

# **Criminal Responsibility Under The Law of NSW**

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# Criminal Responsibility Under the Law of NSW

- 1. The Participants**
- 2. Joint Criminal Enterprise**
- 3. Extended Joint Criminal Enterprise (common purpose)**
- 4. In Company**
- 5. How is the Case Put?**
- 6. Sentence**

# The Participants

1. Principal in the 1<sup>st</sup> Degree
2. Principal in the 2<sup>nd</sup> Degree
3. Accessory before the Fact
4. Accessory after the Fact

# Principal in the 1<sup>st</sup> Degree

- The person who actually commits the crime or is present at the scene pursuant to a joint criminal enterprise with the person who actually commits the crime.
- Liability is primary or not derivative.

# Principal in the 2<sup>nd</sup> Degree

- A principal in the second degree is a person present at the commission of the crime who encourages or assists in its commission.
- Liability is derivative. Prosecution must prove the commission of the offence by the principal in the first degree.
- Potentially limited cases in this area.

# Accessory Before the Fact

- An accessory before the fact is a person, not present at the crime, who encourages or assists the commission of the crime.
- 2 parts (a) knowledge and (b) action.
- Liability is derivative. Prosecution must prove the commission of the offence by the principal in the first degree.

# Accessory After the Fact

- An accessory after the fact is a person who assists the principal in the first degree to avoid detection, apprehension or conviction after the offence has been committed.
- 2 parts (a) knowledge and (b) action.
- Liability is derivative in the sense that the prosecution must prove the commission of the offence by the principal in the first degree.

# Joint Criminal Enterprise

- Joint criminal enterprise may be relied upon by the prosecution when:
  - the accused reaches an understanding or arrangement amounting to an agreement between the accused and others
  - that they will commit a crime
  - the accused is present (query) when the crime is committed, and
  - the accused possesses the necessary mental element for the crime.
- Agreement need not be reached at any time before the crime is committed.
- The accused will be guilty as a principal in the first degree. His or her liability is primary, not derivative.



# Extended Joint Criminal Enterprise

- Extended joint criminal enterprise (or common purpose) may be relied upon:
  - where the offence committed is not the offence agreed upon but is an offence
  - falling within the scope of the common purpose.
- What is meant by “within the scope of the common purpose”?
- The test is subjective: the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.

# Extended Joint Criminal Enterprise cont.

- In other words:
  - did the accused who was present pursuant to a joint criminal enterprise
  - contemplate the act (i.e. the other offence)
  - as a possible incident in the commission of the crime to which he or she had agreed?

# Extended Joint Criminal Enterprise cont.

- **Example:** the accused and his girlfriend agree to do an unarmed robbery. They confront the victim and assault him with their fists. In the course of the attack, the girlfriend produces a knife and threatens the victim with it.
- Clearly, the girlfriend is guilty of armed robbery as a principal in the first degree. As for the accused, if he did not contemplate the possibility of his girlfriend presenting the knife, then he is not guilty of armed robbery. If he did, he is guilty of armed robbery.

# Extended Joint Criminal Enterprise cont.

- In *Clayton, Hartwick and Hartwick v The Queen* Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ affirmed the principles set out in McAuliffe:
  - [17] A person who does not intend the death of the victim, but does intend to do really serious injury to the victim, will be guilty of murder if the victim dies. **If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight** *McAuliffe v The Queen* (1995) 183 CLR 108 at 118; *Gillard v The Queen* (2003) 219 CLR 1 at [112]. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder.
- In joint enterprise murder the co-accused must have foreseen the possibility that the principal offender acted with intent to kill or inflict grievous bodily harm.

# In Company

**Button & Griffen** (2002) 54 NSWLR 455; (2002) 129 A Crim R 342 was a case of aggravated sexual assault under s.61J where the sexual acts occurred fifty metres from other members of the group. After considering the cases on Kirby J proposed the following five guidelines (at [120]):

**First**, the statutory definition (s61J(2)(c)) requires that the offender be "in the company of another person or persons".

**Secondly**, the accused and such person, or persons, must share a common purpose (either to rob, or as here, sexually assault).

**Thirdly**, the cases appear to assume that each participant is physically present.

**Fourthly**, participation in the common purpose without being physically present (for example, as a look-out or as an accessory before the fact) is not enough.

**Fifthly**, the perspective of the victim (being confronted by the combined force or strength of two or more persons) is relevant, although not determinative. If two or more persons are present, and share the same purpose, they will be "in company", even if the victim was unaware of the other person.

# How is the case put?

1. A practical suggestion: before hearing / trial ask the prosecutor how the case is put. That is, ask for particulars.
2. Is it essential that judges carefully direct juries as to the nature of the Crown case and the basis for alleged liability of the accused.
3. Look at the Bench Book directions.

# Sentence

- Role is always important.
- What is the finding as to liability? (e.g. 1st or 2nd degree?)
- Examine closely the role of your client as against other participants.

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Thanks to: Jennifer Wheeler, Richard Button SC and Colin Scouler