualification doesn't change the fact that there will be cases where there is that level of harm, causing death, but that's still quite a gap between – and then there's a gap and, as Mr Rapley has talked about, there's a gap there which we say has to be considered in holding someone liable for manslaughter.

KÓS J:

Well the trivial harm is the common law gloss right?

MS GRIEVE KC:

Yes.

KÓS J:

I'm not sure any more argument is necessary. The gloss wouldn't be necessary if death is part of the required offence.

MS GRIEVE KC:

So that's where we've got to separate it from the section 66(2) party's foresight and the principal so the principal has to do an act that's at least more than trivial harm to be liable but that is the maximum required of the principal.

KÓS J:

No, all they have to do is commit an unlawful act which causes death. Triviality is unrequired. I mean the consequence is plain. Death is more than trivial harm.

MS GRIEVE KC:

Yes, but for the principal to be liable the act has to be objectively dangerous. So that's distinguishing the act that's done from the consequence. So in terms of 59 we say that the error in approach underlies that because it doesn't include the consequence of death and it doesn't engage in the point that the offence is a culpable homicide and, as Justice Mallon says, that omits a central requirement from the actus reus component of the offence that must be foreseen. Now in terms of the majority's conclusions or to get to the conclusion that it gets to there, the majority goes through from 51 onwards to discuss *Rapira* in terms of the foresight required for a section 168 murder and then notes *Rapira* as only applying to section 168 cases. This is paragraph 52. So it refers at 51 to *Rapira* at 22, then says that is only concerning secondary liability under section 168 not 167 –

WINKELMANN CJ:

Sorry?

MS GRIEVE KC:

This is 52 of the majority decision. Then referring to the *Hamilton* and *Tomkins* approach in 53 and then the majority from 54 goes on to reason that the *Tomkins* approach has been changed to something lower than death through applying *Te Moni*. I will go through the steps in that reasoning because it's hard to trace through what the basis is for the majority's conclusion but it appears to come from *Rapira* and then to apply *Rapira* to 167 but distinguish *Tomkins* by saying in *Te Moni* there was a direction which was a lower level of harm which wasn't complained about and that's a comment also referred to in *Rapira*. So if now is a convenient time, your Honours, I can start with *Rapira* when we resume.

WINKELMANN CJ:

Okay. We'll start at two. Everybody we'll start back at two.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.04 PM

MS GRIEVE KC:

Yes, thank you, your Honours. Turning now to *Rapira* which I just want to deal with quite briefly. There the Court discussed first the knowledge required for section 66(2) parties to murder and then that's from paragraph 21 onwards, which is at our bundle page 654, and then the knowledge required for parties to manslaughter from 29 onwards. I'm not going to take your Honours –

WINKELMANN CJ:

Did you say 654?

MS GRIEVE KC:

Yes.

WINKELMANN CJ:

Your appeal bundle?

MS GRIEVE KC:

Yes, yes, our bundle, yes. So that's where *Rapira* there are the headings which helpfully define the Court's discussion first of the knowledge required for a secondary party's murder and then manslaughter. So I'm not going to take you there but I just make the point that in dealing with knowledge required for parties to murder and manslaughter, the Court takes a different approach between the two because the Court refers to murder on the basis of section 168, that's paragraph 22. So taking the *Tuhoro* definition, if you like, and then for manslaughter, the Court does go through the definition as a culpable homicide, that's at paragraph 29, and goes on to say that an unlawful act can include an unlawful assault intended to cause harm which is not trivial, referring to the principal's requirement for manslaughter and then it goes on, the Court goes on at 31 to then interpret "offence" as the plaintiff's act only, sorry the principal's act only, rather than the act and the consequence and that's where we say the approach is incorrect and is inconsistent with the reasoning that I took your Honours to in the Australian cases *Barlow* and of course *Tomkins* and the New Zealand cases as well.

Just in passing I just note that at 22, when discussing the knowledge required for murder, the Court refers to *Barlow* or cites *Barlow* in support after *Trinneer* and *Jackson* and I take that to be an error because *Barlow* doesn't support the approach there so I'm not sure but I think that's incorrect so I just note that because we do rely on the *Barlow* approach.

So then in terms of manslaughter, again the Court in *Rapira* deals with the policy reasons underlying section 168 and goes on to apply the knowledge required of section 168 parties to murder, to manslaughter cases and –

O'REGAN J:

Where do they do that?

MS GRIEVE KC:

This is 33. So 32 onwards and then 33.

WILLIAMS J:

This is still *Rapira*?

MS GRIEVE KC:

Yes. So that's referring to the reasoning in *Hardiman* which was in the end for manslaughter dealt with as a section 66(1) case rather than a section 66(2) case but the Court there goes on to refer to *Tuhoro* and then apply it to manslaughter at 34 and 35. And just lastly on *Rapira* there's a comment at 25 about the trial Judge's direction in *Te Moni* where the Court refers to that direction or in the summing up "a killing with murderous intent" – sorry: "The Judge had directed in terms of knowledge that a killing was a probable consequence: a killing with murderous intent… would make the secondary parties guilty of murder; a killing without that intent but in the course of an enterprise which 'envisaged some degree of violence' would make the secondary parties guilty of manslaughter." That's the *Te Moni* direction and the Court in *Rapira* says: "No complaint was made as to these directions" and that then appears to be the basis for the majority's reasoning here and it's dealt with by Justice Mallon in her judgment so I won't go through it but I make the point that the *Te Moni* case wasn't a case where really on the facts it was an issue as to whether death was foreseen, the focus was on whether or not the common purpose had ended and because the principal was given a loaded gun to go into the bank, on the facts it was never going to be an issue about whether death could be foreseen.

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Now underlying the *Rapira* issue, sorry the *Rapira* reasoning, is also the issue that I've referred to about the, and that we've discussed, about whether or not the foresight should be the same as that required for the principal and the section 66(1) party. So I'll turn now to that because the reasoning from *Rapira* then comes through into the majority's decision here, and that's at 61 and 62 of the majority decision here, referring to section 66(1) parties as compared with section 66(2) parties. So there's reference to nothing in the language of the section requiring a heightened mens rea for section 66(2) parties as compared with section 66(1), and then at 64 regarding the principal, the majority, again

referring to *Rapira* in support, refers to the odd result, echoing the comment in *Rapira* refers to there should be no need for an elevated mens rea comparable to that of the principal. So that echoes *Rapira's* comment about that at paragraph 30. And what we say about this is that there isn't any real engagement either in *Rapira* or in the majority decision about the different bases as between section 66(1) and 66(2) which we say underlie the argument that a section 66(2) party should be required to foresee death as a consequence.

So I just want to take your Honours to some of the – so the academic comment about that, so that's the Simester article at page 1161 of our bundle, so at paragraph 596 it refers to *R v Powell* [1999] 1 AC 1 and then –

O'REGAN J:
Who was this?

MS GRIEVE KC:
This is Professor Simester.

KÓS J:
Which of his articles is this?

MS GRIEVE KC:
This is *The Mental Element in Complicity*, Law Quarterly Review 2006.

WINKELMANN CJ:
And what page is it of your authorities?

MS GRIEVE KC:
1161 and half way through the paragraph 596 there he says: "Complicity by aiding and abetting is also straightforwardly differentiated from joint enterprise in Canada and New Zealand with separate mens rea requirements." It goes on to say that : "If we look back to Fitzjames Stephen's *Digest of the Criminal Law*,

we find that liability for aiding and abetting is distinguished formally from liability pursuant to a common purpose," and he goes on to quote that.

KÓS J:

We all know it's differentiated. That's why there's two subsections, but the different standard you were applying?

MS GRIEVE KC:

Well, what I'm saying is that it's intentionally differentiated because of the different bases for the complicity, liability, and there are comments in *R v Powell* from Lord Mustill –

GLAZEBROOK J:

This is more ground 1, isn't it? Why do you say it applies to ground 2?

MS GRIEVE KC:

It applies to ground 2 as well because there are arguments that just as the principal should not be required to foresee death or any consequence of the act nor should the secondary party, so it applies to both, really.

GLAZEBROOK J:

Sorry, I don't really understand why this commentary applies to saying you have a differential between the principal and the accessory under common purpose.

MS GRIEVE KC:

It just sets out that they are different.

GLAZEBROOK J:

Yes, but –

MS GRIEVE KC:

And that is the starting point for subjective foresight being required in the words of the section.

GLAZEBROOK J:

I'm just having difficulty seeing why this says that – I mean this says they're different but apart from –

MS GRIEVE KC:

Yes, well it traces it back to the –

GLAZEBROOK J:

It just says that if it "commits a crime foreign to the common criminal purpose" which I thought was ground 1.

MS GRIEVE KC:

Sorry, where are you looking at now?

GLAZEBROOK J:

I don't know, that's why I'm asking you where.

MS GRIEVE KC:

Oh, okay. So I'm referring to the section about complicity by aiding and abetting and then referring to Stephen's at differentiating between ordinary principles of accessory liability and joint enterprise liability.

Then goes on over the page, at 1162, to say, refers to: "This is a doctrine of joint enterprise liability, not of complicity by assistance or encouragement. In effect… attributing responsibility on the basis of S's affiliation to a criminal enterprise." So it's making the point that the liability comes from joining the criminal enterprise rather than participating in the unlawful act. Sorry, in the ultimate offence.

So perhaps if I take you to the comments of Lord Mustill in the *Powell* case at page 698. Sorry, 697. So last paragraph of page 697: "Throughout the modern history of the law on secondary criminal liability", he refers to the joint enterprise, and then says: "The problem is to accommodate in the principle the foresight of the secondary party about what the… offender might do," et cetera. Referring to *Anderson* and *Morris*. Then over the page, 698: "Intellectually, there are

problems with the concept of a joint venture, but they do not detract from its… practical worth," et cetera, and if your Honours perhaps just read that paragraph. So he's referring there to the culpability of a secondary party at a lower level than the culpability of the principal who actually does the deed.

O'REGAN J:

But he then decides to agree with the other judges, doesn't he, to the contrary?

MS GRIEVE KC:

Yes. He's not doing away with it, but he is acknowledging the difference between them there.

WILLIAMS J:

It's hard to follow that reasoning anyway and even if he doesn't like it, if he's in on the game, how's that going to help? There are lots of reluctant joint venturers, not just in crime.

MS GRIEVE KC:

Yes, well I suppose it comes down to the fundamental difference we've talked about already which is he's not the person doing the act that is the incidental offence.

WILLIAMS J:

Yes, but in a sense, if he says, I don't like this, please don't do it, and he goes on anyway, he clearly has contemplated the prospect and has kept going.

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MS GRIEVE KC:

Well, I suppose depending on – short of withdrawal, but –

WILLIAMS J:

Yes, well, withdrawal is a whole another thing, but if he clearly knows that this person is capable of doing terrible things, asked him not to, but keeps going.

MS GRIEVE KC:

Yes, but that's the –

WILLIAMS J:

That's foresight, isn't it?

MS GRIEVE KC:

That would be foresight.

WILLIAMS J:

Yes.

MS GRIEVE KC:

That would be foresight.

WILLIAMS J:

Well, isn't that what Lord Mustill was talking about?

MS GRIEVE KC:

I think what he's saying is that foresight is the appropriate test to establish culpability in that situation.

WILLIAMS J:

I thought you were pulling it out and saying that in those circumstances, S would be less culpable.

MS GRIEVE KC:

No.

WILLIAMS J:

Okay, sorry, I misunderstood you.

MS GRIEVE KC:

So the reference by both the majority and the Crown in their submissions referring to the lesser party having a higher mens rea requirement is not right because we say it's not higher mens rea, it's different. It is subjective foresight

of all of the actus reus and that is lower than the intention required for the principal and the section 66(1) party, and that's because it's intended to cast the net more widely for reasons of joint enterprise. But we say that when applied to manslaughter, that it does require foresight of all of the actus reus and it's appropriate that it requires that as distinct from the principal.

KÓS J:

Presumably this has to be a portable argument. There are lots of crimes which have factual elements and consequences wrapped together.

MS GRIEVE KC:

Yes.

KÓS J:

If your argument is right for manslaughter, it must be right for all of those other provisions.

MS GRIEVE KC:

That's right.

KÓS J:

So we'll have to stress-test it by reference to those.

MS GRIEVE KC:

Yes, and I think the example given in the Court of Appeal, by the Court of Appeal in *Jackson* was fraud.

KÓS J:

Yes.

MS GRIEVE KC:

For example. Yes. I'm just conscious of time, so I'll just deal with the issue now of reckless murder which has been discussed already briefly because that's referred to in the Court of Appeal's – the majority judgment at paragraph 60, sorry, and also addressed by Justice Mallon, and we talk about

it at paragraph 104 of our submissions where we say the secondary party might not foresee the exact circumstances of the offence by the principal, or even who the principal might be, but they foresee a risk of escalation resulting in a killing, and it is as described in *Tomkins* and then carried through in that line of authorities where he refers to, Justice Cooke refers to a killing short of murder. So that is, we say, available, and there's a recent High Court of Australia decision of *Mitchell* which we've provided. It's at paragraph 60 on page 26 which refers to this also.

WILLIAMS J:

60 and 66 did you say?

MS GRIEVE KC:

Page 26, paragraph 60.

O'REGAN J:

Of what?

MS GRIEVE KC:

Of a case that was filed last week which I think your Honours have.

WINKELMANN CJ:

Miller.

MS GRIEVE KC:

Miller. Sorry, *Mitchell*, not *Miller*. Page 26, paragraph 60.

WINKELMANN CJ:

This is page 26 of the appellant's authorities?

O'REGAN J:

No, of the case that was filed.

MS GRIEVE KC:

No, it was a supplementary case.

WINKELMANN CJ:

Okay.

KÓS J:

So that's not up on our…

WINKELMANN CJ:

No.

GLAZEBROOK J:

Page what, 60?

KÓS J:

The supplementary, sorry.

MS GRIEVE KC:

Page 26, paragraph 60. That's it. That refers to a participant in a robbery that might foresee very serious bodily harm or death but not that the primary offender would do so with murderous intent noting in that circumstances, even if the primary offender is convicted of murder, a participant can only be convicted of manslaughter.

O'REGAN J:

Yes, but that's not saying that that's a – I mean that's dealing with a different situation, isn't it?

MS GRIEVE KC:

Yes, so –

O'REGAN J:

It's not saying it's a requirement that you predict death?

MS GRIEVE KC:

No, no. No, it's not. I'm not relying on it for that, only to say that there can be circumstances where a secondary party can –

O'REGAN J:

Yes, no, I accept that.

MS GRIEVE KC:

– foresee a killing without appreciating the mens rea of the principal.

KÓS J:

I mean again that rather seems to be against you, that passage. It might foresee –

MS GRIEVE KC:

That's a common law case in Australia so different.

WINKELMANN CJ:

But why are you taking us to it?

MS GRIEVE KC:

Just for the principle, that it's recognised in the authorities that it's possible for a secondary party to foresee a principal acting without murderous – a killing without murderous intent. So just in terms of the –

WINKELMANN CJ:

It's correct – you're saying there is recognition of the gap that Justice Mallon referred to in the authorities.

MS GRIEVE KC:

Exactly. And so, finally, in terms of some of the points that the Crown makes about the need to mark killings by unlawful act with convictions, we just make the point that the approach here doesn't change the mens rea for principals or for aiders and abettors so it's not a case of reserving manslaughter for cases of serious violence only. Those parties will remain liable but section 66(2) parties only through the funnel of foresight or otherwise to the extent of their foresight if they don't foresee death. And setting the bar too low for manslaughter and relying on sentencing leniency is, in our submission, not an answer because

culpable homicide is legal responsibility for someone's death and it shouldn't be attributed to someone who has taken no part in the act causing death unless the foresight requirement is met.

KÓS J:

If this qualification is right and distinguishes section 66(2) from 66(1), it would have been terribly helpful if Parliament had made that more clear and I'm wondering if the absence of clarity on this point is against you.

MS GRIEVE KC:

Well, Sir, I suppose I would come at it from the opposite way and say it would have been clear if Parliament had intended using the word "offence" to exclude a key part of the actus reus, the critical part of the actus reus being the death so –

WILLIAMS J:

Your point is that the lack of clarity if applied more widely over-criminalises?

MS GRIEVE KC:

Yes.

WILLIAMS J:

The criminal offence, particularly a serious one, should be read narrowly?

MS GRIEVE KC:

Yes, yes.

KÓS J:

Although then the question becomes why the same really isn't done in section 66(1). I understand your argument on (1).

MS GRIEVE KC:

Yes.

WINKELMANN CJ:

Well actually section 66(1) has the mens rea element read into it by the law, doesn't it?

MS GRIEVE KC:

That's right.

WINKELMANN CJ:

So, in fact, it's even more is done to section 66(1) than you're suggesting is done here which is just sticking to the language.

MS GRIEVE KC:

That's right.

O'REGAN J:

What is it you're contending for in the appeal? What's the outcome you're looking for? Obviously, setting aside the conviction but what else?

MS GRIEVE KC:

Yes, so seeking that the conviction be quashed.

O'REGAN J:

What about a retrial?

MS GRIEVE KC:

Well we would say that here the jury – it was presented on the basis of the knife or nothing so there wasn't evidence of other serious violence so – and that was the way the Crown presented it, so we would say that without that there wouldn't be a basis for a retrial.

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WILLIAMS J:

There would if the knowledge of the knife is available on the evidential basis we have it.

MS GRIEVE KC:

Yes.

WILLIAMS J:

I realise that Justice Osborne took a different view, but a jury might not agree.

MS GRIEVE KC:

We rely on Justice Osborne's –

WINKELMANN CJ:

But that finding doesn't prevent a retrial being directed, does it?

MS GRIEVE KC:

No, it doesn't.

WINKELMANN CJ:

And what about included charges?

MS GRIEVE KC:

Yes, so Mr Rapley is going to address you on that. So section 192 – section 189(2), injuring with intent, is an option in terms of substituting that conviction.

GLAZEBROOK J:

Can I just go back to the retrial? On ground 1, why do you say there wouldn't be a retrial?

MS GRIEVE KC:

I might leave your Honours to address that to Mr Rapley.

GLAZEBROOK J:

I didn't quite understand why you said not on ground 2, either.

MS GRIEVE KC:

Why there wouldn't be on ground 2?

GLAZEBROOK J:

Yes.

MS GRIEVE KC:

Ah. Well, in terms of the difference, I suppose it's probably the same, actually, for both of them, because if it was knife or nothing, then we would say that without the jury having found that Mr Burke knew of the knife, that there would be no other evidence on which to convict him.

GLAZEBROOK J:

Then you rely on Justice Osborne's surmise that the jury found that he didn't know about the knife, is that…?

MS GRIEVE KC:

Yes, yes. Just in terms of the sentence that Mr Burke has served, so he was sentenced to five years, two months, and he has been in jail since his arrest in December 2018, so he has been in jail already for four years, three months. So he is very close to serving that.

GLAZEBROOK J:

That wouldn't be a reason for not ordering a retrial.

MS GRIEVE KC:

No, I accept that. I accept that, your Honour.

GLAZEBROOK J:

It may be a reason for not conducting a retrial, but…

MS GRIEVE KC:

Unless your Honours have got further questions, those are my submissions.

WINKELMANN CJ:

Thank you, Ms Grieve. So Mr Wilkinson-Smith, are you next up?

MR WILKINSON-SMITH:

Yes. As the Court pleases. So on behalf of the New Zealand Criminal Bar Association as an intervener, we have obviously filed some lengthy submissions but I just want to go and try and stick to that 30-minute period that you've allocated to us.

The broad submission for the CBA is that the current interpretation of section 66(2) potentially over-criminalises people on the periphery to make them criminally liable for the actions of others. So clearly, it is in the interest of justice to reach an interpretation of section 66(2) that properly criminalises people and captures those people but excludes those who are deemed to be too peripheral.

Section 66(2) has a number of component elements, so in terms of widening or narrowing what it captures, a number of those terms can be defined narrowly or broadly to achieve that goal. One of the broader suggestions that the CBA had put forward is that in the same way that mens rea is read into section 66(1), it's not actually in the words of section 66(1), that mens rea could be read into section 66(2) which would give us some consistency with the *Jogee* and post-*Jogee* lines of decisions where the idea of liability for a secondary common enterprise accessory would be an intention to assist, whether or not that intention actually is casually connected. There wouldn't need to be a causal connection but there would have to be a mens rea element of an actual intention consistent with section 66(1) and consistent with what the *Jogee* line of –

WINKELMANN CJ:

To assist with what?

MR WILKINSON-SMITH:

To insist, to assist in the offence actually committed which they'd be liable.

O'REGAN J:

Jogee effectively did away with the common law equivalent of section 66(2).

MR WILKINSON-SMITH:

It did.

O'REGAN J:

And obviously we can't do that with a statute.

MR WILKINSON-SMITH:

No, but it would be in the same way that an intention element, a mens rea element, is read into section 66(1) that could be, if the Court thought it was appropriate as a way of capturing properly criminal activity, be read into that, into section 66(2). So really the submission is that there are a number of aspects or elements of section 66(2) that potentially can be adjusted and it's the accumulation of how it is applied determines whether we are criminalising appropriately, over or under-criminalising.

WINKELMANN CJ:

Is how you achieve what you've just proposed that you take the interpretation of section 66(2) that I mentioned earlier, which is that you find that there is an intent that when the person agreed to the common venture, they're agreeing to carry it into effect, so aiding and abetting, assisting, and they're only liable – and therefore they render themselves liable to everything that is naturally within that common venture, a probable consequence of it or probable effect of it? So, therefore, the aiding/assisting of a common venture attaches to the probable consequences of it – not probable, they are events that they could foresee?

MR WILKINSON-SMITH:

They'd have to not only foresee but intend that they – that they intend to assist and the situation that would intend to – sorry –

WINKELMANN CJ:

Well so you're putting it that high?

MR WILKINSON-SMITH:

Yes, no –

WILLIAMS J:
Under 2?

WINKELMANN CJ:
Under 2.

MR WILKINSON-SMITH:
Yes, under 2 and because it would still cover the situation where, and I give it as the flat tyre scenario, which is a person who joins a common intention, has an intention to assist with a foreseen offence but because of a flat tyre, or for some weird reason, doesn't actually participate in the offence itself but the mens rea aspect which –

WILLIAMS J:
The flat tyre doesn't make it to the bank.

MR WILKINSON-SMITH:
It doesn't make it to the bank.

WILLIAMS J:
Well that's withdrawal by God, isn't it?

MR WILKINSON-SMITH:
Well no they haven't probably gone as far as withdrawal. My submission would be the requirements to withdraw are relatively strict in terms of notifying the others that we no longer wish to but if through some reason, although you intend to participate which would be the mens rea, that's *Jogee*, but in fact you don't, you would still have some liability. Differentiating that from the person who nearly says –

WINKELMANN CJ:
That's a very – leaves section 66(2) sort of as a vestigial kind of provision.

MR WILKINSON-SMITH:
It would –

GLAZEBROOK J:

And it's actually odd to punish for intent as against something you've done so that scenario seems actually worse than somebody who is there raining punches down on somebody.

WILLIAMS J:

Unless they're really hurrying to change the tyre so they can get there and just miss.

MR WILKINSON-SMITH:

Yes, yes, but the additional element that we're asking for, as in *Jogee*, is that they actually formed an intention that they would insist which, on the CBA's submission, is –

GLAZEBROOK J:

But if the common purpose is to give somebody the bash –

MR WILKINSON-SMITH:

Yes.

GLAZEBROOK J:

– then they must have formed the intention to give someone the bash, haven't they?

MR WILKINSON-SMITH:

Yes, but it's an intention to commit the foreseen offence as well so it would be an intention to stab in this case.

WINKELMANN CJ:

So what I –

GLAZEBROOK J:

So you're doing the ground 1, Mr Rapley's ground 1, is it?

WINKELMANN CJ:

No, it's a different thing.

MR WILKINSON-SMITH:

Well we're suggesting –

O'REGAN J:

No, it's going further.

GLAZEBROOK J:

No, I know you're doing something different but –

MR WILKINSON-SMITH:

Yes, yes.

GLAZEBROOK J:

– what I'm trying to understand is what exactly you're suggesting?

MR WILKINSON-SMITH:

It would have to be an intention to assist the offence that's committed by somebody else.

GLAZEBROOK J:

Which in this case is murder?

MR WILKINSON-SMITH:

It would be that Mr Burke would have had to form an intention on the application of this case to assist Mr Burke being stabbed.

WILLIAMS J:

It's a pretty radical re-write of section 66(2), isn't it?

MR WILKINSON-SMITH:

Well it's in *Jogee* they were prepared to decide that the –

WILLIAMS J:

Well they were repealing section 66(2). It's a different game.

MR WILKINSON-SMITH:

Going back and inserting it. What I come on to say is that the notion of implying or reading into criminal provisions mens rea occurs right throughout the Crimes Act and it's a way of properly acknowledging criminal acts normally attached to full mens rea.

WINKELMANN CJ:

If he had to have an intention to assist the killing of him he'd be guilty of murder, wouldn't he?

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MR WILKINSON-SMITH:

Yes, he would.

WINKELMANN CJ:

So there's no manslaughter under that?

MR WILKINSON-SMITH:

Yes, it would be difficult. If it's established he had an intention to assist the killing of the deceased, and of course if the principal's then convicted of murder, (inaudible 14:40:29).

WINKELMANN CJ:

It might be that it would be sufficient if he had an intention to assist the act which killed him.

MR WILKINSON-SMITH:

That's the –

WINKELMANN CJ:

So for instance stabbing.

MR WILKINSON-SMITH:

The next tier down is equivalent.

WINKELMANN CJ:

So that's probably not the most attractive argument you're advancing. I think you'll see that.

MR WILKINSON-SMITH:

No.

WILLIAMS J:

What's your next point?

MR WILKINSON-SMITH:

Yes, so the submission really is based on this idea of legality which suggests that for law to have proper deterrence effect, it needs to be promulgated and published and understood so that then rational actors, if we can suggest that these people are expected to make rational decisions about their risks and benefits, know where the law is and decide or embark on doing something both unlawful and has, in particular, foreseen risks, and I've referred to Lord Steyn's reasoning in *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428 and then the Australian case *Momcilovic v R* [2011] HCA 34 where Chief Justice French said there was a "powerful" principle requiring that "statutes be construed, where constitutional [*sic*] choices are open, to avoid or minimise their encroachment upon the rights and freedoms at common law," and I would suggest that has some application here.

If the Court's considering the appropriate meaning of these provisions in section 66(2), if there's an interpretation that's open that holds some of those fundamental civil rights, the presumption of innocence, then that interpretation should be favoured. I have also referred to the principle of lenity, which again in the situation where there is some ambiguity or controversy about the proper meaning of a term, then that should be construed in favour of the defendant.

I would suggest that looking at the history of conflicting authorities on section 66(2), it's almost obvious that there is some ambiguity about the meaning of some of these terms. In fact, some of the so far settled definitions are actually, some way, depart from what would be thought to be the literal meaning of those terms. I know my learned friend for the Defence Lawyers Association is going to deal with that in terms of whether "probable" means probable or whether "probable" may actually mean possible, so I won't make submissions directly on that, but we support a definition which is, both for the reasons of lenity and legality, would suggest that probability should be given a more narrow and thus more difficult task to be proven to make that person liable under section 66(2).

If I can sort of reduce it to a more street level, there is, in my submission, to some extent the provisions of section 66(2) and its component parts should be obvious and plain to the man of the street, rather than requiring very detailed and, in some situations, interpretations that depart from the more obvious meanings of some of those terms.

WINKELMANN CJ:

And that's why you support the second ground, don't you? Am I correct in that?

MR WILKINSON-SMITH:

Yes, so when it says "the offence", to the layman, and in terms of understanding the effect of the law and where the boundary of unlawfulness stops in, at least one of the obvious definitions of "the offence" in the case of manslaughter is to foresee death. Obviously, the majority's decision in the Court of Appeal in this case decided that the offence was an assault more (inaudible 14:44:43).

WILLIAMS J:

Your argument, at least your starting argument, was intend death.

MR WILKINSON-SMITH:

I do, but I'm also supporting the appellant's argument that if there is an ambiguity in terms of what the offence means in terms of what needs to be

foreseen, that ambiguity for reasons of legality and lenity should favour a narrow pro defendant interpretation.

WILLIAMS J:

I think if your person on the street scenario, would a person on the street accept that someone who joins a group to commit crimes and understands the risks of engaging with that group in a way that we've been talking about, then I think that person on the street would say: "Yes, that person should be guilty for what goes on", don't you?

MR WILKINSON-SMITH:

So well I try and give two scenarios which extend on that and the first is the one I set out at 5.1 in my submissions and, sorry, I will come back and try and answer that question in this way. I call this the dutiful gang son scenario where two gangs, Gang A and Gang B, who are rivals, Gang A has members right from young 16 year olds up to 50 or more, intergenerational gangs, brothers, sons, cousins, younger members are subordinate and may or may not progress up through the steps of being associates, prospects or full members or even office holders. Prospect A in this example is an 18-year-old, has a number of older relatives in the gang, may be at the prospect stage. A goes to a gang meeting where he hears about a gang confrontation because of some alleged disrespect from Gang B. Prospect A hears that some members will have firearms and he knows the gang history of violence and death. Because of that background he may well foresee that one of the gang may shoot a rival gang member. But prospect A is scared, he doesn't want to kill anyone but because of family and gang associations require him, as being part of that wider family gang group, to go along, he goes along. He doesn't take part in any of the violence but his knowledge of what can occur in a gang situation where guns are used means that on the current definition he would foresee a killing and he would be guilty of murder under the majority's view of the Court of Appeal in this case.

WILLIAMS J:

Does the prospect know there's a gun?

MR WILKINSON-SMITH:

Yes.

WILLIAMS J:

Well it would be under the minority's decision too then?

MR WILKINSON-SMITH:

Well he would be – if on the English approach, which would require not only foresight that a killing might occur, he would actually have to intend to assist with that killing. In the English system that would make him liable for murder. Under our current situation where we don't read that into section 66(2) he would be. And more so if he goes along but doesn't know about the gun, he would still be liable for manslaughter even though he doesn't intend to assist with that. If that fact scenario was explained to the man on the street, I suspect it might be more grey in terms of whether they have a moral repugnance for that involvement or they might take the view that some people are born into some groups and the –

WILLIAMS J:

You've got to be careful not to remove all human agency here.

MR WILKINSON-SMITH:

Yes.

WILLIAMS J:

That itself can be oppressive. I mean clearly a decision was made, albeit by a scared kid –

MR WILKINSON-SMITH:

Yes.

WILLIAMS J:

– who felt the family pressure or the peer pressure or whatever but a decision was made. Why shouldn't we respect that?

WINKELMANN CJ:

I must say I'm not finding the example particularly helpful because surely isn't the example you should be addressing is the one which is the, as I understand it, the Crown's proposition that you just need to show, to be guilty of manslaughter, they agree they're going to go and beat some people up and if someone carrying that out kills someone, then the whole bunch of them are guilty of manslaughter which seems like an extreme case.

MR WILKINSON-SMITH:

Yes, and I think that is a more sympathetic case –

WINKELMANN CJ:

And in fact that's really a section 61 case.

MR WILKINSON-SMITH:

Yes.

WINKELMANN CJ:

But it can be charged on section 66(1), I don't know, but under section 66(2) there's this problem of complete crossover and the Supreme Court has rejected, hasn't it, the notion that these should be charged separately, section 66(1) and section 66(2), *Bouavong*, overturned in *Ahsin*.

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MR WILKINSON-SMITH:

Yes, so in that situation where the level of agreed unlawfulness is even lower, whether it's just a fight and there's an expectation, there's no expectation of weapons but if during the fight there's the king hit and the person hits their head on the corner of the kerb or hits their back of the head on the hard road, on the respondent's interpretation they would only need to foresee the punch to the head, they would not need to foresee that death through that mechanism occurs, they would be liable for manslaughter. I would suggest to a layman, a young person in that position, who takes no – doesn't throw a punch but is aware that punches might be thrown –

GLAZEBROOK J:

Well let's have them all throwing punches because that's the case here, the two were throwing, both throwing punches.

MR WILKINSON-SMITH:

Yes.

GLAZEBROOK J:

Well at least Mr Burke was certainly throwing punches.

WINKELMANN CJ:

But then someone stabs.

MR WILKINSON-SMITH:

Yes.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

No, but leaving aside the stabbing.

MR WILKINSON-SMITH:

Yes.

GLAZEBROOK J:

Somebody knocks him over and he hits his head –

MR WILKINSON-SMITH:

Yes.

GLAZEBROOK J:

Now they've clearly intended to assist with the common purpose of giving the bash, there's no question about that, so what do you say they have to intend to do?

MR WILKINSON-SMITH:

So if we accept as *Rapira* that the principal only has to intend the punch, doesn't need to foresee the death, but it's harsh, but they can be properly labelled as a manslaughterer because they threw the punch, I would suggest there is a principled reason to say that doesn't apply to the secondary party who doesn't actually throw the punch –

GLAZEBROOK J:

Or the punch that throws him down on the ground –

MR WILKINSON-SMITH:

Yes.

GLAZEBROOK J:

– but has thrown five others beforehand is clearly assisting the other person in the unlawful act.

KÓS J:

Well that's clearly section 66(1).

MR WILKINSON-SMITH:

Yes, if that section, and I think that's the position Ms Grieve took, if the evidence supports section 66(1) and if *Rapira* remains, yes. However, if on the evidence the physical acts have not been committed by the secondary party but there –

GLAZEBROOK J:

But how do you relate that to this case?

MR WILKINSON-SMITH:

Well he's not – Mr Burke, as I understand it, not understood to have used a weapon himself so he hasn't inflicted the type of violence that's actually been –

GLAZEBROOK J:

So that's ground 1 really, isn't it?

MR WILKINSON-SMITH:

Yes, that's ground 1 whether he needs to know at least with some degree of specificity, that the category of an offence, whether it needs to be GBH or whether it needs to be a stabbing weapon or something even more, is a question of degree which the Court will obviously find the right balance on.

KÓS J:

Well what I'm struggling with, it's probably pretty obvious by now, is why we have a different approach to that offence or the offence in section 66(1) and section 66(2). Section 66(1) in *Edmonds* is perfectly clear, death need not be foreseen but because in this scenario the member of the group hangs back –

MR WILKINSON-SMITH:

Yes.

KÓS J:

– doesn't get his punch in, might not be a section 66(1) but under section 66(2) he's completely out because he didn't foresee death, whereas if he got one little punch in and was an aider under section 66(1) it would be irrelevant. I just don't understand the logic behind the distinction of the qualification being introduced here.

MR WILKINSON-SMITH:

So a section 66(1) liability does require that direct action, it doesn't require an earlier event, an agreement to do some level of unlawfulness but does not require any further participation. So it doesn't make in that scenario the section 66(2) person liable, completely liable for no offending. There may be a range of other offences that they've committed by participating in a group that has sufficient criminal enterprise. So this is not a binary situation of, if section 66(2) narrows to take away the person who foresees but doesn't intend to help with a more serious offence, it simply means that they might need to look to other criminal provisions of a lesser gravity but an appropriate gravity which would be participating or the violence itself but not manslaughter which requires the extra element of a death.

KÓS J:

Yes, it just seems to me the offence referred to in section 66(1) and section 66(2) hasn't lined the same package and you de-package a bit of it in section 66(2) and take out or, sorry I should say, I beg your pardon, they de-package it in section 66(1), you're adding something to the package in section 66(2)?

MR WILKINSON-SMITH:

Yes, what I'm effectively suggesting to the Court is it's the packaging of the component elements of section 66(2) and then arriving at whether that appropriately captures or doesn't answer the question about whether some of those terms have been wrongly interpreted because in the end the mischief that we are beyond the purposes of just this case is to capture correctly those who should be deemed criminal for their participation and to not use this provision for the remainder.

I just make one further submission in terms of this idea of criminalisation and whether sentencing in fact can mitigate perhaps people who are captured by section 66(2) but are of lower culpability, I suggest there's a couple of difficulties with that submission. Firstly, it still obviously criminalises that activity because it attaches, in this example, a manslaughter conviction to somebody which on a different application of how this should be viewed they would not be guilty of manslaughter, they would be guilty of some lesser offence, and therefore that they would be appropriately criminalised. That also doesn't take in account the period leading up to trial if they are charged with murder or manslaughter. Obviously, there is a reduction in rights in terms of their bail situation, in terms of whether they'll be eligible for bail just by dint of being charged with murder. So, in my submission, sentencing is not the complete answer to any over-criminalisation caught by section 66(2). Thank you, your Honours, is there anything further I can assist with?

WINKELMANN CJ:

Thanks Mr Wilkinson-Smith. Now is it Mr Stevens?

MR STEVENS:

Thank you, Your Honour. May it please the Court. I think Te Matakahi's submissions can really be narrowed down quite comfortably from the written submissions that have been filed. In essence, as the Court will appreciate, Te Matakahi says that the proper interpretation of section 66(2) is that a secondary party must foresee that death is a probable consequence of the prosecution of the common purpose in order to be guilty of manslaughter. I don't propose, with respect, to address my written submissions in relation to the Court of Appeal's majority's decision unless the Court wishes to hear from me and I propose to move directly to –

WINKELMANN CJ:

I think that's fine.

MR STEVENS:

Thank you, Ma'am. So we say as the Court in *Edmonds* said that: "The approach to common purpose liability must be firmly grounded in the wording of section 66(2)… A secondary party is guilty of any offence committed by the principal in the prosecution of a common purpose, provided the commission of that offence was a probable consequence of the prosecution of the common purpose" and we say that that offence, as my learned friend Ms Grieve very comprehensively for the appellant and, as my learned friend Mr Wilkinson-Smith has for the CBA, we say that that offence when it comes to manslaughter is an unlawful act that results in death and it is that that the secondary party must foresee. We say that when it comes to section 66(2) there is no basis for importing into the situation a requirement that the secondary offender foresees an unlawful act that is likely to do more than trivial harm. We say that's a gloss that isn't necessary. To answer your Honour Justice Kós' question, when it comes to section 66(2) it may be necessary for the principal in a manslaughter case to ensure that a principal isn't convicted where the act is very, very minor.

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KÓS J:

I don't think it's being imported in, in section 66(2).

MR STEVENS:

No, Sir.

KÓS J:

The fact is it's out in section 66(1). You don't need it, that element of foresight in section 66(1). You're bringing it back in again for (2).

MR STEVENS:

Not intentionally.

KÓS J:

It's not there for the principal offender, it's not there for section 66(1) but for some reason, which at the moment is alluding me and someone's got to explain it to me, it comes in at (2).

MR STEVENS:

Well we say it doesn't come in at (2). That's –

KÓS J:

No, no, required a foresight of death.

MR STEVENS:

Foresight of death.

KÓS J:

Not required for the principal offender, not required for section 66(1), bang it's in section 66(2). Now why?

MR STEVENS:

Well I think as my learned friend Ms Grieve said, your Honour, it's because section 66(2) introduces it in the case of manslaughter so when it's –

KÓS J:

Well it doesn't talk about manslaughter and both section 66(1) and (2) talk about the offence or that offence –

MR STEVENS:

Yes.

KÓS J:

– but they end up being different on your analysis?

MR STEVENS:

Well section 66(1) and section 66(2) are addressing different circumstances and different situations so section 66(1) establishes liability on the basis that the secondary offender assists in some way with the act that causes death whereas section 66(2) doesn't require the secondary offender to take any part in the victim's death other than foreseeing it. So section 66(2) is expanding criminal lability to those who participate in a common purpose and take the risk that death may be caused and that's the argument that Te Matakahi advances and I'll come to that perhaps in a moment when I address the Crown's purposive approach. It could also, your Honour, be explained on the basis that the less actus reus, the more mens rea required, so that there is a principal basis for a distinction between section 66(2) and section 66(1). But we say that on a plain reading of section 66(2) when it refers to "the offence" it's manslaughter and manslaughter is an unlawful – killing by an unlawful act.

KÓS J:

But it's different for section 66(1)?

MR STEVENS:

Well there are certainly different requirements for section 66(1) because –

KÓS J:

No, the offence. It sounds like the same word to me.

WILLIAMS J:

Your argument is read it literally or you over-criminalise because this person had no hand in the actual offence, they just happened to be there doing something else.

MR STEVENS:

That's the essence of it, but also when one looks at it on a common sense and logical approach, in my respectful submission, that's – we're moving to my learned friend for the Crown's argument in relation to the purposive approach. The Crown seems to be suggesting in paragraph 37 of their submissions that the purpose of section 66(2) is to deter because the Crown says: "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."

Well we, your Honours, say that the purpose of section 66(2) is to widen the net of criminal responsibility to include those who participate in a joint criminal enterprise or common unlawful purpose knowing or foreseeing that the consequences may be the commission of another offence. To put it very succinctly they run the risk, they take the risk but in order to run the risk they've got to know what they're risking and what they're risking is not an unlawful act they're risking –

GLAZEBROOK J:

They're what sorry?

MR STEVENS:

What they're risking Ma'am is not an unlawful act. The risk that they foresee, the risk that they're taking is not an unlawful act, it's a risk that the unlawful may result in death.

WILLIAMS J:

You're happy that the one punch manslaughter in that group is running the risk?

MR STEVENS:

No, because he doesn't foresee that there's a risk of death.

GLAZEBROOK J:

You mean the perpetrator –

MR STEVENS:

He doesn't foresee that there is a risk –

WILLIAMS J:

I mean the principal.

MR STEVENS:

So the principal well he is – the principal is guilty because it's an unlawful act that causes death so it's manslaughter and I –

WILLIAMS J:

Yes, but looking, forget the underlying issues, do you say that person is running the risk or it's just tough because the definition is different?

MR STEVENS:

Well we say that there's no issue of foreseeability of risk.

WILLIAMS J:

No, the statute doesn't require it but…

MR STEVENS:

No, so –

WILLIAMS J:

Does that person know the risk when they throw a punch?

MR STEVENS:

Did they know the risk? Not if they –

WILLIAMS J:

Because that counts against you if they don't have to.

MR STEVENS:

They don't know the risk if they haven't turned their mind to it and the one punch manslaughter case is a problematic case, in my respectful submission, even perhaps from a public perception point of view, but certainly when it comes to section 66(2) the one punch manslaughter case where the secondary party hasn't foreseen that there is a risk of death, they shouldn't be guilty of manslaughter and I think the public, with respect, would certainly agree with me, I certainly hope they would.

GLAZEBROOK J:

Well if you've got a group beating somebody up and someone dies I'd be surprised if the public thought that the only person –and they intend to beat them up and they all do –I'd be surprised if the public thought it was fair that only one of them who may even have just thrown the final punch is the only one who's criminalised –

MR STEVENS:

Well they wouldn't be the only one of course –

GLAZEBROOK J:

– in terms of the death itself because we do hold human life quite dear and in many cases we do criminalise without any intent whatsoever in their carelessness.

MR STEVENS:

And that's perhaps the force of the argument from the Crown is that it's the sanctity of human life that necessitates the interpretation that the Crown contends for but, in my respectful submission, even in the case that your Honour has raised there is still, of course, section 66(1) which may well cover the other participants in that joint beating, but if it's a person who hasn't

participated in the actus reus and perhaps doesn't want the result that has occurred, then is it appropriate that they are criminalised?

KÓS J:

Well I think we can assume that none of them wanted to kill the man who's lying in the pool of blood on the pavement.

MR STEVENS:

No.

KÓS J:

And let's assume for these purposes that none of them foresaw that was the consequence of them getting into the affray with him.

WINKELMANN CJ:

Part of the difficulty with this discussion is the crossover between section 66(1) and section 66(2).

KÓS J:

But that's exactly what we're testing.

MR STEVENS:

Yes.

KÓS J:

So in this group the guy that throws the fatal punch gets manslaughter, the guys that threw punches around with him but didn't throw the fatal punch get section 66(1) but the guy hanging on the edge –

GLAZEBROOK J:

Well they may or may because it depends what they're assisting.

MR STEVENS:

Yes, they may just end up with convictions for assault or injuring with intent –

GLAZEBROOK J:

Well that's what concerns me slightly because I'm not sure that you just say - in that group situation that you can say it will be section 66(1) because the same argument that you're making would apply, wouldn't it, that they didn't foresee or intend death?

WINKELMANN CJ:

But they'd have to foresee it –

KÓS J:

Well that one is under *Edmonds*.

MR STEVENS:

Well no, we say that –

WINKELMANN CJ:

They just have to assist the –

MR STEVENS:

We say, with respect, that the necessity to foresee death is introduced by the wording of section 66(2).

O'REGAN J:

Correct.

KÓS J:

I can't see that and that's what I'm struggling with.

O'REGAN J:

That's your argument though, yes.

MR STEVENS:

That's certainly the argument.

WINKELMANN CJ:

Well I'm –

GLAZEBROOK J:

Is that because –

WILLIAMS J:

You have to go further though and say, “and that’s a good thing”, don’t you because you have to establish that, it's not entirely straightforward.

WINKELMANN CJ:

And you establish it on the basis of, a different basis of liability which I don’t – I'm wondering if we’re just repeating the argument we heard from Ms Grieve, because your argument that we haven't heard yet, is about the different standard, different way of expressing probably, probable consequence?

MR STEVENS:

Yes, your Honour, and I don’t mean to simply repeat my learned friend’s submissions in –

WINKELMANN CJ:

I wasn’t suggesting you were, more that we were dragging you back through them.

MR STEVENS:

No Sir, no Ma'am.

WILLIAMS J:

Yes, you got tempted into that.

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MR STEVENS:

Well perhaps if I could move, does the Court wish to hear on the issue of knowledge of carriage of a weapon? I think that Te Matakahi’s submissions set that out very clearly and we adopt the approach taken in *Edmonds* that there

are occasions when it is necessary for the trial Judge to direct on knowledge of the presence of a weapon, but it's on an evidential basis, not on a legal basis, and so I think, with great respect, that the passage cited from *Edmonds* very clearly makes the point that we are trying to make with respect to whether there's an evidential requirement for the direction on the –

WINKELMANN CJ:

So your point is different to the appellant's on that?

MR STEVENS:

Unfortunately, yes.

O'REGAN J:

But I don't think the Crown's contesting that, are they?

MR STEVENS:

They're not.

O'REGAN J:

That there can be circumstances where it's needed because you can't understand what the common purpose is without knowing what everybody knew.

MR STEVENS:

Yes.

O'REGAN J:

And if he'd known that there was a knife, and that it was quite likely to be used, it would've been a different common purpose in this case, wouldn't it?

MR STEVENS:

Indeed. So it may be that there was requirement in this case for that particular direction, and of course the majority decided that there wasn't any such requirement, but the argument is very succinct, I hope, in the submissions of Te Matakahi, and as I say, we adopt the approach of the Court in *Edmonds*.

So if I could perhaps move to the final issue that we wish the Court to consider, and that is the meaning of probable consequence. To very briefly respond to the Crown's position that it's not a matter that should be addressed on this appeal, and it's not a matter that can be raised by the intervener. In our respectful submission this Court, of course, can control its own process, and the power to allow the interveners to provide written submissions, and to address the Court, is really inherent. So we say that this Court should now consider the issue of the interpretation, or the appropriate interpretation of probable consequence, and that's putting it on a very basic level. If the Court is going to look at section 66(2) as a whole, the interpretation of it, it should include this issue, which has become a very difficult issue, and particularly when it comes to directing juries. We say further that, of course, the Court of Appeal did also, in paragraph 44, address the issue of probable consequence.

So the Crown says that the position taken in *R v Gush* [1980] 2 NZLR 92 (CA) is clear and that there is no necessity for this Court to revisit the issue of the interpretation of probable consequence. If I could just find a copy of *Gush*, thank you. This isn't unfortunately in any of the casebooks. I apologise for that.

GLAZEBROOK J:

We've got it.

O'REGAN J:

We've got it on the screen.

MR STEVENS:

Thank you. I think, with great respect, *Gush* is illustrative of part of the difficulty facing the lower Courts, because of course, in *Gush*, the learned President, his Honour Justice Richmond, at page 94, line 15, talks about the appropriate interpretation of probable consequence and that it means an event that could well happen as opposed to a possible consequence. But then his Honour cites at length from the High Court of Australia in *Johns v The Queen* (1980) 54 ALJR 166; 28 ALR 155 and from the judgment of Justice Stephen.

Then his Honour returns to the issue at page 95, paragraph – sorry, line 34. This is what Justice Richmond says: "The various factors and considerations referred to in the foregoing passage satisfied Stephen J that the appropriate measure for the complicity of the accessory was awareness of the offence in question as a possible consequence rather than awareness of the offence as more likely to happen than not. In like manner they satisfy us that the objects of s 66(2) would be largely frustrated, rather than advanced, if we were to regard the word 'probable' as used in that subsection with the meaning 'more probable than not'.

So even in the case that's supposed to be the genesis of the proper approach, there is a real confusion as to what probable – sorry, common purpose means, and so we say that there is a necessity for it to be clarified. It's difficult perhaps, and this is of course a matter for the Court to decide exactly what the words do mean, but probable is defined in the Oxford Dictionary to mean "likely to happen or be the case." We say that that provides a higher degree of expectation that an event will happen that is captured by the phrase "could well happen" and we say that to the layperson or to jurors, it can be equated with possibilities as opposed to probabilities, as indeed appears to have happened with Stephen J, in the High Court of Australia. So we say that there is now a necessity for this Court to give an interpretation in relation to the phrase "probable consequence" that can be used in the lower Courts when addressing a jury.

Now perhaps the difficulty to date has been, and perhaps the Court's reluctance to date because we addressed the cases where this Court has declined to consider the issue, perhaps the difficulty previously was that there seems to be a suggestion there's a choice between possible consequence and, at the other end of the scale, more probable than not but we say that there is an in-between interpretation that should now be adopted and that's set out in our submissions at paragraph 65: "Knowing something to be a probable consequence means that the secondary party knew the offence was a likely outcome on the facts known to him or her at the time."

KÓS J:

That just seems to substitute one vagueness for another Mr Stevens.

MR STEVENS:

Well that's always the difficulty, Sir, and I accept that there is an element of that but there is a necessity that seems to explain what probable consequence means.

KÓS J:

So you're dodging away from saying it has to be 51% plus?

WINKELMANN CJ:

Your point though is that could well happen is such a lukewarm –

KÓS J:

Yes.

WINKELMANN CJ:

– kind of mishmash for an expression, whereas at least likely to happen, known to be a likely outcome, gives that sense of a likelihood which is clearly implicit in – more clearly present in probable.

MR STEVENS:

Yes, Ma'am.

WILLIAMS J:

The problem is where lawyers just love playing with these words –

WINKELMANN CJ:

Well words have power of course.

WILLIAMS J:

– and it's our living, but the four punters that normally sit over there have to make some sense of them, and "could well happen" means "might" –

MR STEVENS:

Yes, it's a possibility.

WILLIAMS J:

– in the mind of a punter.

MR STEVENS:

Yes.

WINKELMANN CJ:

If it means anything at all.

MR STEVENS:

And that's the difficulty is that the Courts over time have really read down the meaning of probable consequence and, as the jury looks at it, it's quite different from perhaps what was intended and it's certainly different from what it means in my respectful submission.

WINKELMANN CJ:

Well like you also say that it's actually a little bit of a quaint archaism, whoever says "could well happen?" I mean that's not exactly in common parlance amongst young people these days, could well happen, might well happen.

WILLIAMS J:

Well the statute says probably, that would be a good start, wouldn't it?

WINKELMANN CJ:

Might well happen.

MR STEVENS:

Well it says "probable consequence" yes.

WILLIAMS J:

Well you'd have to turn it into some form of useful adjective.

MR STEVENS:

Yes.

GLAZEBROOK J:

Well you could just say it's higher than a possibility so probable.

O'REGAN J:

There's quite a lot of provisions in other countries that also use the word "probable." Do any of them – is there any authority from other countries indicating that probable has a different meaning than substantial or real risk which is where we seem to have now landed in the jury directions given?

MR STEVENS:

Well I'm afraid, your Honour, that I haven't had the opportunity to review all of the other countries where probable is used but what we would say in relation to the current direction in the Bench book which is, as I understand it, a real or substantial risk, is that still doesn't go far enough. A real substantial risk doesn't mean it's probably going to happen. It simply means there's a risk, there's a possibility. So we say that the current –

GLAZEBROOK J:

Well it has to be a substantial risk.

WINKELMANN CJ:

Well what do you say because that's tied to the definition, that's recklessness, isn't it, that's used in association with recklessness, what do you say about that? 1520

MR STEVENS:

Well it may be appropriate in the context of recklessness where it's the principal party who's taking the risk, but we say that when it comes to whether an event is likely to happen or not, and whether the secondary party is considering whether there's a risk there, then it needs to reflect more than simply a substantial risk or a real risk. It needs to be much closer.

KÓS J:

Could it vary according to the seriousness of the potential consequence? In other words, a crime against the person might have a higher – sorry, might have a lower threshold, and another crime, perhaps a higher one?

MR STEVENS:

We would say no, your Honour. It has to be consistent.

KÓS J:

The same for everything?

MR STEVENS:

Yes, but where it could vary perhaps, I'm just thinking whether it could vary where, depending on the level of the crime –

KÓS J:

Let's say at once, the idea I think to the public that you have to, that it has to be a 51% probability would not appeal. So it seems to me, for a crime against the person, it's going to be lower than that, and if it's the case for all crimes, then we're back into real or substantial. Something more than 10% and something less than 40%.

MR STEVENS:

Well, we would say that the same standard has to be applied across all crimes, and it's not a question of the public's perception, it's a question, with great respect, of what the secondary party sees or knows or foresees. So I accept it's very difficult. I would love to stand here and contend for more probable than not, but I'm not –

WILLIAMS J:

If, for example, you adopted the phrase, "at the beating someone would probably be killed" that's a pretty stiff test, although it's the same word as the word in the statute.

MR STEVENS:

It's certainly a lot higher –

WILLIAMS J:

Isn't that what you're contending for?

MR STEVENS:

It's certainly a lot higher than "could well happen". No, we're contending for something we would say that's slightly less than that. We're saying that it was a likely outcome.

WINKELMANN CJ:

Well, no, but it's the word that this –

O'REGAN J:

In the context of section 167 and 168, doesn't "likely" mean a real or substantial risk? Isn't that the way that it's been interpreted? So it just seems to me changing from "probable" to "likely" just begs the issue. It's still the same issue.

MR STEVENS:

So adopting Justice Williams' approach, we should say that it could probably happen or would probably happen.

O'REGAN J:

Well, but then that it leaves it up in the air for jurors to decide, and some might think that means a real risk, and some might think it means it's almost certain, and you don't really want to have the jury evaluating things on a different basis from each other.

WINKELMANN CJ:

Mind you, the same would be true whatever word you used because everything –

WILLIAMS J:

Instead of "real and substantial". Yes.

WINKELMANN CJ:

Isn't that what the community's being asked, to apply their own common sense about what is a probable consequence?

MR STEVENS:

I accept that it's a very difficult issue, and as his Honour Justice Williams has observed, it's all about words and whether the words are, we enjoy words, whereas the rest of the community is perhaps looking more for some guidance and some certainty in the words that we use. But what we say, Te Matakahi says, that the present words that are being used are not appropriate because they don't reflect the degree of foresight required. So "could well happen" isn't appropriate to reflect probable consequence.

O'REGAN J:

But I think that "could well happen" has now really been superseded by "real and substantial risk", hasn't it?

MR STEVENS:

We would say even a "real and substantial risk" tends more to the end of possibility than probability. So it would be nice to have a magic formula that could satisfy the Court, and I've been wracking my brains as has the rest of Te Matakahi and my learned friends.

WILLIAMS J:

And the rest of the common law world.

O'REGAN J:

Quite a lot of the Australian statutes do say – they actually use the words "real or substantial risk", so they impose a recklessness standard.

GLAZEBROOK J:

I suppose you could say to the jury it doesn't have to be more likely than not, but it has to be more than possible.

MR STEVENS:

That might – yes, Ma'am. That could be one –

GLAZEBROOK J:

But I mean –

WINKELMANN CJ:

We wouldn't be saying that to a jury. No.

GLAZEBROOK J:

Well, I mean if you just say probable or likely, then it might be, as I think Justice O'Regan was saying, that some of them might think that means "almost certain". Some of them might think "it's more probable than not", and some of them think that there's a chance.

WINKELMANN CJ:

It seems to me that it's quite a long way from what seems to be intended to be caught by section 66(2), was that when people set out and agree a particular criminal enterprise, then they're taken to agree to that which is going to probably be involved in that criminal enterprise. That's what section 66(2) was aimed at. That's the probable.

MR STEVENS:

Yes, they're –

GLAZEBROOK J:

And intend that –

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

– because if you intended to become part of it, then you clearly intend the consequences of whatever you've agreed to be part of it, it wouldn't you say…

WINKELMANN CJ:

Yes.

MR STEVENS:

Well, in the section 66(2) situation though –

GLAZEBROOK J:

Yes.

MR STEVENS:

– they agreed to the common purpose but they were also acknowledging that there's a risk that it may go beyond the common purpose and that – and other effects –

GLAZEBROOK J:

Well maybe they don't, maybe they just say: "We agree to the common purpose and then anything that is a probable consequence of that common purpose we also agree to and intend."

WINKELMANN CJ:

So when you're going to do an armed robbery then it's probably a probable consequence for an armed robbery that someone's going to get very badly hurt?

MR STEVENS:

It may well be but is it a probable consequence if they're going to get killed, if there's an armed robbery and the guns are loaded, then there's a lot greater chance that someone's going to get killed if it's armed robbery –

GLAZEBROOK J:

Yes, yes.

O'REGAN J:

But it still has to be known by the participant.

WINKELMANN CJ:

Yes, it still has to be known and all above caveated by that.

GLAZEBROOK J:

So you agree to do an armed robbery, you know and agree that there's a firearm that's loaded then – I mean if it's more probable than not maybe not because you're hoping that everybody will just go: "Here's your money" and you get out without any…

WINKELMANN CJ:

But as Justice Young said the higher, the more – the closer to what actually happens the common venture is, the smaller the gap is, leap for the jury, to see it's probable foreseeable consequence.

MR STEVENS:

So in conclusion on this aspect of the case for Te Matakahi we say that there is a problem that this Court needs to consider and address. We've proposed what we collectively have felt would assist but we would certainly defer to your Honours in terms of coming up with an appropriate formula. The only other point addressed by Te Matakahi is the question of Justice Mallon's approach to the appeal itself. We say, of course, that her Honour took the right approach right up until the last moment and I don't think the Court needs to be addressed any further on that. Unless your Honours have any questions those are our submissions.

WINKELMANN CJ:

Thank you. Ms Laracy?

MS LARACY:

May it please the Court. The proposed structure of the Crown's oral submissions involves me starting with ground 2 of the grounds as put forward by the appellant. So focusing on the question with the manslaughter liability under section 66(2) requires foresight of death. We start with that ground because it engages most directly, in our view, the foundational principles of

New Zealand's law of manslaughter and its relationship with the party's provisions.

So starting in that way it puts the offence of manslaughter squarely, and I suggest helpfully, at the centre of the appeal. That means that I will try and go up to what is roughly page 20 in my submissions. Mr Sinclair will then address the first ground which essentially concerns the question of whether Mr Burke had to foresee that the particular type of violence that caused death, in this case a stabbing, was a required element. And in responding to that Mr Sinclair will address the law from relevant common law jurisdictions if that appears appropriate and the different schools of thought that have been at times introduced to put certain limits on the law of manslaughter. So he will particularly look at those policy rationales. Mr Sinclair may also cover any questions that may arise with respect to the proviso or the additional ground raised by the interveners concerning the meaning of probable consequences if the Court would find that useful.

Just by way of preliminary statement, I do appreciate that in dividing it up in this way it may be somewhat frustrating for the Court if I defer to Mr Sinclair. It simply makes sense in the context of not trying to duplicate so I apologise in advance but I would endeavour to give a brief answer to any questions from his part that are addressed to me but largely leave it to him. That's the introductory material. Could I just check with the Court, are we proposing to go until 4 o'clock and then –

WINKELMANN CJ:

Four o'clock.

1530

MS LARACY:

Four o'clock, right, thank you. I'd like to start briefly with section 66. Section 66(1) is the primary party's provision and it covers those, as the Court knows, who actively help or encourage others to commit offences. Section 66(2) is supplementary or residual. It has a deliberately broad reach

and it is a broader base of liability and I refer the Court to a comment about its broader base of liability in *Ahsin* as authority for that.

Second, it's important to understand the policy rationales that underlie the two provisions. Section 66(2)'s policy rationale does not depend on finding that the defendant helped in a causative way the actual act to occur. That's the role of section 66(1). Rather its policy justification is to respond to social harm that's caused by people who agree to deliberately engage in unlawful behaviour and who appreciate that in doing so harm may result. Section 66(2) provides that each of the parties will be responsible for every offence that was committed within the scope of the particular agreement, whether the scope of the agreement is tacit or explicit, and that's a factual question on the evidence what is the scope of the agreement. But there are limiting factors built into section 66(2). So the secondary party is only liable for every offence committed so long as that offence was subjectively foreseen by that defendant as a probable consequence of the agreement and, in my submission, that is a fundamental protective and limiting factor that meets many of the points of concern that have been raised by counsel for the appellant in this case.

GLAZEBROOK J:

When you started off you said something like "deliberately engage in behaviour where harm may occur" but you do accept that it's only where it's subjectively recognised that it's a probable consequence which is higher than may occur, isn't it?

MS LARACY:

Yes, may I –

GLAZEBROOK J:

Okay, so it's –

MS LARACY:

– no, your Honour is absolutely correct.

GLAZEBROOK J:

Yes.

MS LARACY:

And I appreciate it's not helpful to substitute other words when some of the terminology is in question but yes probable consequence.

GLAZEBROOK J:

That's the trouble, we keep substituting words I think and…

WINKELMANN CJ:

I'm not sure. The way you've put the social wrong seems to be too wide because isn't it all traced back to really accessory before the fact so people who agree with others that something's going to happen, a criminal venture is going to be launched, section 66(2) is designed to prevent them being able to say: "Well look I agree that that would happen but I didn't specifically agree that X, Y and Z would happen" and that's really what section 66(2) is aimed at. It's aimed at avoiding adventitious-type arguments about particular ways of executing the offence or things that might be seen to be inevitable. I don't see it as having the broad sweeping social purpose that you've articulated.

MS LARACY:

Section 66(2), in my submission, the purpose of that is summarised in our submissions, at paragraph 37 are where we've explained that: "It's 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." The example your Honour gave of being involved prior to the commission of a particular offence and then seeking –

WINKELMANN CJ:

Well it's always prior. It might only be 10 seconds but it's always prior.

MS LARACY:

And in a supportive way but then seeking to distance oneself from the act that is committed, that fits more comfortably within the principles of aiding and abetting prior as an accessory before the fact which are reflected in the subsections of section 66(1) so if it's an act of assistance, whether before or during, that falls under section 66(1).

WINKELMANN CJ:

No, I'm not talking about acts of assistance. I said where they agreed to a venture and they can't avoid liability for that which is done in pursuit of that venture, just because they didn't specifically endorse those acts.

MS LARACY:

Yes, I would agree –

WINKELMANN CJ:

That seems to me section 66(2).

MS LARACY:

That is, that would be section 66(2), as put. But those acts have to be foreseen by the particular defendant, and what is foreseen by the particular defendant may be different where there are multiple parties involved under section 66(2) and they may be different from what is foreseen by the principal, and the clearest, in my submission, statement of these principals is to be found in *Rapira*, where this very point is made that in the context of one criminal assault, there will be different offences committed by the different parties who are involved, and remembering that everyone is a party, a principal is a party, a secondary, a sister is a party, under our law they are all parties, they are all equally liable, and the differentiation of these in terms of culpability comes in at sentence. But the point that is made in *Rapira* is different offences may be committed by the different parties, and different states of mind can quite properly be attributable to the different parties based on the findings and the evidence in the case. There's no inconsistency with that.

WILLIAMS J:

Just explain that last point, different states of mind in respect of what?

MS LARACY:

Well the particular context in *Rapira* involved a principal, just by way of example, who had been convicted of – who was liable for murder on the basis that they intended grievous bodily harm knowing that it, under section 167(1)(b) *[sic]* could well result in death, and the Court examined the state of mind that is required for the parties –

WILLIAMS J:

Oh I see. Sorry I thought you were talking about different levels of foresight among the party cohort.

GLAZEBROOK J:

Well you could have that.

MS LARACY:

Well, they're all parties.

WILLIAMS J:

Yes.

MS LARACY:

So the principal –

WILLIAMS J:

Well those not just principals but as parties.

MS LARACY:

That's right. So they will have, the parties, the secondary parties, will have a different mens rea, a different foresight under section 66(2) to the principal who has been convicted of murder in relation to the same criminal –

WILLIAMS J:

Yes, sorry, we were at cross-purposes.

MS LARACY:

Yes.

WILLIAMS J:

I thought you were suggesting that *Rapira* had said that section 66(2) parties could have different levels of foresight but still be uniformly liable.

MS LARACY:

Well the Crown would say that what they have to foresee is the sense, and in this case each party under, each secondary party under section 66(2) needs to foresee the offence of manslaughter, and then the Crown submission is that the offence of manslaughter for that secondary party, for the principal, if convicted of manslaughter, and for any party under section 66(1), are those elements that are set out in the Crown submissions at paragraph 34. So the elements of the offence of manslaughter by unlawful act, which is one of the ways in which manslaughter can be committed, is an offence, and in these types of cases that's a form of assault, almost always a form of assault, and for that form of assault the appellant, or the defendant needs to have the mens rea to intentionally be involved in that assaultive act, and then the act needs to be objectively dangerous in the sense that's been settled by the common law, namely it has to be, it must involve some trivial and non-transitory harm, and that's an objective requirement, and then death is the consequence that is a fact that must result for that offence to be committed.

WINKELMANN CJ:

So they have to foresee the death?

MS LARACY:

No, they don't have to foresee, that is a consequence –

WINKELMANN CJ:

Okay, so you were just saying what they did have to foresee, I thought, but what paragraph are you at in your submissions?

MS LARACY:

Paragraph 34. So there has to be – they have to foresee an offence, and that –

WINKELMANN CJ:

Isn't part of the offence the death.?

1540

MS LARACY:

It is. Well that is the question, that is the question and that requires the Court to ask: "Well what is the offence that was foreseen?" And in this case the offence that must be foreseen is manslaughter and that in turn requires the Court to ask: "Well what must be foreseen for the offence of manslaughter and what must happen in terms of actus reus and state of mind or mens rea for the offence of manslaughter?" and those elements of what I have set out there that –

WINKELMANN CJ:

So what you accept that they must foresee is you say they must foresee an offence which is objectively dangerous but –

GLAZEBROOK J:

That's all.

WINKELMANN CJ:

That's all.

MS LARACY:

And death, death must result.

WINKELMANN CJ:

And that offence that they must foresee must cause a death but they don't have to foresee the death as a probable consequence?

MS LARACY:

They – that's right.

WINKELMANN CJ:

Death's out, death's off the table?

MS LARACY:

That's right.

WINKELMANN CJ:

Even though it's at your 34 you put it off the table for the –

MS LARACY:

That's right.

WINKELMANN CJ:

Right.

MS LARACY:

And remembering that manslaughter is, by definition under the Crimes Act, it is culpable homicide that falls short of murder and that is invariably because the defendant does not have the specific requisite mental states that are required for murder. Those are the mental states in section 167.

WINKELMANN CJ:

So just to take it –you recall earlier today I said to Mr Rapley that the high watermark he had to meet was that his client was guilty, if he agreed to a common venture which involved giving Mr Heappey the bash and Mr Heappey died as a consequence, because there's really nothing more to be foreseen in that circumstance, is there, because he foresaw the beating because he agreed to it –

MS LARACY:

Yes.

WINKELMANN CJ:

– and that's it.

MS LARACY:

And as a matter of law it needn't even be put as high as the culpability inherent in a beating. In this case he plainly did. On his own statement he said: "I thought what was going to happen was a mean hiding," but at common law for manslaughter there needs to be an unlawful – for the manslaughter by unlawful act, there needs to be an unlawful act and the unlawful act is sufficient if it is an assault as defined in the Crimes Act.

KÓS J:

Well if it's subjectively dangerous and at which point the risk of death is a kind of carried parcel, isn't it?

MS LARACY:

That's right because there are many unlawful acts which – unlawful act being a breach of any legislation, that's how it's defined – there are many unlawful acts where it would be an extraordinary thing if death resulted, and that's why this common law gloss, which would be relevant in some cases, probably not in serious assault cases, but this common law gloss of the act that is foreseen needing to be objective and dangerous comes in to ensure that the only acts that are captured, the only breaches of legislation that are captured under the law of culpable homicide, are ones that have an element of objective dangerousness to them. So that again is, I would call it a protective factor, perhaps that's not the right word "protective", but it's a qualification on the statutory language which says any unlawful act. And so –

KÓS J:

Now we know that in section 66(1)(b) where it talks about aiding the principal to commit the offence, we know that the offence for section 66(1) does not require foresight of death because that's what this Court has held in *Edmonds*, do you say the same approach is therefore taken to (2)?

MS LARACY:

Yes, Sir, and the same approach for a principal and the question, well why should that be, is because in each of those cases the offence is manslaughter

and so the elements of the offence of manslaughter are what have to be proven and under the law of manslaughter, which includes everything from highly accidental deaths right through to highly culpable deaths, foresight of death has never been an element, a requirement of the offence. If there is –

WINKELMANN CJ:

So can you address the language of the act then?

MS LARACY:

So we have referred to this interpretation as purposive and the minority interpretation in the Court of Appeal as a strict interpretation or a – I think that is the language we've used – I would say it's only purposive in a policy sense. What I really mean by that is that the interpretation that the Crown put forward here is squarely available on the text of the statute. The offence is the offence of manslaughter and then when the Court asks: "What is the offence of manslaughter involved?" it does not involve foresight of death. So my interpretation is strictly available as a matter of plan interpretation albeit –

WINKELMANN CJ:

Well I mean –

MS LARACY:

– I accept that the minority perspective –

WINKELMANN CJ:

Is it actually because you're reading – the foresight is in section 66(2) it's not in the offence so the foresight comes from section 66(2) and what's said against you, and this is what you have to answer, is that the offence involves death, an unlawful act which causes death and the offence is not complete until the actus reus is established and so the foresight is of the death – the unlawful act and the death.

MS LARACY:

What your Honour is suggesting is that when section 66 is grafted onto the offence of manslaughter it introduces a further element of mens rea and, in my submission, is that cannot be correct. Section 66 is a general procedural provision that applies across all offences in the Crimes Act. It doesn't –

WILLIAMS J:
Procedural?

WINKELMANN CJ:
It's not procedural.

WILLIAMS J:
That's a big call Ms Laracy.

MS LARACY:
Provision for liability but it doesn't alter, it applies to all offences.

WILLIAMS J:
Sure, it's a general provision, yes, but a general provision with big teeth.

MS LARACY:
It is grafted onto the substance, to the elements of all offences and it would be an extraordinary thing if the only offence that I know of where this interpretation is being contended for whereby grafting a general provision or grafting section 66(2) onto the substantive offence alters the mens rea requirements. It alters the substance of the offence and the liability –

WINKELMANN CJ:
But it's an offence, it's actually the thing that creates the offence, section 66(2). It's making you criminally liable for it if that mens rea can be proved. So it's not actually altering substantive events. It's creating a substantive offence which is parasitic or accessorial to the principal offender's offence so it's not altering the principal offence.

MS LARACY:

Well manslaughter – causing death accidentally by an unlawful act is manslaughter. When in the context of section 66(2) that element changes to require foresight of death is a substantive change to the elements of the offence.

WINKELMANN CJ:

Well would you accept that a section reads the same no matter the context. We can't change the meaning of the section when it's applied to different cases. It reads the same for all cases.

MS LARACY:

Yes, and for that reason –

WINKELMANN CJ:

Yes.

MS LARACY:

– I would endorse the proposition that is being put by Justice Kós to my learned friends, namely, doesn't the word "the offence" in section 66(1) have to mean the same thing in section 66(2)?

WINKELMANN CJ:

Okay, well what do you mean by that? What does it mean in section 66(2) then?

MS LARACY:

So in both provisions it references the offence that has been – for which the defendant is liable and in section 66(2) in this case that offence is manslaughter and the Court then needs to consider what does it take to make the defendant liable for manslaughter.

WINKELMANN CJ:

And so that the Court has to –

GLAZEBROOK J:

Well one thing you do have to have is a death.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

I mean there's absolutely no doubt that you have to have a death to be liable for manslaughter.

MS LARACY:

Yes.

GLAZEBROOK J:

Which is what you've got in paragraph 34?

MS LARACY:

Yes.

GLAZEBROOK J:

You just – so you don't have to foresee the death, and why?

WINKELMANN CJ:

So that's why I'm trying to ask you why because it's, you have to be able to foresee the offence, so how do you read the death out of the offence?

1550

MS LARACY:

The offence involves a consequence which does not have a mens rea element attaching, and the idea that every element of the actus reus must have a mens rea element, in my submission, is not correct.

GLAZEBROOK J:

But where do you get just the mens rea in terms of foreseeability and not the actus reus in terms of foreseeability, because that's what's said against you, that you have to have the whole shebang, including the death that you foresee.

It doesn't matter that you didn't intend it. Well actually probably that's not right, but on the appellant's second ground, as against the Criminal Bar Association who are talking about intent.

WINKELMANN CJ:

I think what's said against you is that the essence of the manslaughter offence is the death, and to read that out, it's hard to see why you would, and so that's what I'm asking you. Why would you read out the essence of the offence, which is the death?

MS LARACY:

I don't read it out, Ma'am, but what I do say is that the – there is no foresight required by the defendant of that death as a party under section 66(2), just as there is no foresight required under 66(1), just as there is no foresight of that death required –

WILLIAMS J:

That's a proposition, it's a conclusion, that subsection (2) requires foresight.

MS LARACY:

It requires foresight of the offence.

WILLIAMS J:

Correct.

MS LARACY:

Yes.

GLAZEBROOK J:

But why just the mens rea. You say it's just foresight of the mens rea, not of the offence including the death.

MS LARACY:

Foresight of the actus reus, namely assault and unlawful act. So there needs to be the foresight that there will be a relevant actus – there needs to be the foresight that will be a relevant act –

WINKELMANN CJ:

But isn't the actus reus an assault causing death for a manslaughter, or else it would be an assault.

WILLIAMS J:

Well put that another way, what you read in that last phrase of subsection (2) is that an assault is a probable consequence of an assault. Because you read out the final bit of the actus reus. That just doesn't make sense. Of course, an assault is a probable consequence of assault because that was the point.

WINKELMANN CJ:

Well help us make sense.

GLAZEBROOK J:

Which is why I think you're saying you only have to foresee the mens rea part, rather than the full consequence, unless you say death as a consequence turns it into manslaughter, as against a – and you don't have to foresee that but…

MS LARACY:

I do say exactly as your Honour said, that the defendant only has to foresee the mens rea of the assaultive act.

GLAZEBROOK J:

Yes, well that's what I thought you were saying.

MS LARACY:

But there does, as a matter of fact, have to be a consequence of death following –

GLAZEBROOK J:

Obviously because otherwise it's not manslaughter, yes.

MS LARACY:

Yes, yes, and in terms of the assertion as to why I say this, there is a long body of common law to this effect, and in my submission, I mean we've gone through many cases this morning looking at different ways of analysing these, the trends in the law and these elements that, in my submission, are *Rapira* and this Court's decision in *Edmonds*.

WINKELMANN CJ:

So really you're saying it's been interpreted this way a long time, that's consistent with its policy objective.

MS LARACY:

Yes, and there would be significant violence done to the structure of the criminal law if foresight of death was required for a party to manslaughter under section 66(2). It would upset –

GLAZEBROOK J:

I mean it may well be that you never have manslaughter in those circumstances, is that part of the argument, because as soon as you foresee death then you would usually be within murder.

MS LARACY:

It would almost certainly be reckless, that's right, it would be under section 167(b).

WINKELMANN CJ:

Well, you have to foresee that the, for it to be recklessness you'd actually have to foresee the perpetrator's mental state, so you wouldn't inevitably be within those other – there is a clear gap that this could sit in, in the terms of criminal liability. Because to be guilty for murder you have to foresee the principal's mental state.

O'REGAN J:

If the principal's been convicted of murder that is their state, isn't it. If you predict they're going to stab someone, it's pretty hard to say you didn't predict that was done with intent to cause grievous bodily harm and reckless as to whether death resulted.

WINKELMANN CJ:

You have to foresee, yes, I still think there is a gap there because you're not focusing on the perpetrator's mental state. So, there are different –

KÓS J:

Yes, but you don't have to be sure that they're going to stab. Just again that there's a real possibility.

WINKELMANN CJ:

Yes, anyway.

MS LARACY:

But the Crown would say, as the majority did, that the distinction between murder under 167(b) and manslaughter under 66(2), on that scenario would become illusory, become so fine that it would be unworkable, and there would be policy implications of that too.

GLAZEBROOK J:

Well maybe over-criminalisation, by juries deciding it's murder when in fact it should be manslaughter, is that part of the submission?

MS LARACY:

Exactly. Except that manslaughter operates as the community's sort of protection where there is doubt as to the, perhaps, precision of what was foreseen, and the party was involved in a culpable activity, but did not share so precise a mens rea as the principal. The law of manslaughter provides a sort of a backdrop, or a residual framework which will capture the liability, but ensures that juries are not pushed to stretch facts or, not so much stretch facts,

but to push cases into murder, which can be dealt with on their overall assessment of culpability as manslaughter.

WINKELMANN CJ:
Or into lesser included charges where they might more properly sit.

KÓS J:
Yes.

MS LARACY:
Yes…

KÓS J:
I'm not sure I find this a very appealing argument. I mean on the argument the appellant and the interveners are making, there should be very few manslaughter convictions in a situation where there was not foresight of death. So the fact it becomes an illusory difference might just be doing exactly the right things.

WINKELMANN CJ:
Mmm.

MS LARACY:
Yes. I don't think I can…

WILLIAMS J:
Why is (b) "means to cause", and 66(2) "probable consequence" the same? Shall we get… one is very active, the other is just knowledge.

WINKELMANN CJ:
I think it's recklessness, isn't it?

WILLIAMS J:
Well, it doesn't matter, it's still immediate. Your section 66(2) part is altogether in a different category.

MS LARACY:

Under section 66(2) the defendant agrees to participate in a criminal enterprise, having foresight, if the appellants are right, that death could well result. In my submission the distinction between that and section 167(b) is extremely fine.

WILLIAMS J:

(b)?

MS LARACY:

Yes.

WILLIAMS J:

Okay. I'm not sure I agree with you on that. It seems to me that I would much rather be a section 66(2) person, than a 167(b) person, if I were in the dock.

WINKELMANN CJ:

How does that sit with the notion that you can be guilty of something even though it's not what you intend. So recklessness is you persist even though you see the risk of it, it suggests you persist – it's, you could say it creates more of a mess to encompass that as the same… I suppose I'm just saying I'm having difficulty with your argument.

WILLIAMS J:

What troubles me about the argument is just mapping it onto section 66(2), and how that can make grammatical sense. So the last two lines of that subsection, the common purpose is a hiding. The commission of that offence, let's call it a hiding for present purposes, was known to be a probable consequence of prosecuting the common purpose of delivering a hiding. So a hiding is a probable consequence of the intention to deliver a hiding. That repetition, on your analysis, will recur every time you apply that.

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MS LARACY:

Maybe this was the very point that, of course, the Court dealt with in *Ahsin* where the proposition was – one of the questions that was under examination was whether the act that results and for which the defendant is liable needs to be different from the common unlawful purpose that was agreed, and the Court said no, it can be the same thing. It may be different –

WILLIAMS J:

But in your case, it's always the same thing. At least when manslaughter is at issue.

MS LARACY:

No, it won't always, Sir. For instance, the common unlawful purpose may be to commit robbery, but if it is foreseen that – some of the examples we've had this morning that a – if it is foreseen that a sexual assault may occur –

WILLIAMS J:

Yes, I understand, but on – so let me be more accurate then. On the manslaughter point, you'll always get this mapping across from proposition A to proposition B.

GLAZEBROOK J:

Because death doesn't come into it.

MS LARACY:

If it is – yes. If the common –

WILLIAMS J:

Which means that whenever there's a death, anyone in that group, the common purpose is going to be caught every time.

MS LARACY:

Yes, and the policy basis of that lies in the agreement to embark on a criminal enterprise which the defendant foresees, engages the risk of harm, some bodily harm to some other person, and the law says that's not acceptable.

WILLIAMS J:

Well, no, what the law says is what we decide it is.

MS LARACY:

The law has, to date, said that –

GLAZEBROOK J:

But it won't be acceptable because you'll be guilty of assault. So you're not saying that's fine. You're just saying you're guilty of assault, aren't you? So nobody's saying, don't worry about it if you agree to go and assault someone, you can get off scot-free. If you agree to assault someone and that's your common purpose, then I don't think anybody in the submissions is saying you're not guilty of assault.

MS LARACY:

In my submission, this really is the argument about policy, that in some way it's unfair if manslaughter under section 66(2) captures people who weren't involved in the actual event, and my submission is that it's no more unfair that defendants under section 66(2) are captured by the law of manslaughter, even though they didn't foresee death, than it is that the principal isn't, because manslaughter, as we know, fundamentally will capture everything from accidental death right up to a highly culpable death.

WINKELMANN CJ:

Other than the point that the principal did the act.

WILLIAMS J:

Yes, you multiply that by the number of people in the group, and if you accept that the first one's unfair because, you know, it can be a very minor thing, then –

WINKELMANN CJ:

A 100 people convicted of it.

WILLIAMS J:

Yes, you're just making it as many times worse as there are people in the group.

WINKELMANN CJ:

Well, shall we take the adjournment at this point?

MS LARACY:

Yes.

WINKELMANN CJ:

We'll have to give you more of a fair go at your submissions tomorrow, Ms Laracy.

MS LARACY:

As the Court pleases.

WINKELMANN CJ:

Although you're used to it in this forum.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON TUESDAY 21 MARCH 2023 AT 10.05 AM

WINKELMANN CJ:

Ms Laracy.

MS LARACY:

May it please the Court. This morning, what I propose to do is to address the three broad topics and reasonably briefly if I can. The first is adding some further comments to the question of interpretation of the word "offence" in the context of section 66 of the Crimes Act. The second is addressing the legal policy implications of the appellant's proposed interpretation, and then very briefly, some of the broader social policy ones, albeit Mr Sinclair will be dealing with that aspect. I'll then hand over to Mr Sinclair to address ground 1 and any of the residual matters.

There are some further points I wish to make about the meaning of the word "offence", and as the Court below has noted, there are at least two ways of looking at the word "offence", and in my submission is that both are literal, but the offence meaning that the Crown contends for is purposive in the sense that it gives effect to the purpose of section 66(2).

Now, in terms of those two broad definitions or meanings of the word "offence", the word is used in the law sometimes in a definitional way. When it's used in a definitional way, it captures all of the elements, actus reus, mens rea, circumstances that must be present, to make someone, in the abstract, liable in the criminal law for a particular offence for which they can be punished to a particular penalty. That's the definitional sense.

The other sense in which it is used is when it focuses on conduct, and commonly, and mostly in the Crimes Act, that's what it does. It looks at the act or omission that gives rise to liability on the part of the particular defendant, and the most useful exposition of this distinction can be found in the High Court of Australia's majority decision in the case of *Barlow* and the discussion covers pages 867 to 869 of that judgment. I certainly won't take the Court to – it is

worth reading that whole section in one go, but the key points I wish to make are, without reading it, is that section 2 of the Code, in that case it was the Queensland Criminal Code, had a definition of offence which was identical to the definition that was in the New Zealand Crimes Act at the time that *Rapira* was decided, and that definition is referred to in paragraph 31 of *Rapira*: "An 'offence' is defined by s 2 to include 'any act…for which any person [*sic*] can be punished'." So the definition focused on the conduct, the act of the person.

In this passage in the middle of page 868 starting at section 2 of the Code which deals with the interpretation of of the word 'offence' identifies very clearly this distinction between the two usages, and goes on to make –

WINKELMANN CJ:
Although that is itself ambiguous, isn't it, because you can't be punished for an act unless you do it with a mens rea?

MS LARACY:
No, so what you can be punished for is the full definitional element of the offence which would include certain circumstances that must be present. But it doesn't capture that use of the word "offence" which is focused on the conduct of the defendant himself which is the act or omission. That is short of the definitional element of "offence".

So perhaps I could just take the Court to… "'Offence' is the term that is used sometimes to denote what the law proscribes under penalty and sometimes to describe the facts the existence of which render" –

GLAZEBROOK J:
Sorry, where are you reading from?

MS LARACY:
I'm reading from the middle of – the top of page 868.

GLAZEBROOK J:

Are we getting the bundles?

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WINKELMANN CJ:

Where is it in the casebooks? Is it in the…

KÓS J:

The appellant's authorities, volume 4.

MS LARACY:

It's in the appellant's authorities at page 868. My learned friend has just put it up. Would the Court like me to leave you to read that or just to point out the – perhaps it's sufficient for me to note that that paragraph starting "'offence'" identifies the distinct ways in which this word is used and goes on to recognise that when it's talking about an offence in the context of the conduct of a particular offender, it is talking about the act or omission of that offender conduct that would, if other elements are present, make them liable.

Section 2 of the Code, as I say, mirrors the definition that we used to have in the Summary Offences Act and in the Crimes Act of the word "offence". Now, it's worth noting that that definition has gone from the Crimes Act and from the Summary Offences Act, and the reason for that is that it was repealed at the time of the Criminal Procedure Act because the definition of offence in our context referred to the acts or omissions that would make the accused or defendant liable either on indictment or liable to summary conviction, and that distinction between indictment and summary conviction was done away with with the Criminal Procedure Act, but suffice to say that in the criminal common law, an offence has always related not only to the full set of elements that define an offence for which any offender in the abstract may be held liable for a particular penalty, but also relates and more commonly relates to the conduct element that makes the individual, as a matter of their acts and their mens rea, liable, if other factors are present.

O'REGAN J:

Ms Laracy, can you just pull the microphone a little bit closer to where you're speaking?

MS LARACY:

Apologies. The other point I wish to draw the Court's attention to is that, a little further down in the same page, the paragraph commencing "section 2", the Court goes on to make the point that the meaning of the word "offence" relating to the individual's conduct in section 7 of the Queensland Criminal Code which is the same or the equivalent as section 66(1), that meaning must logically follow through to section 8 which is the equivalent of section 66(2). So if in section 7, it refers to the unlawful act or omission of the defendant that makes them liable for assisting, then section 8, section 66(2), it refers to the unlawful act or omission accompanied by mens rea of the defendant that makes them liable as a party under the common enterprise law.

WINKELMANN CJ:

In my part, I find this reasoning difficult to follow. It's too sophisticated for me, I think. It seems to be lacking any kind of substantive merit.

MS LARACY:

Those three pages are, they are clear enough, but they are dense, they're densely worded, and the same concepts are repeated in different languages across those three critical pages of *Barlow*. I would also make the point that the Court goes on at the end of those, it's about five pages later, to say that this is broadly similar to the approach that was taken by the Supreme Court in *Jackson* in identifying what offence meant in their context, and as I say, I would also draw the Court's attention to paragraph 31 of *Rapira* which in the –

GLAZEBROOK J:

Is this really only going to be relevant to manslaughter? The reason I ask that is that I can't – because normally, you have an element of an offence and then you have to mean to do those elements. Manslaughter, obviously, in terms of the death, the whole point is you don't mean to do that because if you did, then it would be murder.

MS LARACY:

There will be other offences, your Honour, that have circumstances attaching to them or consequences, I can't think of what they are at the moment, but –

GLAZEBROOK J:

No, I was having trouble with that, but I think somebody gave a definition of possibly fraud or some of the fraud cases, possibly.

MS LARACY:

Yes.

GLAZEBROOK J:

One of the cases gave an example, but I must admit, I didn't quite follow that example that was given, so.

MS LARACY:

But the point is certainly acutely relevant to understanding the law of manslaughter, but it may well be relevant in respect of other offences, and *Barlow* talks about –

GLAZEBROOK J:

So the submission is that you don't look at the circumstances that must accompany the conduct, you just look at the conduct in terms of the definition of "offence"? Just to get rid of the dense nature of that, is that the submission?

MS LARACY:

The submission is that this is an established meaning of the word "offence". It is, in fact, the way it's most commonly used in the Crimes Act. You will find that where the word "offence" is used, it generally refers to the conduct that is required to make someone – their own conduct that is required to make them liable for an offence. It's generally not used in a full definitional way.

WINKELMANN CJ:

Can you give us an example of that? Because I would imagine that when it's used, it's used to refer to the whole thing because you're only liable for an offence if you do the conduct with the associated mens rea or circumstances that are required to accompany it. So I'd be interested to see where it's just talking about the actus reus.

GLAZEBROOK J:

You don't have the actus reus without the circumstances in manslaughter even though you don't have to intend the circumstances, they would be…

KÓS J:

The problem is there's a fracture in section 66(1) between (a) and (b) and everything that follows (b) because section 66(1) deals with direct co-offenders, section 66(1)(a), where you have people that commit the same offence, they therefore share the mens rea of the principal offender. But after that point, from section 66(1)(b) on, you're not necessarily sharing the same mens rea. What you're doing is participating in that activity with some foresight, and foresight and mens rea are very different concepts. We're not dealing with intention, but rather perception as to what the principal offender is doing.

MS LARACY:

This gets at a fundamental principle which is essential, in my submission, to understanding the law of section 66(2) which is that the party under section 66(2) does have to, whether you call it mirror or share, the essential mens rea of the principal for that offence. So if Mr Webber had been guilty of manslaughter in the sense that he had not had the foresight or the mens rea required for murder, then Mr Burke's – so, Mr Webber was guilty of manslaughter, Mr Burke's liability and mens rea mirrors and follows what Mr Webber foresaw, namely an assault falling short of one with the mens rea requirements of section 167.

GLAZEBROOK J:

Sorry, are we talking about section 66(1) or section 66(2)? Because we're mixing up mens rea and foresight, and I'm getting confused.

Because section 66(1) would have to be mens rea and section 66(2), I thought, the argument was, is foresight only.

WINKELMANN CJ:

Which includes foresight of the mens rea.

MS LARACY:

Section 66 –

GLAZEBROOK J:

Oh, well, yes, probably.

MS LARACY:

Yes.

GLAZEBROOK J:

But not the mens – well, I thought the Crown's position was not the mens rea, and I realise that somebody, CBA or maybe both of them, say actually it should be mens rea as well, but…

WINKELMANN CJ:

So does your submission entail that under section 66(2), to be liable, say, for causing grievous bodily harm with intent to cause grievous bodily harm, under section 66(2), the person does not need to foresee the mens rea, just violence?

MS LARACY:

No, so the elements of causing grievous bodily harm with intent to cause grievous bodily harm, the mens rea requirement of that offence is intent, just specific intent, intent to cause grievous bodily harm. So the principal who actually under section 66(1) or section 66(2) does that act, needs to have that specific intent.

WINKELMANN CJ:

And the party?

MS LARACY:

And the party, under section 66(1) would have to intend to and assist them in that act knowing that –

WINKELMANN CJ:

With that intent?

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MS LARACY:

Knowing that the principal –

WINKELMANN CJ:

But what about under section 66(2)?

MS LARACY:

And under section 66(2), would have to foresee that the principal would act with the relevant foresight, namely, intent to commit GBH. So this is an example of exactly how it mirrors. So there is a more specific – there is a higher intent in terms of culpability often for intent to cause GBH than there is for manslaughter, which depends, as a matter of the legal elements, on something that the Court recognises as an assault and, of course, "assault" is defined in section 2 of the Crimes Act, and it captures everything from very low level use of force, to very severe use of force, and the gloss on that to make sure that only the relevant types of offences are – or acts are captured. This is common law gloss which is discussed in, particularly in the case of *Lee*, and that's the element of objective dangerousness or alternatively, the objective recognition that this is an act which could cause more than trivial or transitory harm.

WINKELMANN CJ:

Okay, so can you relate your reasoning in relation to the definition of "offence" to how we apply section 66(2) in the context of manslaughter?

MS LARACY:

So in the context of manslaughter, does the Court wish me to do that by addressing the principal guilty of murder and the party guilty of manslaughter, or simply focus on the principal guilty of manslaughter and the party guilty of manslaughter? In my submission, it doesn't –

O'REGAN J:
The former, because that's what we're facing here.

MS LARACY:
Yes. So manslaughter by unlawful act. It's important to recognise that the unlawful act which is the foundation for culpable homicide is the same unlawful act which can give rise to murder as can give rise to manslaughter. There's no difference in the act itself. The difference between murder and manslaughter turns solely on the mens rea.

So the principal convicted of murder by unlawful act needs to act with one of the intents in section 167 or section 168. What's important to recognise is that every instance of murder in New Zealand law requires one of those murderous intents that require either an intention to cause death or an intention to cause serious harm, knowing that death is likely to result. So foreseeability of death, if I can use that as the summary, is the element of murder, except in one situation, and that's under section 168, where foreseeability of death is not an element, and that was exactly what the Court was looking at in *Rapira*. So foreseeability of death is not required for either the principal or the party under section 168.

So if we take an unlawful act, say, under section 167, where there has been intent to cause death, or intentional grievous bodily harm knowing death is likely to result, so either under (a) or (b), the principal needs to have that mens rea. That needs to be proven beyond reasonable doubt.

The party to that murder, the secondary party, under section 66(1) needs to, knowing of that intent, needs to assist in some way. Actual assistance with intent to assist, knowing that the principal has that mens rea.

WILLIAMS J:

The logic of that is, in assisting, you must share that intent.

MS LARACY:

Exactly, Sir.

WILLIAMS J:

So it makes perfect sense.

MS LARACY:

It makes perfect sense, and this is the point that – if I could just digress for one brief second, this is why I really do commend the *Rapira* decision in that it really goes back to first principles of criminal liability in the context of murder and manslaughter. It makes the point that the mens rea of the secondary party under either section 66(1) or (2) must mirror that of the principal. So that's the murder liability. Did I cover section 66(2) party –

O'REGAN J:

No, you haven't yet.

WINKELMANN CJ:

No.

MS LARACY:

So the principal convicted of, or guilty of murder under section 167(1), section 167(a) or (b), the party under section 66(2) needs to be part of a – have agreed to a common unlawful purpose, foreseeing that the principal could well commit an act, could well commit an unlawful act with the requisite mens rea. So it could well commit an unlawful act with, under section 167, intent to kill, or it could well commit an unlawful act with intent to cause GBH being reckless as to whether the death ensues. So that's the murder situation. The other situation, and again *Rapira* goes to –

O'REGAN J:

That's for section 167. We're putting to one side section 168 at the moment?

MS LARACY:

Yes.

O'REGAN J:

Yes.

WINKELMANN CJ:

So if we look at your definitional approach to the word "offence" in section 66(2), can we just do that for this point, at this point for murder?

MS LARACY:

Yes.

WINKELMANN CJ:

So can you tell us how it works for a defence then, how it works?

MS LARACY:

So liability turns on, for the party under section 66(2) for murder by unlawful act, turns on that defendant having foresight that in the course of the common enterprise the principal will commit an unlawful act with the mens rea that is short of murder.

WINKELMANN CJ:

So, but I'm just linking your murder one to the wording in section 66(2), the word "offence" because your argument turns on the meaning of the word "offence", doesn't it, in section 66(2)?

MS LARACY:

Yes. That, of course, that is the definition, that is the language that is used in the definition of culpable homicide – well part of the meaning of culpable homicide in section 160(2) of the Crimes Act. So homicide is the killing of a person, that's section 158. Section 160 culpable homicide, homicide can either be culpable or not culpable. Subsection (2), homicide is culpable when it

consists in the killing of any person, and this is the conduct element, (a) by an unlawful act.

WINKELMANN CJ:

So as Professor Orchard says you've just edited out of that definition of the Act, the killing, which is in section 158?

MS LARACY:

Well section 158 is included – the sections together as well as the penalty provision which is later on make up the full definitional statement of the offence of murder but the offence, in my submission, consistent with *Barlow*, consistent with *Rapira*, is the unlawful act. It's the conduct that makes this particular defendant liable and in the context of manslaughter under section 66(2) the conduct that makes them liable is that prior agreement to a common enterprise combined most relevantly with foresight –

WINKELMANN CJ:

Yes, but that's your bigger argument –

MS LARACY:

Yes.

WINKELMANN CJ:

– but I'm just trying to get you to link your argument about the meaning of offence so to use that to substantiate your argument that we should read out death in this so –

GLAZEBROOK J:

Well is it just reading out death because at one stage you were saying you read out the mens rea but when you told us about the liability under section 66(2) for murder –

WINKELMANN CJ:

Yes, you read in –

GLAZEBROOK J:

– you're not reading out the mens rea at all?

WINKELMANN CJ:

No.

GLAZEBROOK J:

And I can see because it's an essential part of the offence –

WINKELMANN CJ:

Of the offence.

GLAZEBROOK J:

– but it's not conduct. I mean they do say in *Barlow* which, if accompanied by prescribed circumstances or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person liable to punishment but you can't edit out the prescribed state of mind if you are looking at murder. You just can't because it just isn't murder without that prescribed state of mind. So your submission that you read out intent can't be right.

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WINKELMANN CJ:

And you don’t say it is.

GLAZEBROOK J:

So what you're saying is you read out which, if accompanied by prescribed circumstances, I'm just looking at section 62 – I'm just looking at the *Barlow* section 2 of the Code, makes it clear that offences used in the Code to denote the element of conduct which if prescribed by something, and you say you read out prescribed by particular circumstances, but you have to accept, I would have thought, that you have to have a prescribed state of mind at least for some of these offences?

MS LARACY:

And the relevant state of mind for manslaughter is knowing or foresight that the principal –

GLAZEBROOK J:

So you're not saying you read out the – you just read out the – if accompanied by prescribed circumstances, or if causing a prescribed result, you read out, but you leave in if engaged with the prescribed state of mind?

MS LARACY:

That's right. I would not want –

GLAZEBROOK J:

Well it's just I don't see how you get what you're saying from *Barlow* though.

MS LARACY:

The consequence is not part of the conduct element for which the language of offence, as used in section 66 or in section 8 of the –

GLAZEBROOK J:

But in many cases the mens rea can be part of the conduct.

MS LARACY:

Well my submission is that the mens rea is – the appellant needs to have mens rea in the sense of foresight that the principal will engage in an unlawful act –

KÓS J:

Which is dangerous?

MS LARACY:

Which is dangerous, and if they engage in an unlawful act with any of the mens rea requirements for murder, then it is murder. If the mens rea is short of that, it is manslaughter, and that is the law of manslaughter. The distinction between murder and manslaughter turns on this mens rea, whether there is presence of the specific intents for mens rea in murder, it doesn't turn on the

unlawful act, and liability does not turn on whether or not the death can in some way be sheeted home directly to the defendant.

KÓS J:

And in support of that argument you've drawn the fact that that's the approach in section 66(1)?

MS LARACY:

Yes.

KÓS J:

Because you do not need to have foresight of death. That's been made perfectly clear in *Edmonds*.

MS LARACY:

Yes, Sir.

KÓS J:

So you are really endorsing the approach taken by Justice Osborne in his question trail, and departing from the approach taken by the majority who omitted that principal offender mens rea element?

MS LARACY:

We are going to deal with the question trail later more specifically.

KÓS J:

All right, that's fine.

WINKELMANN CJ:

Can I just ask does your interpretation and the interpretation of *Rapira* then really involve giving offence a different meaning in manslaughter than it's given in every other case? Because it seems to be arguable that it does.

MS LARACY:

I don't think I can go further than my answer to Justice Glazebrook on essentially the same question. I expect there are other – there will be other offences, I can't think of them right now, where there are consequences or elements or circumstances for which the defendant will be liable for the full offence, albeit there are aspects of that to which mens rea does not attach.

WINKELMANN CJ:

Okay, so it does really entail giving offence a sort of a mobile meaning, responding –

MS LARACY:

Mobile meaning based on conduct acting –

WINKELMANN CJ:

Responding to the context, yes.

GLAZEBROOK J:

Well I think you wouldn't say it's a mobile meaning. You would just say you just look at the conduct in a manslaughter, and you don't look at the conduct combined with circumstances, because the circumstances are the circumstances and, in fact, the death will either make it murder or manslaughter. Is that…

MS LARACY:

Yes.

GLAZEBROOK J:

That's more the submission, isn't it, and the intent changes whether it's murder or manslaughter?

MS LARACY:

Well the death is the consequence and that's a causative question.

GLAZEBROOK J:

So you have to have the consequence but it's not part of the conduct, is that the submission?

MS LARACY:

That's right and it's definitely not part, under section 66(2), of what the secondary party needs to be guilty of because that theory of liability, in particular, does not depend on the death being causative to the acts of the secondary party. Instead it's a theory of liability that is based on agreement to commit criminal acts knowing that in the course of that course of criminal conduct, certain things that may be unintended could well happen.

WINKELMANN CJ:

You've completely lost me. I really can't understand it.

MS LARACY:

It is not a causative theory of – section 66(2), wherever it's applied –

WINKELMANN CJ:

Yes.

MS LARACY:

– your Honour, is not a theory of causation. It's a theory. This is the heart of the policy question. It's a theory of – that bases responsibility and accountability on people who choose to engage in a criminal course of conduct because it is inherent in criminal courses of conduct that things go wrong. It's unpredictable, it's risky, but the individual will – each individual will only be held responsible for what they specifically foresaw as part – as could well – as a substantial or real risk of what could well happen as part of that criminal course of conduct.

WINKELMANN CJ:

Except in the case of manslaughter when they've got this open-ended thing. They may be only thinking about a small – a reasonably – an assault and suddenly – and not foresee the possibility of death, but on this analysis it is quite different, isn't it? It's a different – it is suddenly open-ended whereas

before they've had to foresee consequences and – but not in the case of manslaughter.

MS LARACY:

Not in the case of manslaughter for the offence itself or for the principal or for the party under section 66(1). I mean a very good example of this, which is a case before your Honours is, I've forgotten whose bundle it is in, but it was a principal's case, not a secondary party case, but it is the case of *Lee*. Now Mr Lee intended in the context of doing an exorcism to heal, to help. He certainly didn't foresee death. He was trying to help the defendant, and the unlawful act there was potentially, it was a matter for the jury really, but a very slight pressure on the carotid artery of the deceased. That was an unlawful act in the circumstances. He was liable for manslaughter, and the way the law deals with that is not to say, well because he didn't foresee death, and death must be a definitional part of any culpable homicide, didn't say that, instead the way the law responds is to say well how culpable was this individual based on what they foresaw, based on their act and this is where the –

GLAZEBROOK J:

Although section 66(2) does require foreseeability unlike section 66(1) or the definition of "manslaughter", so I'm not sure that really helps you unless the argument is if you assisted that, but then if you assisted that intending to do whatever you did, you'd be liable under section 66(1), wouldn't you?

MS LARACY:

Yes, under section 66(2) obviously there is a mens rea element and –

GLAZEBROOK J:

So you just don't have to foresee, even though it says you have to foresee it, you say you don't have to foresee it because it's a circumstance not conduct. I think that's the submission, isn't it?

MS LARACY:

Well essentially I say that offence means, as it was explained in *Barlow*, the particular unlawful act of the defendant, the particular unlawful act of the defendant, just leaving aside the common enterprise, we're all agreed that's not in issue, was in the context of that common enterprise foreseeing that the principal would commit an unlawful act with the relevant mens rea, and in the context of manslaughter the principal commits a relevant unlawful act when they commit any assault that is more than trivial or transitory with the intent to commit that assault. So the mens rea attaches to the act of striking, to the act of punching, to the act of stabbing but essentially they are all an assault. So the mens rea does attach and that is the heart of the criminal liability under section 66(2).

KÓS J:

So two things. First of all we're talking about foreseeability not foresight, so there is a degree of objectivity in this. It is what could well happen. Second, –

O'REGAN J:

It was what he knew could well happen.

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KÓS J:

What he knew could well happen, that's right, and so there is a degree of, a mixture of subjectivity and objectivity in that I think. The second thing is that no one who intends to engage in a mean hiding can be surprised that the consequence of that is something going very badly wrong.

MS LARACY:

Yes.

KÓS J:

And the example used yesterday was of the punch, which they had both intended to engage in punches and Mr Burke did engage in punching, where that goes wrong and Mr Heappey falls over and hits his head instead of being stabbed.

MS LARACY:

That's right. If Mr Webber had punched – had upfront punched Mr Heappey once in the head, or in the torso, and Mr Heappey, let's leave it at the head, and Mr Heappey fell over and hit his head and died, then Mr Webber would be probably liable for manslaughter on those facts, on other facts might be liable for murder but probably manslaughter, and Mr Burke would be liable for manslaughter for foreseeing that assault with the relevant mens rea. Mens rea is not and has never been required in our law for the causation element of death.

WINKELMANN CJ:

So I have listened carefully to your argument, and I've read *Rapira*, and in all that there doesn't seem to be a broader conceptual framework to assist with the section 66(2) other than that in the case of manslaughter and murder we have to bring a purposive approach to it. So it is a particular approach for murder and manslaughter to section 66 – well for manslaughter to section 66(2).

MS LARACY:

Well so the purposive approach there is the same purposive approach that I contend for here, namely section – what the Court established very clearly in *Rapira*, or reflected, was that section 168, which was in issue in that case, is the exception to other instances of murder in that it does not require foresight of death, and what was contended for the appellants as parties is that they should be required to have foreseen death.

WINKELMANN CJ:

Death, mmm.

MS LARACY:

And the Court said no, you have to go back to the elements of the offence of manslaughter, and foresight of death has never been a part of that requirement, and if it were to be introduced for a party into section 168, where it is not an element of the substantive offence, that would be to render ineffective section 168 in the context of this broader basis of liability under section 66(2).

WINKELMANN CJ:

So it's a particular reading for dealing with manslaughter and homicide of section 66(2) I think. I've been trying to get from you a conceptual framework which is more pinned down, broader than that, but it seems to me reading *Rapira* and listening to you, it is purposive reading to meet what seems to be to some people, the Court in *Rapira*, a perverse outcome if you apply the foresight requirement in terms of the actus reus, the death actus reus element of homicide.

MS LARACY:

The death is only –

WINKELMANN CJ:

So is it a broader interpretation of section 66(2) or (1) which particularly responds to the homicide context?

MS LARACY:

In my submission it's a perfectly orthodox – it is the way section 66(2) needs to work, and the approach contended for, for my learned friend, does two things. One, it changes –

WINKELMANN CJ:

Okay, well can I just ask you to state how it works more broadly. What is the broad statement of how it works which encompasses then homicide, because this is where I'm not really understanding the broader framework?

MS LARACY:

Where the secondary party – it pins liability on the secondary party for unlawful acts that they foresee the principal will commit, and what is essential is that it's not the full definitional literal offence, rather it's the unlawful conduct that they specifically foresaw, and this is highlighted, for instance, by the Court's decision in *Barlow* where –

WINKELMANN CJ:

So would it be a way of saying that they don't need to foresee the downstream consequences of that unlawful act?

MS LARACY:

Yes, because mens rea has never been –

KÓS J:

Because the principal offender didn't either?

MS LARACY:

Yes, that's right, and a literal interpretation would perhaps, as was the question in *Barlow*, would potentially say that the secondary party is liable for the offence committed by the principal. Now, obviously, that is not correct. Mr Burke is not liable for the murder. Why not? Because he didn't foresee that Mr Webber would act with that intent. What he is liable for is the unlawful act that he foresaw Mr Webber engaging in, but only to the extent that he foresaw Mr Webber acting with a particular level of mens rea, namely to intentionally assault. On the facts in this case the intention we can safely say was considerably higher than that because we know from Mr Burke's own statement that –

GLAZEBROOK J:

But that's not how it's put to the jury so there's no – I mean you have to have the lowest possibly intent, ie, more than trivial because that's the only thing put to the jury, but also you probably – at some stage will you deal with ground 1 as well?

MS LARACY:

Yes.

GLAZEBROOK J:

In terms of the particular, that death didn't result from the one punch?

MS LARACY:

Yes, yes.

GLAZEBROOK J:

I'm just reminding you. You don't have to deal with it now.

MS LARACY:

No, Mr Sinclair will deal with that.

GLAZEBROOK J:

But I don't know – it doesn't help you to say the intent was higher than that because, in fact, that's not what the jury was told so it has to rise or fall on more than trivial.

WINKELMANN CJ:

So if I can just – so what you said, your submission, I'm just capturing your submission. So in cases where a principal is guilty for the unintended consequences of an unlawful act, the party under section 66(2) need not foresee that consequence and that's as broad as – and you say that's a general application?

MS LARACY:

But they do need to foresee the unlawful –

WINKELMANN CJ:

Unlawful act.

MS LARACY:

The unlawful act, and they need to have the mens rea which accompanies, they have to have the – they have to have foresight of – they have to have the state of mind –

WINKELMANN CJ:

Have foresight of, yes.

MS LARACY:

Yes, that accompanies that act and I do –

KÓS J:

So that's why in the question trail it's put: "Are you sure that Mr Burke knew that Mr Webber knew the assault would be dangerous?"

GLAZEBROOK J:

Yes.

KÓS J:

So it's picking up Mr Webber's mens rea and foresight?

MS LARACY:

Mr Webber needed – in order to be liable for an unlawful act of assault, he needed to apply force intentionally to the defendant. He didn't subjectively have to foresee that it would be dangerous.

KÓS J:

Correct, correct.

MS LARACY:

That's an objective requirement, not part of the mens rea, but he did have to foresee that – well he did have to – Mr Webber needed to intend to apply force to the deceased, and Mr Burke needed to foresee that Mr Webber would apply physical force to the deceased.

WINKELMANN CJ:

There wasn't any threshold of seriousness of their force?

MS LARACY:

Not as a matter – there's not as a matter of law, that's right. Of course in this case the defence counsel, in my submission, incorrectly put, with respect, incorrectly put the law of manslaughter to the jury in closing to the jury on this, and that's at page 286 of volume 2 of the Court of Appeal, when my learned friend said that the jury need to know that Webber intended to stab him or that

Mr Burke foresaw death as a probable consequence of the unlawful plan to assault. He needed to foresee death. Counsel says the knife is crucial because it's the only evidence of serious violence so that death is a probable consequence. My submission is that that's wrong and ambitious on a number of levels. It's wrong as a matter of law that Mr Burke needed to foresee death. It's also worth noting, and Mr Sinclair will cover this, that the jury trail shows that as a matter of the evidence in this case he did foresee the use of a knife for a stabbing as part of the common purpose, and I say that because question 18 in the question trail asked whether a stabbing was foreseen as part of the common purpose, and as a matter of fact the jury must have found that was. Now my submission is that that wasn't necessary that it needed to be at the level of a stabbing but on the facts of this case, as it was put, the jury was specifically asked if –

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GLAZEBROOK J:

Can we get the question trail up? I'm just doing it in the abstract, so if you tell us where it is?

KÓS J:

It's 356.

MS LARACY:

Question 18.

GLAZEBROOK J:

Where do you get stabbing from that?

O'REGAN J:

Question 18.

MS LARACY:

Sorry, this question 18, this goes to whether – no you're right. This doesn't attach to the point of foresight. Rather it goes to the – I apologise, well, to the scope of the common purpose.

WINKELMANN CJ:

Well I don't think it does.

GLAZEBROOK J:

Well, no, because the scope of the common purpose is 16. To inflict a physical beating or hiding, and that's the common purpose.

MS LARACY:

And this is a further extension of that. Are you sure that –

GLAZEBROOK J:

Well sort of, except that I think they're saying, did Mr Webber think that he was giving a hiding to Mr so and so by stabbing him, not that you can really put your mind to Mr Webber's mind that a hiding includes a stabbing to death.

MS LARACY:

I take your Honour's point. The point is that to suggest that the stabbing was wholly outside the common plan, in my submission, question 18 responds to that. The common goal is focused on here, and the jury were asked: "Are you sure that the stabbing was part of the common goal" and –

GLAZEBROOK J:

Well isn't that just a factual question?

MS LARACY:

It is.

GLAZEBROOK J:

Was this a – I mean it's not necessarily, you know, it's in the very course of what they were intending to do, so I'm not sure it says anything about intent or anything more that you can read into it.

WILLIAMS J:

It's just what he actually did do.

GLAZEBROOK J:

Yes, that's what I'm, that's (inaudible 10:52:36) take it.

WILLIAMS J:

Not what he intended, not what he foresaw.

MS LARACY:

I accept it's not foreseeability. So I've mentioned the policy rationale for secondary liability, which is in *Rapira* at paragraph 26, which in my submission applies even though that was directed at section 168 murder, for which foreseeability is not required, for exactly the same reasoning I say that that policy rationale applies to the way section 66(2) needs to be interpreted in the context of manslaughter, namely if foreseeability of death were required for a party under section 66(2) for manslaughter, it would change the element of the substantive offence, and it would render section 66(2) as a form of liability in that context ineffective, and the purpose of the law was to ensure that parties to the offending "should likewise be liable to the fullest extent notwithstanding that in their case too they did not foresee the death of the victim." So that's paragraph 26 of *Rapira*.

I also make the point that in terms of something which is important to the principles articulated in *Rapira*, there's the point that there's a hierarchy of offences and culpability in states of mind for which in respect of the same event, different people will come out of that based on their conduct and their state of mind with different levels of culpability, but it would be anomalous and disruptive of the scheme of the criminal law if manslaughter, the lesser offence, the offence that is committed when murder is not committed, required foresight of death, when that is not required for a form of murder under section 168. The idea that you could not be liable for manslaughter unless you foresee death, would be very jarring in the context of the fact that there is a form of murder, which also does not require you to foresee death.

KÓS J:

I'm not sure that's totally convincing. The argument here is that we got to such a point of extension of secondary participation that section 66(2) by its particular wording introduces that extra requirement. So if it's a section 66(1) secondary party, then the same approach applies as the principal offender for manslaughter. No foresight required. It's just at this very extended secondary liability that the appellants justify its inclusion.

MS LARACY:

But the effect of that would be to render section 66(2) of no value in the context of manslaughter, when in my submission we know from the number of cases that it is used in, and this Court's own comments in *Edmonds* as to the value of section 66(2) in cases of combined group assaults, it would render it ineffective, and that's the point I make.

O'REGAN J:

Why would it render it ineffective. You're saying it would be murder or nothing?

MS LARACY:

Well the defendant –

GLAZEBROOK J:

Well it could be manslaughter under section 66(1) in most cases, because assisting includes encouraging, then the 16 year old gang boy that we had in one of the examples, and I can't remember who put that forward, the fact he was going there as part of that big group has to be encouraging under section 66(1) doesn't it?

MS LARACY:

Yes, but section 66(2) has a flexibility and a –

GLAZEBROOK J:

Well maybe one that it should have, because of possible overcriminalisation in those circumstances. That's the argument against you I think.

MS LARACY:

Well certainly that's what's asserted. That's not how this Court commented on it in *Edmonds*, and Mr Sinclair can address that in more detail.

O'REGAN J:

Is liability under section 66(2) available for a section 168 murder?

MS LARACY:

Yes. Yes, that is the *Rapira* situation.

O'REGAN J:

So *Rapira* wasn't just about the principal offender, it was…

MS LARACY:

No, no.

O'REGAN J:

Right.

MS LARACY:

So I won't take you to any of the detail in *Rapira*, but the way it's structured –

GLAZEBROOK J:

But you'd have to foresee recklessness for it to be murder, wouldn't you? I mean it would just be the same –

O'REGAN J:

Not for 168, you just have to prove that someone died in the course of committing another offence.

MS LARACY:

Yes. So just before paragraph 21 of *Rapira*, the heading shows that the next section addresses the knowledge of the secondary party to murder under section 66(2) where the principal is convicted of murder under section 168, and then there's the further analysis just before paragraph 28 which addresses the

variation on that, which is the knowledge required of secondary party to manslaughter under section 66(2), where a principal is convicted of murder under section 168, and the Court makes the point that the elements of the offence stay the same, the mens rea that is required of the party under section 66(2), us under section 66(1), mirrors what is required of the principal.

O'REGAN J:

I mean the High Court of Australia case that was handed up recently, that was decided just last week. It basically says, at least in the common law context, that it's not possible to convict under the extended joint criminal enterprise principle of the common law in a case of, in the South Australian version of felony murder. It maybe that that's based on particular things about the South Australian legislation which don't apply.

MS LARACY:

Yes, yes. The only points I'd make are two. One it's a murder case not a manslaughter case, so of limited, of assistance.

WINKELMANN CJ:

Do you know that decision Ms Laracy?

MS LARACY:

I've only glanced at the headnote, that's all I've had time to read, but it is a murder case, and I would refer your Honours also to the important point that this Court unanimously emphasised in *Edmonds* that in the context of considering liability for manslaughter in, or for murder, parties liability in these assault cases, they must be, the approach must be firmly grounded in the language of section 66 itself, and it would be –

O'REGAN J:

Well section 66 and section 168.

MS LARACY:

Yes.

O'REGAN J:

I mean it's both, isn't it.

MS LARACY:

Yes.

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WILLIAMS J:

So you're, I mean you've taken us through the cases where those assertions are made, albeit authoritatively, but your underlying conceptual argument is that to depart from those conclusions would be to distort section 168 and 167(b).

MS LARACY:

Well it would be, in my submission, to distort first and foremost the offence of manslaughter. It would require – it would introduce, with respect to this particular form of liability, a mens rea requirement that is not otherwise required for any liability for manslaughter, and is not part of the elements of the offence, namely foresight of death.

WILLIAMS J:

I took you to say more particularly yesterday that, and today, that even murder doesn't require what would be required of the manslaughter here in those particular circumstances?

MS LARACY:

That is another legal policy.

WILLIAMS J:

Sections 168 and 167(b), is that right?

MS LARACY:

That's right. This would elevate, in essence, manslaughter to require a more culpable state of mind from manslaughter than is required for murder under section 168. In my submission that's highly anomalous.

GLAZEBROOK J:

You keep saying “state of mind” but what you mean is foresight or foreseeability, don’t you?

MS LARACY:

Or mens rea. Let me call it that.

GLAZEBROOK J:

Well it can be mens rea . Well I don’t think it is because nobody intends anything in manslaughter, or in those other forms of murder, specifically intends, sorry.

MS LARACY:

But mens rea is state of mind, it's knowledge, it's foresight, so if we just use the language of mens –

GLAZEBROOK J:

So you're using it more broadly, all right, that’s fine.

MS LARACY:

Yes, and perhaps I will stick with mens rea.

WILLIAMS J:

Well the mental element is joining the common purpose and foresight. Those are both things that are in your mind?

MS LARACY:

Foresight that the particular unlawful act could well happen.

WILLIAMS J:

Yes, but it's also the joining of the common purpose?

MS LARACY:

Yes, yes, but –

WILLIAMS J:

The willingness, the intending to join the common purpose.

MS LARACY:

That's right.

WILLIAMS J:

There's also a mental element, he didn't intend it.

MS LARACY:

And knowing it could well happen in the course of that common purpose.

WINKELMANN CJ:

I think we're going round in circles now.

WILLIAMS J:

Yes. We've been doing that for a while.

MS LARACY:

The language in the equivalent Canadian position I know doesn't use the word foresight, it uses knowing.

WINKELMANN CJ:

So do you have anything else to say Ms Laracy?

MS LARACY:

Yes, just very briefly. I would say that the concern that manslaughter in this context captures too much is, with respect, a misunderstanding of the law of manslaughter itself. A very limited mens rea has always been required for manslaughter, that was affirmed by this Court in *Edmonds*, and *Jogee* at paragraph 33 makes the general statement that: "… where a person takes part in an unlawful attack which results in death, he will be guilty either of murder or of manslaughter according to whether he had the mens rea for murder." It's not a focus –

WINKELMANN CJ:

Well we're still going around in circles again here, aren't we –

MS LARACY:

Thank you, Ma'am.

WINKELMANN CJ:

– because that all depends upon your view about whether – of the over-reach issue with section 66(2) because we're talking about party liability, not principal. I should say that we're the ones who have been taking you around in circles, Ms Laracy.

MS LARACY:

I think I am about ready to…

GLAZEBROOK J:

And you were going to deal with ground 1?

WINKELMANN CJ:

I think Mr Sinclair is.

MS LARACY:

No, Mr Sinclair will deal with that.

GLAZEBROOK J:

Oh, Mr Sinclair. Sorry, yes, I remember now.

MS LARACY:

I'll just refer the Court to consider the article in the appellant's bundle by Professor Simester at, which just sort of more generally talks about this idea that there may be a broader worry about the reach of extended joint common enterprise and the suggestion that it's Draconian. It's important to remember that what was under question there was the way murder and joint common enterprise had been dealt with in the English law. But he does make the point, and I think there is something in this, that: "Curiously, the law in jurisdictions

such as Australia, Canada, and New Zealand has not generated parallel controversy to that in England." And it's to do with the way the liability doctrine has been applied, and that we haven't had problems of overzealous findings of shared criminal purpose with foresight, and that the common purpose liability should be a form of guilt by enterprise, not by association, and in my submission Mr Burke, in terms of this being an enterprise, was fully engaged, and it's not a matter of being on the periphery in the sense of being merely associated.

O'REGAN J:
I think we've got two different articles by Professor Simester, have we?

WINKELMANN CJ:
Yes.

O'REGAN J:
Which is the one you're referring to?

MS LARACY:
The article, the passage I have in front of me is at 1138, I'm not sure what the title of that is.

O'REGAN J:
That's fine. That's of the appellant's bundle?

WINKELMANN CJ:
It might be a result of prosecutorial decision-making. Lack of controversy because –

O'REGAN J:
Well it's also the definition of "murder" in England, isn't it, because that you don't have to – you just have to intend to commit grievous bodily harm, but you don't have to be careless as to whether death results or not, as we have under section 167(b). So that means people could be liable for murder under extended joint criminal enterprise pre-*Jogee*, even though they didn't foresee

that death, they just foresaw an assault that could involve serious harm. Because that's all the murderer had to foresee. That's all the murderer had to intend. So I think the problem in the UK is a combination of the breadth of extended joint criminal enterprise, and their definition of "murder".

MS LARACY:

Yes, and as my learned friend will cover, particularly complicated by the jurisprudence that was there for a while on knowledge of a weapon. But I do submit that our current approach to the law of manslaughter under section 66(2) affords exactly the sort of flexibility and moral sensitivity that Professor Simester recognised is a value of the spaces of liability, and the Crown says it's important that where death follows an unlawful assault, a deliberately unlawful assault where the intention in this particular case is to deliver a mean hiding, it is not just an assault. It is more serious than that, and the label of "manslaughter" reflects the fact of death, and that is an important policy, social value, in that alone. But how serious the law says that individual's culpability is, and how punitively the person is dealt with, is highly flexible and can result, as we know, from everything from a discharge without conviction to life imprisonment.

I'll now hand over to Mr Sinclair.

MR SINCLAIR:

May it please your Honours. I see the morning is slipping away and I would hope to be finished, subject to diversions, within half an hour or so.

Ground 1, which I now address, was summed up yesterday in a few sentences. The common purpose was a beating. Death was caused by Mr Webber's stabbing. Is Mr Burke liable as a party to manslaughter for that different form of violence. Now the answer, I'm afraid, may take more than a few sentences to explain, but this will be my focus, and what I hope to show is that he would be liable under the post-Jogee law of the United Kingdom, under aiding and abetting principles; under the law of Canada, interpreting virtually the same provision, the same party's provision that we have. As we've seen the law as

stated in *Rapira* and *Renata*, and to judge by the indications in *Barlow* also the common law and the Codes of Australia.

I'll try just to frame the issue a little more. The first ground of appeal argues it was not enough that Mr Burke foresaw the infliction of a hiding. Instead he had to foresee the kind of violence which caused death. So the stabbing or some equivalent form of GBH. It was not proved that Mr Burke knew of the knife therefore it could not be proved he foresaw a stabbing. He was there to support a hiding, not a knife attack.

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So, the appellant submits, a far more exacting kind of, or standard of mens rea was needed than would be needed for the offence of manslaughter on its own. This appeal to a knowledge of the weapon rule, or fundamental difference in the kind of violence reasoning, is an appeal to a criterion limiting what would otherwise be the logical scope of manslaughter in a party setting, where all parties, including the killer, would need the same limited mens rea.

In *Jackson* the Supreme Court of Canada decision, in my submission, gives us the pure logic of manslaughter across the parties provision. So in subsection (1) and (2), and for the killer, who is also a party, all share the same limited mens rea, and the issue is what can or should be done to modify the reach of those principles.

The validity of that limiting criterion knowledge of a type of violence is best approached by considering a broader way, situations where the law may draw a boundary on homicide liability for a party. I will cover this swiftly and then circle back to the first ground, but in outline there are at least three techniques. First, the supervening act doctrine. Then lifting the some harm threshold for dangerousness so that manslaughter is reserved, as it is under the common law of Australia for acts which expose the victim to an appreciable risk of serious harm, and then raising the mens rea requirement so that knowledge of a weapon, or foresight of a type of violence, is required.

Turning to the first of these limiting criteria, the doctrine of supervening act or supervening event, this is kind of safety valve, or principle of remoteness. If a killer, who may be unidentified, causes death in a way that is beyond reasonable contemplation in the circumstances it would be unjust to hold another party liable for that event. In the United Kingdom this supervening act doctrine now has a key role to play after *Jogee*, but first a word on that case. This Court in *Edmonds* had already stressed that common purpose liability must be grounded in the terms of section 66(2), but knowledge of a weapon does not have controlling significance. That there is no scope for a liability test resting on concepts of fundamental difference. *Edmonds* also explains that much of the English thinking about knowledge of a weapon was inapplicable in this country, a response to concerns which were not relevant here.

The *Jogee* u-turn on joint enterprise liability has therefore been seen as having limited significance here, and hence the decision not to grant leave to appeal to this Court in *Uhrle*. But in any event, the body of UK law which had supported knowledge of the weapon thinking in this country has been largely swept away in the country where it originated. In *Jogee* manslaughter is restated in orthodox terms, and party liability to manslaughter does not require foresight of death or really serious harm. The objective test of dangerousness remains at the *R v Church* [1966] 1 QB 59; [1965] 2 All ER 72 standard. The issue of remoteness formerly addressed by the question of fundamental difference in the nature of the violence is now deal with only by the supervening act doctrine, and this, in our submission, is a significant shift from what violence the defendant foresaw, and was the actual violence fundamentally different to, would nobody in the defendant's shoes have foreseen what happened, and indeed did what happen relegate the defendant's acts to history. So a shift from a subjective to an objective test, we can see the difference that would make in a case like this.

Mr Burke said: "I only foresaw a few punches not a stabbing" but a reasonable person in his shoes would have recognised it was far more dangerous. There was the consumption of methamphetamine, knives handed round earlier in the day, a few hours before, going along with a gang enforcer, by definition a person

prone to violence. This supervening act test, as now applied in the UK, would not treat the use of the knife in group violence cases as a supervening act, even if some participants do not know of the weapon, and that is so in Canada as well and I've set out the cases in the written submissions. I don't think I need to take your Honours to them all.

O'REGAN J:

How much can we take out of the UK or the England and Wales position now because after *Jogee* by definition all party cases are dealt with under the common law equivalent of section 66(1), aren't they, so can we really translate that across to how we apply the law in section 66(2)?

MR SINCLAIR:

Well it's at least relevant to section 66(1) as your Honour suggests. It's relevant here also if we're going to consider supervening act as a technique for limiting liability and so it is relevant to consider that in group violence cases and following on from *Jogee* and the cases of *R v Tas* [2018] EWCA Crim 2603, [2019] 4 WLR 14, *Lanning & Camille v R* [2021] EWCA Crim 450, the English Court of Appeal has said that group violence, someone unexpectedly produces and uses a knife, that's not a supervening act. In fact, the trial Judges have not put it as an issue for jury consideration.

WINKELMANN CJ:

I doubt that will be enormous. I suggest you don't overly focus on the other jurisdictions, how this would be dealt with in other jurisdictions. That is relevant but I don't suggest it should be the focus of your submissions. I apprehended it might be. What we're really more interested in hearing is hearing you engage with the appellant's arguments on this point.

MR SINCLAIR:

Yes, and I shall come to that your Honour, but I think a degree of context will be helpful when we do come to that point.

WINKELMANN CJ:

Well the context is New Zealand law.

MR SINCLAIR:

Well, in part, although Canada, as I submitted, is virtually the same provision that we have and…

WINKELMANN CJ:

It has the objective standard though, doesn't it?

MR SINCLAIR:

Well that's perhaps apt to mislead. So the defendant knew or ought to have known that an offence is a probable consequence, that the issue is really – I haven't put that very well – let me just backtrack a second. The issue is what the person, the defendant, has to foresee. Whether that's purely subjective. as it is in New Zealand. or subjective and objective, "ought to have known", doesn't affect the object of foresight.

O'REGAN J:

Well I think the Canadian Supreme Court has basically read the objective part out of their section 66(2) in homicide cases so their provision, post that constitutional case, is essentially the same as ours I think.

MR SINCLAIR:

Yes.

GLAZEBROOK J:

Well maybe take us to the Canadian cases because you say they're more directly relevant.

MR SINCLAIR:

Yes, your Honour. There are three cases which would be helpful to touch on, and I'll give your Honours a reference. The names are *R v Miazga* 2014 BCCA 312, 315 CCC (3d) 182 –

GLAZEBROOK J:

There's no point giving – the way these indexes work you'll have to give us the page numbers of the – or at least on mine it's not very easy to go back to.
1120

MR SINCLAIR:

Yes. I think I can just deal with it by describing where we get to with those cases. They're all group violence situations. They all involve unexpected use of a weapon, and that's the cause of death, and they're all quite recent, and Supreme Court has declined leave to appeal in at least two of them that I can think of. So *Strathdee* and *Miazga*. And that is because the use of the weapon is seen as an escalation of the anticipated violence, not a complete departure from the common purpose.

WINKELMANN CJ:

It's interesting, though, that trial judges, based on my experience as a trial judge, usually do give a weapons direction in these kind of cases because they have a sense that accords with the justice of the situation.

MR SINCLAIR:

I think part of the reason, and see the influence of this in this case, is the case of *Hartley* where knowledge of the weapon was seen to be pivotal, and I'll come to that very shortly your Honour, but I think there were strong reasons to submit that that is an approach that has to be reconsidered in my respectful submission.

GLAZEBROOK J:

Needs to be reconsidered?

MR SINCLAIR:

Hartley.

WINKELMANN CJ:

So there should be no weapon direction?

MR SINCLAIR:

It's not necessary for the law of manslaughter in a case like this, which is, my friend said earlier this morning requires only foresight of the underlying unlawful act. I'll come to this in just a moment if your Honours will…

WINKELMANN CJ:

So what is the underlying unlawful act then?

MR SINCLAIR:

Here? Assault.

KÓS J:

Well, assault that's dangerous in nature, with loss.

MR SINCLAIR:

Yes, and it almost went without saying in this case that it exceeded the lowest requirement of dangerous, objective dangerousness. So that's supervening act. The –

GLAZEBROOK J:

So you say they only reconsidered in the case of manslaughter not murder a weapons direction?

MR SINCLAIR:

Well I mean a murder would be a very different situation because –

GLAZEBROOK J:

No, I'm just asking you what the submission is. You don't need a weapons direction in manslaughter or is it you don't need a weapons direction per se? Sorry, I'm just asking what the submission is.

MR SINCLAIR:

Well the, what was required here was for Mr Burke to have foreseen that Mr Webber would assault Mr Heappey.

WINKELMANN CJ:

I think your answer must be, Mr Sinclair, that you don't need a weapons direction in either case as a matter of logic, and because, you know, because often it's a murder and a manslaughter case together so it must, as a matter of logic, be that you don't need a weapons direction in either.

MR SINCLAIR:

I think, I'm sorry your Honour, I think it probably would be necessary in a murder case because it would be necessary –

GLAZEBROOK J:

That's fine, I thought that was probably the case. I was a bit surprised if it was the wider submission. I can understand the submission in the context of manslaughter, and I think probably it was only put there – well it did make it much more complicated, the manslaughter directions, than you say they needed to be, the fact that you have the weapon direction in there as well.

MR SINCLAIR:

Yes, unnecessary in our submission. So that very quickly is supervening act as a limiting criteria. The second of –

O'REGAN J:

Sorry, just before you move on, can you just tell us what the three Canadian cases were that you summarised? Was one of them *Jackson*?

MR SINCLAIR:

Miazga, M-I-A-Z-G-A.

UNIDENTIFIED MALE SPEAKER:

Page 126 of the respondent's authorities.

GLAZEBROOK J:

Page 126, thank you.

WINKELMANN CJ:

Jackson, and what's the third one?

WILLIAMS J:

Was *Jackson* one of them?

MR SINCLAIR:

No. *R v Cabrera* 2019 ABCA 184, 442 DLR (4th) 368, tab 14, apparently, in our cases, and then there's –

GLAZEBROOK J:

Sorry, I didn't catch that name at all.

MR SINCLAIR:

C-A-B-R-E-R-A. I'm looking at my footnote 153, and *Strathdee* is a similar case, again, where leave was refused.

GLAZEBROOK J:

Can you repeat that case name again please?

MR SINCLAIR:

Strathdee, double E at the end.

O'REGAN J:

I see. That's fine. I just hadn't picked that up. Thank you.

MR SINCLAIR:

Very briefly a second limiting criterion is reserving manslaughter for serious violence causing death, and that's now the position under Australian common law after the case of *Wilson v R* [1992] HCA 31, 174 CLR 313 in 1992. The Court's intention was to exclude manslaughter where violence was not likely to result in death, though it happened to do so. So this is a restriction on manslaughter itself not directly addressing party liability, and this may seem a half way house between the some harm test of dangerousness and foresight of death, but the sequel in Australia indicates that removing the low end of the manslaughter spectrum simply creates a gap which must be filled in other ways,

and we've noted in our submissions modification of *Wilson* in Victoria, and the enactment of assault causing death, standalone offences in other states, from which it might be inferred that bodily harm causing death will usually need to be marked in some way and change in the label from manslaughter may not achieve much. In fact the change may be driven by concerns about the stigma of manslaughter, which is covered in our written submissions, relying in particular on the Supreme Court case of *Creighton*, the philosophy seems to be a person who intends only minor harm should not have a homicide conviction if they end up causing the death of another person, and so it's clear that some Australian Parliaments disagree, and also, in my submission, the Supreme Courts of the United Kingdom and Canada.

WINKELMANN CJ:
Where are you in your submissions Mr Sinclair?

MR SINCLAIR:
I am summarising as drastically as I can…

KÓS J:
Paragraph 97.

WINKELMANN CJ:
Paragraph 97?

MR SINCLAIR:
From 95 onwards.

WINKELMANN CJ:
Thank you.

MR SINCLAIR:
Now I just quickly note that the case of *Pahau v R* [2011] NZCA 147 , which was *Edmonds* in the Court of Appeal, was a section 66(2) case in which the Court of Appeal indicated that if the common purpose was to inflict serious

violence, it might not be necessary for a party to know of any weapons. The trouble, perhaps, with that is the problem of defining what that label of "serious violence" captures. It sits somewhere between GBH and more than trivial harm. It's unclear where the line is to be drawn, or how the difference would be explained to a jury.

WINKELMANN CJ:

Sorry, what case was that, Taho?

MR SINCLAIR:

Pahau. P-A-H-A-U.

WINKELMANN CJ:

Oh yes.

MR SINCLAIR:

Just in a flash your Honours I'll finish on this. Three short points about the serious violence idea is the limiting criteria. Firstly, the mean hiding Mr Burke anticipated appears to lie above that line of serious violence. The risk of serious violence again objectively, when you add in the meth, the knives, the gang enforcer. Second, on the Canadian approach, i.e. *Jackson*, nothing – sorry, none of these complexities arise. You don't have the principal meeting the mens rea for an assault while the subsection (2) party needs to foresee serious harm. The third point here, section 160 makes manslaughter the residual category of culpable homicide after murder is excluded, and the common law of New Zealand requires the unlawful act to involve that modest risk of physical harm. That's a minor gloss on the statutory language requiring an appreciable risk of serious harm would mean a more drastic interference with the statutory definition of "manslaughter". Shall I stop there your Honour?

WINKELMANN CJ:

Not entirely, you're coming back after morning tea?

MR SINCLAIR:

Yes.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.50 AM

MR SINCLAIR:

Your Honours, the third limiting criterion is that the member of the common purpose must foresee the kind of violence that caused death, and this is the argument advanced under the first ground. The appellant primarily relies on some obsolete English law, that is obsolete after *Jogee*, and on *Hartley*, a section 66(1) case. It is clear that the Court of Appeal in *Hartley* was looking for a factor that limits the application of unlawful act manslaughter, how to exclude extreme cases. The Court said it can't be right that in all situations where there is a common purpose of assault without weapons, that all are liable if death is caused by stabbing. What then is the filter to be applied? The Court of Appeal answered with a mixture of principles. Knowledge of the knife was a proxy for foresight of the kind of violence that caused death and here the Court employed fundamental difference reasoning. After reviewing *English*, the English case, the UK case, the Court said there was no basis for a manslaughter conviction because the assault that occurred was completely different from that which the appellant was assisting. Also the Court likened the stabbing to a supervening event. The result for a spree involving three attacks, the second resulting in a fatal stabbing, was that assault was substituted for Mr Hartley's manslaughter conviction.

Does this *Hartley* approach still hold good? Four short submissions on that. Firstly; *Edmonds* treated *Renata* as correctly stating the very limited mens rea requirement under section 66(1). It was not suggested that this only applied if death was caused by the kind of violence foreseen. *Hartley* was not described as qualifying *Renata*. After *Edmonds* knowledge of a weapon is not controlling if there is a sufficient common purpose under section 66(2). What is sufficient is the question left open, in my respectful submission, that overall *Edmonds* seems to leave little scope to apply a *Hartley* reasoning to section 66(1) or (2).

The second point; the English fundamental difference cases can no longer be relied on for support at least in the sense that they no longer express the law in that country. The third point; the supervening event concept must be reconsidered after Jogee and then the English Court of Appeal decisions I mentioned; *Tas*, *Lanning & Camille* and there's another one *R v Grant* [2021] EWCA Crim 1243, [2022] QB 857. In fact, it seems clear that under current English and Canadian principles Mr Hartley and Mr Burke would both be liable for manslaughter. Fourth, although *Hartley* treats section 66(2) as requiring foresight of death, the Court of Appeal in *Pahau*, the case I mentioned earlier, thought it was sufficient if there was a likelihood of serious harm which did not depend on knowing that the killer was carrying any weapon.

KÓS J:

I'm sorry what was this case? It's eluded me.

MR SINCLAIR:

Pahau.

O'REGAN J:

Pahau P-A-H-A-U. It's the *Edmonds* case in the Court of Appeal.

KÓS J:

Right, thank you.

WINKELMANN CJ:

Where is that in your submissions?

MR SINCLAIR:

Page 38. It's actually down in the footnote at footnote 199. This Court in *Edmonds* read *Pahau* as meaning that it was not necessary for the Crown to prove that a killing was known to be the probable consequence.

WINKELMANN CJ:

For what level of – can you place this in legal context here? Is it a section 66(2) case?

MR SINCLAIR:

My point –

WINKELMANN CJ:

What are we talking about?

MR SINCLAIR:

Yes, *Pahau* is *Hartley's* section 66(1) is a good deal of cross-fertilising of thought between the two limbs of (1) and (2). My point about *Pahau* is a very mild one, I hope, that it appears to be a step away from *Hartley* thinking and overall, as your Honour sort of gathered, it's our respectful submission that *Hartley* does not describe the correct approach here, *Rapira* does, and it's very hard to see how that trio of cases *Renata*, *Rapira* and *Hartley*, how those three cases can stand together. Now with that ground I return to the first ground –

WINKELMANN CJ:

So you would say the law is unsettled on this point then?

MR SINCLAIR:

Well my general submission about *Hartley* is that the things that were relied upon to produce that result and those supporting principles have been modified or taken away.

GLAZEBROOK J:

Sorry, can you repeat that again? I'm not sure I quite caught your point.

MR SINCLAIR:

That if one considers *Hartley*, and then looks at the way the law has since developed supervening act, would not work in the way that the Court in *Hartley* thought it would. The English knowledge of a weapon or fundamental difference reasoning is now no longer there after *Jogee*. There is *Edmonds*, on

my reading it anyway, appearing to treat *Renata* as the correct expression of the law rather than *Hartley* and then the Court of Appeal itself in *Pahau*, the predecessor to *Edmonds*, retreating from that *Hartley* thinking as well. So in the context of this case where it is relied on heavily by my learned friends under the first ground, I suppose it's our position that the correctness of *Hartley* may need to be reconsidered. It's very hard to see how *Rapira*, *Renata* and *Hartley* can all be reconciled and stand together.

KÓS J:

Can I ask you to look at your paragraph 103 of your written submissions, which I think you're just about to touch on, and you talk there about the potentially unpalatable situation where no one is prosecuted for homicide in the case of melee that results in death. I suppose what we're wrestling with here, and what the UK Supreme Court has wrestled with in *Jogee*, is the extent to which actually section 66(1) should cover most of the ground here on the basis there are lots of words in section 66(1) which can cover participants in an affray, encourage, incite, assist, none of them require a punch to be thrown or a knife to be directed. What's section 66(2) got left to do?

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MR SINCLAIR:

Yes. Well I think your Honour is correct in saying I think that the English position now is that joint enterprise liability, which would have been the common law equivalent of (2) is now absorbed into (1), but the fact (1) has joined the common purpose, namely the evidence of assisting or counselling, I think that's the way it now works, and Professor Simester, I think, covers that in one of the articles.

In this case, and is a point I was going to cover maybe briefly, the question trail, this seemed to be a case where subsection (2) added nothing but clutter and in my respectful submission the jury perhaps could have been safely directed on the basis of section 66(1) liability only.

KÓS J:

Well they could have except there's a slight problem in question 14 in the question trail, which is at page 354, because the way the Judge framed it for section 66(1), Mr Burke had to know that Mr Webber was going to stab the victim, and for my part I'm not sure that was a requirement.

MR SINCLAIR:

On our case that has to be wrong.

KÓS J:

Yes. It was enough that he knew that he was going to use violence that was more, could cause more than trivial harm.

MR SINCLAIR:

Yes. So the, it's somewhat circular, isn't it. The probable consequence of the common purpose was assault, that assault was the very thing that they set out to do, and that's why subsection (2) is not adding much in that situation.

WINKELMANN CJ:

But that's not answering Justice Kós' question which was directed to what additional work does section 66(2) do that section 66(1) doesn't.

MR SINCLAIR:

Well it might have significant work to do in another factual context.

WINKELMANN CJ:

Such as when people cook up a plan together and one person goes off to carry it out, and in carrying it out commits various wrongful acts, and then that's a clear section 66(2) kind of a case, isn't it, because they're off doing the acts, the question is whether that's carrying out the common venture that they settled upon.

MR SINCLAIR:

Yes, I suppose an example might be a plan to rob a warehouse and the probable consequence of that common purpose –

WINKELMANN CJ:

Is assaulting the security people.

MR SINCLAIR:

– is that if there's a caretaker present violence may flow from that.

WINKELMANN CJ:

And that links it, that reminds us about its origins, which was accessory before the fact in history.

MR SINCLAIR:

Yes, although as I understand it the Stephen's reform and the enactment of section 66 was intended to do away with all that English doctrine of primary –

WINKELMANN CJ:

I think it was intended to do away with the procedural flummery associated with that, which required separate trials in some cases and not in others.

MR SINCLAIR:

I think the English rule is that a secondary offender had the same knowledge as the principal, and that's no longer essential under section 66. The other thing about section 66 is that all the parties were all on the same footing including the, in our case, the person who performed the killing.

WILLIAMS J:

One way of reading section 66(2) is that it's a constrainer, that the common purpose is captured in the word "aid", "encourage", to assist to encourage and so on, and (2) makes it clear that the scope is that outside that, outside your contemplation, that which you aided and encouraged, you're not caught.

MR SINCLAIR:

Well it's casting a broader net, and what it's focusing on is the evil of criminal combinations. It's not a long way from the concept of conspiracy.

WINKELMANN CJ:

So you don't accept Justice Williams' proposed construction, which is that subsection (2) constrains, limits liability under subsection (1), you say?

WILLIAMS J:

Well it reflects subsection (1) because the idea of the common unlawful purpose is very close to encouraging and assisting, because once you're in on the common purpose, you must be taken to be encouraging and assisting that purpose, and if you encourage and assisted an assault, what did you contemplate, but nothing more.

MR SINCLAIR:

I think I see your Honour's point. Is it helpful to think of what happened here, as I suggested earlier, Mr Burke could have been dealt with under subsection (1) only.

WILLIAMS J:

Yes. I wonder whether it, has *Jogee* teach – the post-*Jogee* experience teaches us we may actually be dancing on a semantic pinhead in terms of the practical impact.

MR SINCLAIR:

If one considers the position of Mr Sim, Mr Waho, Ms Cook, they are more naturally in the category of subsection (2).

WILLIAMS J:

Yes.

MR SINCLAIR:

So they're not on the scene, they're not actively assisting what happened. But they were –

WILLIAMS J:

Yes, but they're still encouraging.

MR SINCLAIR:

They were part of the –

WILLIAMS J:

They're still caught by "encourage" or "abet". They have to be.

O'REGAN J:

Or incited even.

GLAZEBROOK J:

Yes, I was going to say they set it up, or at least one of them.

KÓS J:

I think it's an interesting theory. I don't think that's what Parliament had in mind. I think they put (2) in there to add something as a basis for culpability, rather than to limit (1). But it's certainly a –

GLAZEBROOK J:

It could've been more, even if it's not to limit (1), it could be more limited than (1) is what, the other way of putting it.

KÓS J:

That's true.

WILLIAMS J:

Because, as you say, it wouldn't have made any difference in this case, and as others say, and as the experience of *Jogee* teaches us, it doesn't make a difference in many cases.

KÓS J:

And the problem here is that we've been diverted into section 66(2) because of an error in the question trail, and the question we looked at before.

MR SINCLAIR:

Yes.

KÓS J:

Because that question we looked at was at 14 I think, is miscast and probably Mr Burke should have been dealt with under section 66(1) as an aider, an abettor, or a counsellor. In fact an aider, because he assists in the melee.

MR SINCLAIR:

Yes.

KÓS J:

And we know that section 66(1) under *Edmonds* does not require foresight of death.

MR SINCLAIR:

But I've always understood subsection (2) to have the purpose of widening the net of liability. In fact that's the expression used by the High Court of Australia in *Barlow*, dealing with the equivalent provision and *Edmonds*, and I think *Vaihu*, maybe *Vaihu* in particular explain better than I can explain here, the utility of subsection (2) in a great many situations.

WILLIAMS J:

In theory that's probably right, but only in theory because the cases seem to suggest that there's very limited utility in that expansion, practical utility, and it's really complicated for the poor jurors.

MR SINCLAIR:

Yes, I feel it may have been an unnecessary limb of party liability to have covered here but –

O'REGAN J:

But it's there.

MR SINCLAIR:

Yes, it's there, and it's –

WINKELMANN CJ:

Right, so let's move on. Enough naval gazing, let's move on.
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MR SINCLAIR:

I'll proceed through this next bit at a somewhat slower pace because the emphasis is somewhat different from my written submissions and it's a little complex.

WINKELMANN CJ:

Well can you give us a headline of what it's about?

MR SINCLAIR:

Yes. So back to the first ground of appeal and I have three submissions to make on that. Firstly, reasoning backwards from the murder committed by Mr Webber, to the foresight required of Mr Burke for manslaughter, is the wrong analysis. Unlawful act manslaughter rests on a base crime rather than any specific type of act committed by the principal. Here the base crime, the unlawful act, was assault. Mr Webber began it, Mr Burke carried it on. The stabbing was part of it and the jury must have answered "yes" to question 18 of the question trail: "Was the stabbing committed in the course of carrying out the common purpose –

GLAZEBROOK J:

Can we get the question trail up again please if we're going to refer to the – thank you.

WINKELMANN CJ:

So we're looking at the question trail now are we?

MR SINCLAIR:

Yes. So 358 of the case in appeal. Well I don't need to take your Honours here but the question is –

GLAZEBROOK J:

Well it's much easier if we've got it up. We have got it up now so you can just carry on with your submission.

MR SINCLAIR:

All right, so must have answered “yes” to that. The stabbing was committed in the course of carrying out the common goal. So the base crime is assault, which could comprehend the beating, assault with a knife, assault with a hammer and so forth. Now the particulars of assault all come under the umbrella of assault. Now the objection might be that stabbing was qualitatively different from what Mr Burke foresaw –

WINKELMANN CJ:

Well isn't there actually a problem on the evidence that there is no evidence that they agreed to stab, and so there's no suggestion that they agreed to a stabbing, and the next question was not whether it was carried out in the course of the common goal since they hadn't agreed to it, but really whether he foresaw the stabbing and you say it's not necessary to foresee the stabbing?

MR SINCLAIR:

My point about the question in the question trail was that the stabbing factually and circumstantially is part of the working out of the common purpose and the objection your Honour has just touched on is the one I was just about to address. So –

KÓS J:

Can you just tell me where in your written submissions you are? I know you say you're departing slightly from them but I just want to anchor myself.

MR SINCLAIR:

Yes, well what I'm trying to deal with in its simplified form, your Honour, is really what's set out, and I apologise for a very lengthy footnote, on page 28. It's footnote 154. It seemed to me that –

KÓS J:

Will you be handing up a magnifying glass?

MR SINCLAIR:

It seemed to me that this was put far more lucidly than I could ever manage so I've put it more or less in full alas with some typographical errors.

WILLIAMS J:

That’s obviously very lucid but not that visible.

MR SINCLAIR:

Well, and I loathe to dive into a footnote in an oral submission, but perhaps that's just going to be –

WINKELMANN CJ:

It's based on the Krebs article?

MR SINCLAIR:

Yes.

KÓS J:

Yes, in full.

WINKELMANN CJ:

Yes.

MR SINCLAIR:

And I think it's useful because Dr Krebs does engage directly with the point raised by Professor Simester which was shown to us yesterday by the appellants –

WINKELMANN CJ:

And addressed by Professor Tolmie.

MR SINCLAIR:

Yes, it could be seen as a response to that also but –

WINKELMANN CJ:

Or her response I think in terms of timing.

MR SINCLAIR:

But Professor Simester, as I understand it, was saying well stabbing is different, it's a different quality of act from what the defendant, the party, foresaw. Dr Krebs responds in very simple terms by saying, well, the problem is that that's focusing on the specific act of the killer, not the base crime. So the base crime of assault captures the anticipated violence and the stabbing was an escalation of that violence and the question is really should Mr Burke be held responsible for the escalation. And this, we submit, should be determined objectively by asking whether the concurrent stabbing was a supervening act. Was the violence beyond the contemplation of a reasonable person in Mr Burke's shoes and this is the –

GLAZEBROOK J:

Well how do you get to an objective test?

MR SINCLAIR:

Because the base crime of assault is, as Ms Laracy covered this morning, in a party to manslaughter situation, requires only that the assisting –

GLAZEBROOK J:

But if you get rid of "ought to have known", how do you suddenly put it back in on this bit?

MR SINCLAIR:

Well because under English law, under Canadian law too, the foresight required of the party, in Canada under both subsections, in England under aiding and abetting principles, is limited to the intention needed for the base crime, which is assault. Now the base crime embraces the violence included in that assault which, as we see here, is an escalation from what Mr Burke foresaw, and this is why I thought it was useful to consider where the law may modify the reach

of that, those principles. In England it would now be supervening act not fundamental difference and that's really the approach that we're indicating here.

WILLIAMS J:

It kind of feels like a little in-flight engineering. You do it because you're worried that one does it and you directly look – one does it because one's worried about the scope, so you just insert an objective standard to reduce scope. It may be an indicator that a more fundamental approach is required than just in-flight adaptation.

MR SINCLAIR:

Well, with respect, I don't think – this is not a new doctrine in the law at all but –

WILLIAMS J:

Well you mean it's been adopted in Canada and the UK?

MR SINCLAIR:

It's been shaped in such a way after *Jogee* which, of course, indicated that cases like *Anderson* were a charitable view of what went on, but overwhelming supervening act, as now applied in England, would not absolve someone in Mr Burke's position, or in these other cases I mention, where there's group violence. There's an escalation from punching and what have you, unexpected use of a weapon, someone dies. Let's not compartmentalise into, oh, well there was a punching part of this episode, and there was a stabbing part that was different. It's all dealt with under the umbrella of assault, the base crime, but is there a need to –

WINKELMANN CJ:

So can I just take you back –

MR SINCLAIR:

I'm sorry, your Honour.

WINKELMANN CJ:

Carry on. You finish your answer.

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MR SINCLAIR:

Is there a need to moderate the broad reach of those principles, and something of this kind was referred to by this Court in *Edmonds*.

WILLIAMS J:

Yes, well it does seem to be a – the problem I thought is that it does seem to be a patch. You parachute in the reasonable bystander on the Clapham omnibus bus to deal with your problem, when in fact the real problem is what was intended by the scope of the plan, and that's subjective.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Can I ask you, take you back to your original submission, because I'm not sure I totally understand it. So this is what I've noted down. The question is whether Mr Burke should be held liable for the escalation of the violence. You argue that this should be determined by an objective standard. The basis for this argument is that the foresight required of a party is limited to the intention needed for the base crime, which is assault, so you only need to show contemplation of the assault. Where does the objective standard come into that?

MR SINCLAIR:

No, well this is really something different I think. This is a technique the law applies –

WINKELMANN CJ:

Well I'm taking you back to your own words. So where does the objective – you said –

O'REGAN J:

I think Mr Sinclair said it would be, that the question was, was there a supervening act – sorry was the stabbing something which was different from the assault of supervening act, and that, under the *Jogee* principle, is an objective test.

MR SINCLAIR:

Yes, yes.

O'REGAN J:

What would a reasonable person have thought was within the scope of what they'd agreed to do.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Okay, so when you're saying objective, the only area in which the objectivity comes into is the objective – it's an objective question for the jury as to whether this supervening act was outside, which does seem to be parachuting something into the legislation that is not contemplated by it.

O'REGAN J:

Well it would be in a case, for example, if you'd agreed to do a robbery of a house, and then one of the offenders decided to rape one of the occupants, that would be a supervening act, so the other robbers would not be liable.

WINKELMANN CJ:

But the objectivity is the problem.

GLAZEBROOK J:

But that's because, that's on a subjective test, it wouldn't be part of, I don't know why you need an objective test.

O'REGAN J:

It's just that's what the English courts have said. It's not, I don't think Mr Sinclair is necessarily saying it has to be, he's just saying that's what *Jogee* said and what the Court of Appeal cases following it have said.

MR SINCLAIR:

Yes, it's similar thinking in Canada too and in Australia, I've mentioned the cases of *Markby* and *Varley*, similar sort of escalation situations. But it's a tool that avoids unfairness, in essence.

WILLIAMS J:

The way Justice Young dealt with it in *Edmonds* was to say, your standard scenario section 66(2) group violence cases is, I didn't know about the knife, I didn't know about the weapon, and judges were taking a pragmatic approach to carefully editing those away because they're difficult but importing and objective standard.

MR SINCLAIR:

There are two ways of coming at this. It seems to me one is running the supervening act test over it, which would have the juries asking, in the right sort of case, was this beyond reasonable contemplation. Does this make one so remote from what was foreseen, what was assisted, that it is simply unjust to impose homicide liability. So that's one approach. The other one is going back to fundamental difference knowledge of a weapon. The problem we say with that is for someone like Mr Burke it lets himself limit his liability subjectively, so he can easily say, theoretically there should have been no stabbing here, the victim hadn't committed any capital crime under the gang code, but objectively serious violence –

GLAZEBROOK J:

But section 66(2) has taken out or ought to have known. So they did that on purpose, didn't they, so why are you importing it back in?

MR SINCLAIR:

Well not on –

GLAZEBROOK J:

And I mean it will be a matter of, I mean this is an unusual situation because this was a – well not that unusual necessarily because I'm just thinking *Ahsin* is probably similar – they thought they were going around insulting a whole pile of people and you could argue that they didn't have contemplation of something further than that, but normally in those group melee you could well say, well of course subjectively he knows that someone in the, whatever was said, someone in the gang is going to have a knife, and then there's going to be subjectively an indication it might be used.

WINKELMANN CJ:

I think the difficulty, Mr Sinclair, might be we're not quite clear what you're arguing for. Are you arguing that we should approach this issue by using the supervening act, because I thought we'd rejected that earlier in terms of your rejection of various limiting matters, or what are you arguing for here?

MR SINCLAIR:

I'm disappointed to hear that your Honour, but that is, there is virtue in that approach, is –

WINKELMANN CJ:

You're saying there's virtue in that supervening act approach?

MR SINCLAIR:

But may I just deal with Justice Glazebrook's point, because no we're, we would say we are not tinkering with what section 66(2) requires at all, on orthodox principles as expressed, reflected, say, in the case of *Jackson*. What Mr Burke would need to know is that assault was the probable consequence of carrying out the common purpose, and of course it was because that was exactly what they set out to do. But the breach of –

GLAZEBROOK J:

But then you say he needs to know assault – escalation is included in assault, is that right, or not?

MR SINCLAIR:

We do submit that, yes. Then the issue becomes, well, is that an injustice, was the stabbing so remote, if you substitute Mr Burke for a reasonable person with his knowledge, is that stabbing so far beyond contemplation that it's unfair to impose manslaughter liability on him. The answer has to be no in this case, because the –

WINKELMANN CJ:

But are you suggesting we read in a proviso, then, as a sort of a safety valve, or are you not suggesting that?

MR SINCLAIR:

Yes, well, run that test over it and see what the answer is. Otherwise we're stuck with fundamental difference reasoning, and that's where Mr Burke can say, oh well, as I think your Honour Justice Kós put it, you know it should have been a two punches from me and two from the other guy and that was all it should have been. But if you look at this subjectively, very serious violence was just always on the cards here.

WINKELMANN CJ:

Is this argument set out in your written submissions?

MR SINCLAIR:

Yes, I believe it is your Honour.

WINKELMANN CJ:

Can you just give us the paragraph for reference?

MR SINCLAIR:

It's consistent with the…

GLAZEBROOK J:

Can I just restate it, your argument –

WINKELMANN CJ:

He's just going to give me the reference and then…

GLAZEBROOK J:

Oh you think it might be set out in here.

WINKELMANN CJ:

Yes, he said he thought it was. Is it 78 and 79 and 80 I think? Or the following. When I read through it –

MR SINCLAIR:

Yes.

WINKELMANN CJ:

– I hadn't understood that you were arguing for it.

O'REGAN J:

Well the fundamental difference has already been rejected in *Edmonds*, hasn't it? The fundamental difference approach has already –

MR SINCLAIR:

Yes.

O'REGAN J:

– been rejected in *Edmonds* so the question is what replaces it.

MR SINCLAIR:

Yes, I think that is the situation we're in.

WINKELMANN CJ:

And how would a jury be instructed in respect of this?

MR SINCLAIR:

Well we did think it might be helpful to redraft the question trail that was given and perhaps lightly tidy it right at the end. But the question trail should have simply, if section 66(2) was going to be part of it, should simply have reflected

that Mr Burke's knowledge need go, subjective knowledge, need go no further than knowledge that an assault on Mr Heappey was the probable outcome of their common purpose which I find just somewhat redundant I suppose.

1230

KÓS J:

Well that's the problem. This argument it is redundant because the real approach here is we don't need to get to overwhelming supervening act because the common purpose here was an assault, which was inherently dangerous, so it meets the essential requirement for manslaughter. But let us imagine a different fact situation which is that you and I agree to go and tickle someone. Now tickling is an act of assault but is not inherently dangerous. So at that point you have an assault, you have an argument about whether it is within the scope of manslaughter, but in any case in that situation when the tickling turns instead into a full out bash, the defendant or the secondary party will be entitled to say that is so far outside the scope of what was agreed that it wasn't within contemplation. It's like the context of the rape and the context of burglary. A different kind of assault altogether.

MR SINCLAIR:

Yes. Yes, well I'm very conscious of the danger of hypothetical but I had thought perhaps two parties of Quakers who have a difference of opinion. They decide to resolve this behind the meeting house with fisticuffs. If someone produces a knife in that situation, or a gun, I think you would say that that is beyond reasonable contemplation and it would be unjust to follow the full logic of manslaughter principles through to a conviction there.

WINKELMANN CJ:

So Mr Sinclair can I take you back to my question because you didn't actually answer it. I wasn't asking about the question trail about the earlier issues, I was asking you about how we put the safety valve into a question trail.

MR SINCLAIR:

Well, yes.

WINKELMANN CJ:

Well who deals with the safety valve?

MR SINCLAIR:

In the first instance, and I'm simply reflecting the English approach here, it is a question for the Judge whether it is even put for consideration by the jury. So I think it was the situation in *Tas* at least, and the appeal was should have been, it should have been there.

WINKELMANN CJ:

Which case sorry?

MR SINCLAIR:

Tas, T-A-S. But if the basis for it is there, then I don't think it's a complex exercise for the jury to be asked to consider the hypothetical reasonable person invested with the knowledge of the defendant. Is it beyond reasonable contemplation –

GLAZEBROOK J.

Doesn't *Edmonds* really deal with this? Let's assume there's no manslaughter involved but what you have is an agreement that you're going to go and slap somebody across the face, which is more than trivial, and that the Crown says is the common purpose, but unbeknownst to somebody, somebody pulls out a gun and shoots them in the head, and *Edmonds* says the lower the criminality of the alleged common purpose the easier it will be to establish, ie, we agreed we're going to go and give him a slap, but perhaps harder to show the ultimate offence was recognised to be a probable consequence of its implementation. The person doesn't die from the wound. The higher the criminality, ie, we agree we're going to give her a really serious beating, and closer to the offence actually committed, the more difficult it may be to establish, but the easier it will be to infer, and that's just using the words of section 66(2) in terms of probable consequence, isn't it, without adding glosses or anything to do with it?

MR SINCLAIR:

Yes. That sounds to me like what was said in *Vaihu* and that makes absolute – it makes perfect sense in that situation whereas, as Ms Laracy said, there will need to be symmetry between mens rea and actus reus for a party to GBH. That manslaughter is different because –

GLAZEBROOK J:

Well I know that that's a different argument from saying that you've got some – you have to have a supervening act or anything of that nature because in *Edmonds* you don't have a supervening act, it's just that you are stuck with your common purpose and the probable consequence from that subjectively.

MR SINCLAIR:

Yes, well I'm not sure, your Honour. It was a paragraph in *Edmonds* round about paragraph 50-odd I think, I won't try and find it now, but it seemed to chart out, and it would resonate with the submission the Crown made in that case too, that there are some cases conceivably where you would say no knowledge of a knife, no manslaughter, no party liability for manslaughter, and so it's a matter of seeing whether –

GLAZEBROOK J:

Well it's going to be factual in any circumstance but that's the question the jury has to ask themselves, don't they?

MR SINCLAIR:

Mmm.

GLAZEBROOK J:

I'm just asking whether you need this complication of this objective/the subjective 12:36:12) addition to that?

MR SINCLAIR:

Well it's a simple submission in a way. It just seems a far more preferable way of approaching this than the purely subjective knowledge of a weapon, what was the defendant's foresight of the violence, the expected violence and was

this fundamental, or was what happened fundamentally different, which all loads it on proving the defendant's state of mind.

WINKELMANN CJ:

Right, so Mr Sinclair you said you had three points, has this taken us through all three points?

MR SINCLAIR:

Only the first two, your Honour, but I can be very brief, and the second is familiar ground. So requiring Mr Burke to have known that stabbing was a probable consequence, or that he was assisting a stabbing, implies that he would be acting with something close to murderous intent so that in prosecuting the common purpose, in fact, the very attack he was assisting, he knew it was probable that Mr Heappey would be stabbed and that's the implication of *Hartley* reflected in the section 66(1) direction given in this case. Mr Burke needed to know he was assisting with the stabbing. So that's problematic but I appreciate that we've covered that fairly extensively already.

The final point was simple also, and I may have touched on this in answer to some of the questions, but returning to the fundamental difference enquiry triggers the problematic distinctions that always afflicted that doctrine, so is a prolonged beating fundamentally different from a few punches, is punching with a knuckleduster fundamentally different and so forth.

WILLIAMS J:

I wonder whether the problem is that it's turned itself into a doctrine when in fact it's just –

WINKELMANN CJ:

The facts.

WILLIAMS J:

It's not a principled inquiry at all, it's a factual inquiry.

GLAZEBROOK J:

Yes. As *Edmonds* says.

WILLIAMS J:

And juries are rather good at that, they're just not any good at law.

GLAZEBROOK J:

And that's basically one of the – the second observation and *Edmonds* says just what is the probable – did the person think there was a probable consequence.

MR SINCLAIR:

Well –

WINKELMANN CJ:

And judges have dealt with that by saying, and you might think that it was significant there was a weapon used, and so when you're thinking about this you will focus on whether the defendant knew about the presence of the weapon, you will likely focus on whether or not, et cetera.

MR SINCLAIR:

Well all are necessary, in our submission, where the base crime is merely assault.

WINKELMANN CJ:

Yes, I've got that, yes.

MR SINCLAIR:

But the point –

O'REGAN J:

But I think *Edmonds* has basically said we should get away from fundamental difference.

MR SINCLAIR:

Yes.

O'REGAN J:

I don't think you need to address that further.

MR SINCLAIR:

Yes, and it's been left behind in UK law, and the Supreme Court in Canada has not seen fit to adopt it in the 30 years since *Jackson*, so it can't be concluded, in my submission, that foresight of the level of violence is a necessary or desirable feature of the contemporary law of manslaughter applied to parties.

WINKELMANN CJ:

So is there anything else? Did you want to address the issue of the included charges?

MR SINCLAIR:

Sorry, your Honour, of?

WINKELMANN CJ:

Included charges.

1240

MR SINCLAIR:

I wasn't planning to, your Honour. Just briefly on the issue of probable consequence, the meaning of that term, the issue raised by the interveners, now I simply add to the written submissions that these facts seem a bad platform for considering that issue because there's no probability to be assessed. Of course, the assault was the probable consequence of the common purpose because the common purpose was assault.

Just before I end we did remodel the question trail as I mentioned earlier. If it's helpful to do so I can provide that to the Court. There's really one major change and that is the double knowledge requirement, Mr Burke needed to know, Mr Webber needed to know that it was going to be dangerous in the limited

sense required, and that was unnecessary because the assessment of dangerousness is objective, possibly didn't even need to be covered in a case like this, where it was self-evidently of that modest standard of objective dangerousness. So if that would assist the Court it's available but otherwise unless there are further questions I'll end there.

WINKELMANN CJ:

You can hand it up. We'll have to give the appellants an opportunity to respond to it. Have they seen it Mr Sinclair?

MR SINCLAIR:

No.

WINKELMANN CJ:

We'll receive it. I'm sure the appellants will want to put up their model too, what they say it should be.

MR SINCLAIR:

Thank you.

WINKELMANN CJ:

That's fine but Mr Sinclair did you want to address on should the appeal be allowed? We've heard submissions from the appellant on that, I imagine the respondent wants to be heard on that or not?

GLAZEBROOK J:

Whether there should be a retrial ordered if we did allow the appeal, or whether we should convict on included charges or what the Crown submission is.

MR SINCLAIR:

Ms Laracy may have a thought about that. We do, of course, have a proviso-type submission, and one aspect of that is that if the jury had been correctly directed on section 66(1) without the influence of *Hartley* then a conviction would be almost certain. May it please the Court.

MS LARACY:

The Crown would request that the Court, if it were to allow the appeal, order a retrial and the matter would then be left for the Crown. But the Crown's position is that this, as a manslaughter, was a hair's breadth away from murder, the Crown only left the matter to the jury on the basis of murder, and in my –

GLAZEBROOK J:

Sorry, I just missed that.

MS LARACY:

The Crown only left the matter to the jury on the basis of murder, the Judge directed on manslaughter but the Crown didn't do that. So the Crown's position is that this is a very high culpability manslaughter for all the reasons my learned friend has gone into about the circumstances that –

GLAZEBROOK J:

You're not suggesting you could revisit murder though?

MS LARACY:

No, no, I'm not.

GLAZEBROOK J:

Okay, no that's fine.

MS LARACY:

It's simply to the point of, is it in the public interest for the Court to do the ordinary thing it would do in a case like this and order a retrial. The Crown submission is that it most certainly is and my learned friend, Mr Sinclair, will address you on the proviso point which is important because it relates to what we say is an error in the way the Judge directed under section 66(1) –

WINKELMANN CJ:

I think we've already had a submission on that, haven't we? You delivered it with incredible efficiency.

MS LARACY:

Well the point of that is it goes to if section 66(2) was not used because it was a complicating factor in this case, it's critically important that the jury are properly directed on section 66(1) because, in the Crown's submission, there's a clear route to a manslaughter under section 66(1) –

KÓS J:

So was that the question 14 point that I was raising before –

WINKELMANN CJ:

It was.

KÓS J:

– because this redraft doesn't deal with that.

MS LARACY:

I'll let Mr Sinclair deal with the question trail.

WINKELMANN CJ:

Is there anything to add to what you just said, which was that if the jury have been correctly directed under section 66(1) conviction would have been inevitable?

MR SINCLAIR:

Yes, yes. But I'm sorry I thought Justice Kós had a question about –

KÓS J:

No, I think we've traversed it. It's that particular question, question 14, I think, in the question trail at page 354.

MR SINCLAIR:

Yes, we've removed that from what we submit would have been a more desirable form of question trail.

KÓS J:

Well, no, the one you've handed up is only section 66(2) so that's…

MR SINCLAIR:

Oh, I see, yes.

WINKELMANN CJ:

But that's all right, we know what, we know that, we know it.

KÓS J:

We understand.

WINKELMANN CJ:

I think that's it, isn't it, Mr Sinclair?

MR SINCLAIR:

Thank you, yes, may it please the Court.

WINKELMANN CJ:

Thank you. Now Mr Rapley?

MR RAPLEY KC:

Yes, thank you, your Honour. Right, well dealing with ground 1 first –

WINKELMANN CJ:

Are you going to handle all the reply or are you best splitting it?

MR RAPLEY KC:

Yes, I will, yes, yes and try and do that briefly, lunch looming. The actus reus of mens rea – the actus reus of manslaughter is an unlawful act which causes death and that is the stabbing. So it was not the physical beating or hiding which the jury could find, despite thinking that Mr Burke didn't know about the knife. Now my learned friend Ms Laracy said, when arguing ground 2 albeit, that the acts have to be foreseen by the particular defendant, and there are various combinations of that. The act was stabbing. If he did not foresee a stabbing, but foresaw an act of a different type, as Sir Robin Cooke set out for

us and adopted throughout the New Zealand jurisprudence, then he would still be liable if it was of a similar type. If he foresaw acts of a type which the law treats as materially different, foresight of those acts do not constitute foresight of the stabbing.

O'REGAN J:

Is "materially different" any different from "fundamentally different"? I mean hasn't *Edmonds* basically said that's not the law anymore?

MR RAPLEY KC:

Well I suggest an act of assault is materially different than an act of stabbing someone multiple times. That is – and *Edmonds* contemplates –

O'REGAN J:

Well stabbing someone multiple times is an assault.

MR RAPLEY KC:

But the reverse isn't true. So an assault doesn't mean it's a stabbing. So a stabbing is a significantly different and more serious form –

O'REGAN J:

Well you've now said "significantly different, materially different" and we've got *Edmonds* saying fundamental difference is no longer part of our law, so what –

MR RAPLEY KC:

Well we have *Edmonds* at paragraph 49, appellant's authorities 23, contemplates manslaughter cases where the common purpose is pitched at that lower level and therefore it's going to be harder to prove the defendant, or the secondary party, foresaw the ultimate manslaughter offence. That just –

O'REGAN J:

Well that's question begging there though, because the question is, what is the ultimate offence, and the Crown's position is it's an assault, and in this case that assault happened to cause death.

MR RAPLEY KC:

Well the ultimate offence was a manslaughter offence, so that means where there's more serious violence which causes death the Crown must still prove the defendant foresaw that serious violence. We set that out in our submissions at 57 to 61 with *Edmonds*. Foresight of the lesser physical beating, which did not cause death, and it didn't, is not foresight of the much more serious stabbing which did. That's the key point I suggest, and *Edmonds* –

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KÓS J:

Are you asking us to depart from *Edmonds*?

MR RAPLEY KC:

No. No *Edmonds* at 25 says the common law as set out in *Chan Wing Siu* closely corresponds with section 66(2), and that's pre-*Jogee*, and that's as relevant today that common law pre-*Jogee*, as it was then, section 66(2) hasn't changed. The Crown –

WILLIAMS J:

Isn't it the case, Mr Rapley, that both you and the Crown agree that there can be a form of assault which is not caught. We just heard Mr Sinclair putting that proposition through the so-called doctrine supervening act. So there is no difference on the idea that it won't be every assault necessarily. The question is whether you apply a subjective or objective standard to that assessment, mainly that the Crown doesn't say every assault.

MR RAPLEY KC:

Yes, the Crown is relying on Canada, which has "ought to have known", so *Jackson* is ought to have known.

O'REGAN J:

But Canada doesn't have "ought to have known" for murder cases and manslaughter cases.

MR RAPLEY KC:

Exactly, but for manslaughter it does. So for murder, *Jackson* at page 199, the appellant's bundle at page 199 says section 21(2), which is their equivalent, only requires subjective foresight in murder cases. So they decided that it was against their Charter. But like Australian Codes, overwhelming supervening doctrine, which your Honour Justice Williams is talking about from *Jogee*, presupposes this objective test, which –

WILLIAMS J:

Yes, I'm sure you disagree on that.

MR RAPLEY KC:

Yes, and that was repealed in 61 after *DPP v Smith* [1961] AC 290 and for good reason.

O'REGAN J:

Yes, but it's *Jogee* that talks about the supervening act being objective, doesn't it?

MR RAPLEY KC:

Yes it is, and so – I mean *Barlow*, my learned friends relied on Canadian cases, Australian cases, they've got "ought to have known" as well in their Australian –

O'REGAN J:

They just say it was a probable cause.

WINKELMANN CJ:

So you say that this, I suppose the different, you could say the difference between Mr Sinclair's and your approach is that you find space within the – you say it's to be achieved by finding space within the language of the provision, and he's suggesting the addition of this safety valve by judicial means?

MR RAPLEY KC:

Yes, and I say, we say that you have to subjectively foresee the crime that was committed, and the act that caused death was stabbing, here, and the unlawful act was the stabbing, it wasn't the punch, or the assault, and so – and we see from the Crown's question trail he would be guilty under that question trail if a gun was pulled out and he was shot with a gun.

WINKELMANN CJ:

Or a bomb.

MR RAPLEY KC:

Or a bazooka, or a tank, or anything, and so what – the position we were faced with at trial was that question trail, as it was set out, which initially said knowledge of a knife and if they didn't – if they found he didn't have knowledge of a knife they effectively did use this one. We're saying it doesn't matter, was the harm more than trivial, and it was that he was going to assault him, was that conviction would be inevitable because that was the plan was to assault. But context is everything. My learned friend gave the Quaker example, but this context is the intra-gang punch-ups where they do that all the time to each other, over $300, he's had hidings like this all the time, and so one has to be careful with these sort of cases, and my learned friend said well the Quaker, the standard would be he wouldn't, it would be an overwhelming supervening event. Why? Because he's a Quaker and you don't expect him to pull out a knife.

WILLIAMS J:

I'm not familiar with that gang.

MR RAPLEY KC:

No, me neither, and so there we go, and in a gang case here we have intrafamilial gang members disciplining each other where Mr Heappey was expecting to be punished, and that's clear, and he was expecting to be punished at Mr Waho's, because they arranged to meet at Mr Waho's, supposed to turn up there, by Mr Webber. So he knew he was going to be assaulted or given a hiding by the disciplinarian that they're talking about. So that was what the text

was, and he was text to contact Matty, contact Mr Webber. Mr Heappey was told to contact him. So Mr Heappey was going to receive a beating, a hiding, and of course we look at that and need to see that for that context and conceptually the world that it's in. So that's why Mr Burke says, it didn't even dawn on him that someone would be killed, and stabbed in that way.

On ground 2, very briefly –

GLAZEBROOK J:

Can I just – we've obviously had this redraft, suggested redraft. Do you, would you like to, and I'm not asking you to comment on it now, because it might be, because it would help me anyway if you could articulate, perhaps in writing afterwards, what you say – it's really that last question, I think, because I think he would probably agree with the rest of the questions, it's probably that last question, how would you articulate your ground 1 in a question trail is the question.

MR RAPLEY KC:

Yes, we'll do that in writing. The question 6 they've got there is the, within the common purpose, and it's a temporal question in consideration often. The stabbing, of course, occurred in the course of –

KÓS J:

Your real argument will be with question 5, not question 6.

MR RAPLEY KC:

Exactly, yes it would be, and it's always the case that it occurs within the prosecution of the common purpose, they go to have a fight, or something like that, and someone pulls out a gun, so I suggest it's more temporal, but five –

WILLIAMS J:

There might be a problem – I had a problem with six in the judge's draft as well because I just wonder what laypeople would take of "in the course of" because if it's simply at the same time as, then of course the answer to that is yes.

MR RAPLEY KC:

Always yes, yes. During. Yes, so thank you, I'll do that in writing, but that's probably where I'll focus. On ground 2 our key argument, of course, is that the offence is culpable homicide and neither the principal offence, section 160(2)(a), nor section 166(1) *[sic]* says anything about mens rea, it just deals with the actus reus. Respectively section 160 is culpable homicide, section 166(1) *[sic]* about the acts of aiding and abetting, but any mens rea read into these two has been judicially imposed, of course. Section 66(2) though, unlike the principal offence and aiding and abetting section 66(1), expressly imposes a mens rea requirement. So the fact under section 66(1) the judicially imposed mens rea doesn't extend to death for an unlawful killing, doesn't shed any light on, and this is your Honour Justice Kós' point that was raised earlier, on what the statutorily imposed mens rea on section 66(2).

So our submissions at paragraph 98, we deal with that issue about symmetry or the lack thereof, and on that point, which your Honour Justice Kós raised, is Justice Cooke in *Renata* says an aider and abettor does not need any mens rea as to death, and *Renata* is respondent's authorities, page 7, line 25, with the same learned Judge in *Tomkins*, at appellant's authorities, 809, page 255 to 256, which is a section 66(2) case. Justice Cooke said: "Because foresight of the offence is required it does require foresight of an unlawful killing."
1300

So the point he was trying to make is that the same learned Judge can say there is a different mens rea for these two different sections. Very briefly on disposition I would suggest –

WINKELMANN CJ:

So on that analysis if anything is out of whack, section 66 wins, judge constructed.

MR RAPLEY KC:

Yes, quite. On disposition I would suggest that a substituted conviction for section 189(2) is appropriate in this case. I mentioned that earlier. But if this

Court is minded not to do that, and a question of retrial arises, I would suggest that as at today, and certainly by the time a judgment, Mr Burke will have served almost all of his sentence of five years, two months, and I mentioned that other day as to –

KÓS J:
When did he commence the sentence?

MR RAPLEY KC:
18 December 2018 was when he was arrested, so he's been in jail since his arrest, and he, so it's my calculation, we'll just need to check that, but it's four years, three months he's been in jail and was sentenced to five years, two months.

WINKELMANN CJ:
What about miscarriage of justice?

UNIDENTIFIED MALE SPEAKER:
Proviso.

WINKELMANN CJ:
The proviso.

MR RAPLEY KC:
Yes, well I suggest that we deal with that in our submissions, that the proviso shouldn't apply in this case because the jury haven't been given, and weren't given, the proper question trail, and we set out at paragraph 106 Justice Simon France's comments on *Stretch* that: "Mr Stretch is entitled to have the jury correctly directed on the elements of the offence, and expressly on the need for him to have foreseen that one of his co-defendants would intentionally inflict grievous bodily harm. This is important when the charged offence is alleged to be not the common purpose but a foreseeable and foreseen more serious offence."

KÓS J:

But that's a very different case context from this one if we don't require foresight of death as part of a section 66(1) conviction.

MR RAPLEY KC:

Yes. But equally I say, suggest if a requirement of foresight of a stabbing, then he didn't foresee that, he only foresaw an assault, and he's been found liable for a far more serious offence of manslaughter rather than an assault, which even on the substituted offence of 189(2), with a maximum of five years, is far less serious and therefore a proviso shouldn't be resorted to. Thank you. Any other questions I can assist with?

WINKELMANN CJ:

No, thank you Mr Rapley. Thank you all counsel for your submissions, and we will take time to consider our decision.

COURT ADJOURNS: 1.03 PM