Limits of knowledge for joint criminal enterprise under Victorian statute

The King v Rohan (a pseudonym) [2024] HCA 3

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In an appeal from the Victorian Court of Appeal, the High Court considered what the prosecution must prove to establish that a person is 'involved in the commission of an offence' under s 323(1)(c) of the *Crimes Act 1958* (Vic), being where the person 'enters into an agreement, arrangement or understanding with another person to commit the offence'.

Unlike Victoria, New South Wales has not legislated a scheme to replace the common law doctrine of joint criminal enterprise. Section 11.2A of the Commonwealth *Criminal Code* provides for liability by joint commission of crimes, to capture circumstances where there is an agreement to commit an offence and the offence is committed under that agreement.

In the context of the Victorian legislation, the two judgments in *The King v Rohan (a pseudonym)* [2024] HCA 3 consider the distinction between concepts applicable to joint criminal enterprise and those which attend accessorial liability. The decision demonstrates the application of statutory construction principles to the interpretation of statutory criminal responsibility where it replaces common law doctrines.

Background

By a combination of s 324(1) ('if an offence … is committed, a person who is involved … is taken to have committed the offence') and sub-ss 323(1)(c) and 323(3)(b) of the *Crimes Act 1958* (Vic), if an offence is committed, a person who entered into an agreement, arrangement or understanding with another person to commit the offence is taken to have committed that offence and is liable to the maximum penalty for that offence, whether or not the person realised that the facts constituted an offence.

The respondent was convicted of six offences of involvement in offences by having entered into an agreement, arrangement or understanding to commit the offence, pursuant to s 323(1)(c). The offences the subject of agreement involved (1) supplying drugs and alcohol to two girls aged 11 and 12 ('Daisy' and 'Katie'), and then (2) sexually penetrating and sexually assaulting Daisy.[1]

It was an element of the drug offences that the supply be to a child under 18 years of age, and an element of the sexual offences that the penetration be of a child under the age of 12 years. It was not an element of either offence that the accused knew the victim's age or knew that the victim was under a certain age.

The prosecution case was that the respondent and his two co-accused reached an agreement to supply the alcohol and cannabis to the complainants and then engage in sexual activity, including sexual penetration, with both the complainants. The trial judge did not direct the jury that for the 'agreement … to commit the offence' the prosecution had to prove that the accused knew the ages of the complainants.

The Victorian Court of Appeal held that it was necessary to prove beyond reasonable doubt that, at the time the agreement was made, the accused knew the relevant complainant was under 12 (for the sexual offences) and knew the complainants were both under 18 (for the drug offences).

High Court

The High Court unanimously allowed the prosecution's appeal. Applying established principles, the majority (Gageler CJ, Gordon and Edelman JJ) observed that the starting point to ascertain the meaning of the statute is its text, while at the same time having regard to context in its widest sense, including historical context, and purpose. Ordinarily, the same meaning is given to the same words appearing in different parts of a statute: at [25].

Their Honours determined that the term 'offence', in these provisions, could not have different meanings – the same offence is being referred to throughout the relevant subdivision: at [28]. The offence is the offence that is committed and for which a person may be liable to the maximum penalty, that is, 'the concatenation of factual elements (physical, mental and circumstantial) which give rise to criminal liability': at [28].

However, it did not necessarily follow that, because 'offence' referred to all of the elements of the offence, it had to be proved that a person who 'enters into an agreement … to commit the offence' *intends*, *knows* or *believes* in the existence of those elements: at [29].

The three co-accused agreed to supply cannabis to *Daisy and Katie* and then engage in sexual activity with *Daisy*: at [32]. Those acts were criminal. The accused had the necessary state of mind to agree to commit the offences. The prosecution did not need to prove that any of the accused had any further knowledge or intention beyond that they agreed, in relation to the drug charges, to supply the cannabis intending that *Daisy and Katie* use it and, in relation to the sexual charges, to sexually penetrate *Daisy* intending that Daisy be sexually penetrated.

It did not matter which of the accused actually did the acts: at [32]. The critical matter that made the agreement one 'to commit the offence' of sexual penetration of a child under 12 was the that the agreement was to intentionally sexually penetrate *Daisy*, who was under 12 – not simply to intentionally sexually penetrate any person (which would not, in itself, be an offence): at [33].

Mr Rohan submitted that the prosecution had had to show that the accused knew the girl concerned was under a specified age (in

accordance with *Giorgianni* (1985) 156 CLR 473) (*'Giorgianni'*): at [39]. This would also apply to s 323(1)(a), which provided that a person is involved in the commission of an offence if the person 'intentionally assists, encourages or directs the commission of the offence'.

However, the majority found, sub-ss 323(1)(a) and (c) are expressed differently and have different work to do. The word 'intentionally' in s 323(1)(a) prevents that provision having too broad a reach so that, as explained by Mason J in *Giorgianni* concerning common law accessorial principles, the (at [40]),

> … 'link in purpose' between the secondary and the principal offender is not established where a person does something to bring about, or render more likely, the commission of an offence by another in circumstances in which, through ignorance of the facts, it appears to [them] to be an innocent act.

The 'link in purpose' is established by the requirement for intention informed by knowledge of the essential facts: at [40].

By contrast, the 'link in purpose' required by s 323(1)(c) (which compares with common law joint criminal enterprise) is provided by the 'agreement, arrangement or understanding' between them 'to commit the offence': at [41]. That is, the offenders are agreeing to embark on a course of conduct together – to commit a crime together – and there is no need to read in an additional fault element: at [41]. The additional fault element in *Giorgianni*, that the accused knew all of the essential facts which made what was done a crime, is apposite to s 323(1)(a) (like aiding and abetting, a form of derivative liability, requiring the commission of a crime by another), but is inapposite to s 323(1)(c) which, like joint criminal enterprise, is a form of primary liability: at [41].

Similarly, Gleeson and Jagot JJ observed that knowledge of the child's age was not required, and it was only required that the child in fact be under 18 or under 12: at [46]. Section 323(1)(a) is intended to cover behaviour that at common law would be covered by aiding, abetting, counselling and procuring. The word 'intentionally' in s 323(1)(a) reflects the fault element required by *Giorgianni* that the accused knew every fact essential to the offence: at [63]. The very words 'aiding, abetting, counselling, and procuring' indicate that 'a particular state of mind is essential' for such an offence to be committed, being actual knowledge of each element of the offence: at [63].

According to Gleeson and Jagot JJ, s 323(1)(c) covers group activity that would be covered by common law doctrines of acting in concert, joint criminal enterprise and common purpose: at [64]. Such offences involve a 'mutual embarkation on a crime' – an agreement, arrangement or understanding that the parties will commit acts or omissions constituting a crime, in which event, if one person commits all acts or omissions necessary to constitute the crime, the others have also committed that crime: at [64], referring to *Osland v The Queen* (1998) 197 CLR 316 (*'Osland'*), 343 [73] (McHugh J). It is the acts, not the crime, of the actual perpetrator which are attributed to the person acting in concert: at [64], citing *Osland*: at [75].

To cover the common law doctrines, s 323(1)(c) could not require the Crown to prove not only the fact of entry into the agreement to commit the offence and the commission of the offence, but also that the accused knew a fact where knowledge (as opposed to the existence) of that fact was not itself an element of the offence: at [66].

In conclusion, under s 323(1)(c) the Crown did not have to prove that the respondent knew that the person being supplied drugs was under 18 (for the drug charge) or that that the person being intentionally sexually penetrated was under the age of 12 years (for the sexual charge): at [33], [40] (Gageler CJ, Gordon, Edelman JJ); [75], [76] (Gleeson and Jagot JJ). BN

ENDNOTES

1 *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71B(1); *Crimes Act 1958* (Vic) s 49A(1).