



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

BETWEEN:

**The King**

Appellant

and

**Rohan (a pseudonym)**

Respondent

### APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

#### **Part I: Internet publication certificate**

1. It is certified that this outline is in a form suitable for publication on the internet.

#### **Part II: Outline**

2. This appeal turns on the interpretation of s 323(1)(c) of the *Crimes Act 1958* (Vic) ('**Crimes Act**'), which provides that a person is 'involved' in an offence if he or she 'enters into an agreement, arrangement or understanding with another person to commit the offence'. Pursuant to s 324(1) of the Crimes Act, a person who is involved in the commission of the offence is taken to have committed the offence.
3. Specifically, the primary question for this Court is whether, in introducing the current version of Subdivision 1 into Part II Division I of the Crimes Act, the Victorian legislature intended to create a complicity regime whereby all liability is wholly derivative, or whether, as the appellant submits, the Victorian legislature intended to retain the distinction that existed at common law between derivative accessorial liability, and primary liability of a party to an agreement to pursue an unlawful common purpose.

#### ***Complicity prior to the enactment of s 323***

4. This Court recently discussed the nature of joint criminal enterprise (or common purpose) in the case of *Mitchell & Ors v the King*.<sup>1</sup> That case is one in a long line of authorities that

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<sup>1</sup> (2023) 97 ALJR 172 (JBA p 864).

recognizes the fundamental difference between complicity by aiders and abettors and complicity by those engaged in a joint criminal enterprise.<sup>2</sup>

5. At its heart, joint criminal enterprise affixes each perpetrator with primary liability for all acts within the scope of the agreement, regardless of which perpetrator performs those acts. Here, each offender agreed that Daisy and Katie would be provided with drugs and that Daisy would be sexually penetrated. The jury having so found, each offender was properly rendered liable for the acts performed within the scope of the agreement. The import by the Court below of a requirement to prove an additional fault element (specifically, an intention to perform the acts with knowledge of the complainants' respective ages) is inconsistent with the language of s 323(1)(c), the historical context of that provision, and the legislature's stated intention.

### ***Background to s 323***

6. The amendment of the Crimes Act to include s 323 arose from the 'Simplification of Jury Directions Project' report ('**the Weinberg report**').<sup>3</sup> The report recommended a significant change to the liability created at common law by the doctrines of joint criminal enterprise and common purpose, by replacing these doctrines with what the authors of the Weinberg Report described as 'a completed conspiracy offence'.<sup>4</sup> In line with principles relating to conspiracy, the new subsection proposed by the authors of the Weinberg report adopted the fault element of 'intention' as specified for traditional forms of accessorial liability in *Giorgianni v The Queen*.<sup>5</sup>

### ***Legislative intent***

7. The legislature did not adopt the recommendations of the Weinberg report, insofar as it recommended to import the principles of conspiracy – and thereby the fault element of intention – into the form of complicit liability for activity carried out pursuant to an agreement, arrangement or understanding. So much is clear from the structure of s 323, the context (including historical) of s 323 and the extrinsic materials.
8. The extrinsic materials<sup>6</sup> clearly show that whereas the legislature intended to import the fault element from *Giorgianni* into s 323(1)(a), it specifically determined not to do so in

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<sup>2</sup> *McAuliffe v the Queen* (1995) 183 CLR 108 at 113–4 (**JBA pp 368–369**); *Osland v the Queen* (1998) 197 CLR 316 per McHugh J at 341–351 (**JBA pp 488–498**); Kirby J at 382–383 [174] (**JBA pp 529–530**) and Callinan J at 402 [217] (**JBA p 549**).

<sup>3</sup> Weinberg report (**BFM pp 4–104**).

<sup>4</sup> *Ibid* [2.279] (**BFM p 97**).

<sup>5</sup> (1985) 156 CLR 473 ('*Giorgianni*') (**JBA p 224**).

<sup>6</sup> **JBA pp 919–947**.

respect of s 323(1)(c).<sup>7</sup> No reference is made to the ‘completed conspiracy offence’ concept which underpins the Weinberg report’s recommendations for liability arising from group activity, nor is the significant change said to be wrought by s 323(1)(c) highlighted.

9. In enacting s 323(1), and in differentiating between complicity by ‘assists, encourages or directs’ in s 323(1)(a) and complicity by ‘agreement, arrangement or understanding’ in s 323(1)(c), the legislature clearly intended to retain a distinction between those two broad types of complicity. Each sub-section picks up the language of the common law. If no difference in the fault element exists, there would be no reason to separate the sub-sections. This is especially so when one considers the inclusion of the word ‘intentionally’ in s 323(1)(a) and its omission from s 323(1)(c).
10. The practical effect of the application of the judgment of the Court below is inconsistent with the aim of the legislative amendment – simplification. As the Court below observed,<sup>8</sup> removal of primary liability for those who embark on a joint criminal enterprise results in different thresholds of criminal liability for each offender, depending on the role they played. This sits uncomfortably with s 324B, which specifies that role need not be determined.
11. Rendering all complicit liability derivative will also create conceptual difficulties for juries, particularly where s 324B has application, or where an offence has been jointly committed (in that each offender has committed separate acts which, when combined, make the offence complete). After all, it is the acts or omissions constituting the offence which are attributed to a party to a joint criminal venture, not the crime constituted by those acts or omissions.

Dated: 11 October 2023



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<sup>7</sup> See Explanatory Memorandum (**JBA p 936**).

<sup>8</sup> Judgment of the Court below (**CAB p 137**).