CHAPTER 14

COMPLICITY

Parties to an offence

14.1 An accused may have personally performed all the elements of the offence, either acting alone as a sole 'principal' or together with other 'co-offenders' who have also each performed all the elements of the offence. Alternatively, co-offenders acting together may perform different elements of an offence. The Penal Code s 31 defines co-offenders:

> A co-offender shall mean a person who, in agreement with another, takes part with him in the commission of a criminal offence.

For example, in a robbery one person may threaten violence while another person takes the property. They can both be liable for the offence if they are working to an agreement.

14.2 Sometimes, one person will perform all the elements of an offence with another person assisting or otherwise contributing as, what is variously known as, an 'accomplice', 'accessory' or 'secondary party'. The Penal Code s 30 sets out a framework by which a person may attract criminal liability even though that person did not necessarily perform any of the acts or omissions which constitute the offence.

14.3 The primary forms of secondary participation are specified in the Code s 30:

> Any person who aids, counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principal offender.

In addition, s 35 makes a person inciting or soliciting an offence liable to be charged and convicted as a principal offender in cases where the principal offence is committed as well as where it is not committed.

14.4 Under s 33, liability is extended to all parties to an unlawful purpose for an offence committed by any of them that is a foreseeable consequence of carrying out the unlawful purpose.

> Any accomplice or co-offender in the commission or attempted commission of an offence shall be equally responsible for any other offence committed or attempted as a foreseeable consequence of the complicity or agreement.

This is commonly called 'common purpose' liability.

14.5 Parties to an offence do not include 'accessories after the fact'. An accessory after the fact is someone who, after an offence has been committed, helps the offender to escape punishment: Code s 34(1). A spouse and certain close relatives are excluded from liability: s 34(2), An accessory after the fact is not a party to the original offence but commits a separate offence. However, penal liability is the same as for a principal offender: s 34(3).

Charges, verdicts and punishments

14.6 Secondary parties can be charged and convicted as if they were principals. For example, a woman can be charged with the rape of another woman and convicted of the offence on the basis that she assisted the male principal. Alternatively, a particular mode of secondary participation may be charged. The Code ss 30 and 35 expressly mention charging as a principal offender. The same applies to s 33 under common law principles.

14.7 Where the charge specifies a particular mode of participation, that mode must be

proved. However, where the charge does not specify a mode of participation, the prosecution can argue any mode in the alternative. In *Urinmal v Public Prosecutor* [2013] 23 at [74], the Vanuatu Court of Appeal said this about cases of group violence where the actions of individuals cannot be identified:

> All cases are fact specific. However, in such a situation where particular acts and injuries cannot be attributed to individual participants in the assault, but it is proven that they were participants, it is not necessary for the precise part played by each to be identified. The essential question is whether the evidence has gone to the length of showing that one must have struck the blows and others encouraged or helped, or possibly that some or all struck the blows. A specific categorization as principal or party is not required, (see *R v Witika* (1991) 7 CRNZ 621 (CA)).

14.8 It has sometimes been suggested that, when the prosecution alleges secondary participation, the particular mode of participation should be indicated in the charge: *DPP (Northern Ireland) v Maxwell* [1978] 3 All ER 1140; *Giorgianni v R* (1985) 156 CLR 473 at 497; 58 ALR 641 at 658. The argument for indicating the mode of participation is that the accused should be given notice of the precise case which will be alleged. However, this can be done in ways other than by specification in the charge. Requiring a mode of participation to be specifically charged would be unfair to the prosecution in a case where it can prove participation but not a particular mode.

14.9 Following conviction, a secondary party is liable to the same punishment as a principal. This follows from the provision in Code ss 30 and 35 that the secondary party may be convicted as a principal offender. The same applies to s 33 under common law principles. It will often be possible to argue that a secondary party is less culpable than a principal offender and deserves lesser punishment. However, there are instances in which the secondary party is the instigator, planner and main beneficiary of the offence, and may therefore deserve greater punishment than the person who carries it out.

Forms of aiding

14.10 The Code s 30 identifies 'aiding' as one of the forms of complicity but does not specify its elements. Aiding includes providing material assistance for the commission of the offence, at the scene, beforehand or afterwards: for example, providing information, instruments, a 'look-out' or a getaway vehicle. In the context of s 30, aiding also includes providing psychological encouragement or support at the scene of the offence. Encouragement beforehand constitutes counselling, which is separately identified in s 30. However, encouraging at the scene has been called 'abetting' at common law and in any some criminal statutes. Where there is no mention of abetting, as in s 30, it could be subsumed within aiding or counselling. Nothing turns on the choice of location but 'aiding' has tended to be preferred: see, for example, *Beck v R* [1990] 1 Qd R 30, (1989) 43 A Crim R 135 (CA).

14.11 The explanation of using the term 'aiding' for encouraging at the scene and 'counselling' for encouraging beforehand turns on the relationship between statutory provisions and their antecedents at common law. At common law, a distinction was drawn between 'aiding and abetting' at the scene of an offence and 'counselling and procuring' beforehand: *Giorgianni v R* (1985) 156 CLR 473. In *Osland v R* (1998) 197 CLR 316; 59 ALR 170; [1998] HCA 75 at [206] (**14.48C**), Callinan J noted:

> [T]he distinguishing feature of accessories *at* the fact was their presence at the commission of the crime. Accessories *at* the fact were described as 'aiding and abetting' the commission of the crime. Accessories *before* the fact were referred to as having 'counselled or procured' the crime. Different penalties were typically imposed for the various classifications of participation.

14.12 Passive presence during the commission of an offence does not amount to aiding if the person is merely a spectator. See *R v Manedetea* [2017] SBCA 19 at [22]:

> If a person is present with knowledge that the offence with which he is charged as an accomplice may take place and chooses to remain, it is evidence of encouragement but no more. In order to be guilty as an aider and abettor, he must not only be present but at least be concurring in the result.

This should not, however, be interpreted to mean that there is no liability for an omission to act which makes some positive contribution to the commission of an offence. For example, the entry of thieves into a building may be facilitated by a security guard accomplice who fails to lock a door.

14.13 Although it is well established that mere passive presence does not constitute secondary participation, the application of this rule can cause difficulty. Passive presence must be distinguished from an act of deliberately making oneself present in order to observe an offence, which can amount to aiding by encouragement; or from acting as a look-out or sentry: see *Kilatu v R* [2009] SBCA 20. Passive presence must also be distinguished from presence under circumstances from which intention to encourage or readiness to help if necessary would be inferred: see the discussion in *Beck v R* [1990] 1 Qd R 30, (1989) 43 A Crim R 135; see also *R v Manedetea* [2017] SBCA 19 at [25].

Fault element of aiding

14.14 Intention or recklessness is the fault element for aiding. There is no express reference to a fault element in the wording of s 30. However, the general requirement for intention or recklessness under the Penal Code s 6 will apply to all forms of complicity in s 30. Aiding therefore requires an intention to aid the offence or at least awareness of the risk of aiding it. Admittedly, the view taken of the common law of secondary participation by the High Court of Australia is that intention alone will suffice and mere recklessness is excluded: *Giorgianni v R* (1985) 156 CLR 473 at 481–2, 487, 194–5, 500–1, 506–7; 58 ALR 641 at 646–7, 651, 656–7, 661, 665–6. This has, however, been controversial. Moreover, there is no justification for reading a restriction to

intention alone into the Code.

14.15 It is sufficient that an aider contemplates the kind of crime to be committed by the principal. It is not necessary that its precise details be known: *Ancuta v R* [1991] 2 Qd R 413. In that case, the accused was convicted of unlawful possession of specified motor vehicles on the basis that he had supplied compliance plates for use on stolen vehicles, even though he did not know on which specific vehicles they would be used. There must, however, be intention or recklessness with respect to the type of offence that was actually committed.

14.16 It has been held that if one person aids another (for example, as a driver), knowing that some offence is to be committed but not knowing which particular one is to be committed, the aider is liable for the commission of any of the alternatives that were actually contemplated: *DPP (Northern Ireland) v Maxwell* [1978] 3 All ER 1140. It can be said that the accomplice in such a case such as *Maxwell* has a conditional intent to aid whichever of the contemplated offences will actually be committed by the principal. The same analysis can be made of a case such as *Miller v R* (1980) 32 ALR 321, where the accomplice drove the principal on a series of occasions knowing that murders would be committed on some of these occasions but not knowing on which particular occasions the murders would be committed. The driver was not only aware of the risk that his conduct might aid the commission of an offence; he was prepared to help in the event that an offence would be committed. These are examples of what might be called ‘conditional intent’: see **4.14**, **13.10**.

14.17 As a matter of general principle, intention is required for all elements of any offence of aiding, regardless of what kind of mental element is required for the principal offence. The mental element for aiding does not vary for each offence to reflect the mental element of the principal offence. For example, aiding a rape requires an intention or recklessness with respect to aiding non-consensual sexual intercourse. The aider must therefore know there is at least a risk of lack of consent, even though the principal can only deny culpability through a defence of mistake of fact under the Code s 12 if that mistake is an objectively reasonable one.

14.18 However, there may be some exceptions to this general principle. There is a line of authority in other jurisdictions to the effect that, in cases where there was an intention to aid some offence but a more serious offence resulted, there has been an aiding of the more serious offence. For example, in *R v Licciardello* [2017] QCA 286 at [31], where the charge was unlawfully doing grievous bodily harm, it was held to be sufficient that an aider knew that there was or was about to be an assault. See also *Giorganni v R* (1985) 156 CLR 473; 58 ALR 641. In issue in *Giorganni* was a New South Wales offence of culpable driving causing death. It was said to be sufficient for secondary liability to prove intention to aid only the culpable driving, because there would then be an intention to aid an unlawful act. Thus, for manslaughter by intentional violence all that the aider would need to have knowledge of would be the original assault: see *R v Johnson* [2007] QCA 76 at [26], [51]; *R v Brown* (2007) 171 A Crim R 345, [2007] QCA 161 at [32]. There is a similar rule respecting manslaughter in Canada: see *Cluett v R* [1985] 2 SCR 216 at 229–30; *R v Jackson* [1993] 4 SCR 573 at [16]–[20].

14.19 This line of authority appears to reflect 'the predicate offence principle': see **5.40**. This is a common law principle that, for offences in which an underlying lesser offence is coupled with aggravating features to create a more serious offence, a fault element is required only for the predicate offence. In Chapter 5, it was argued the principle underlies the confinement of the intention requirement in s 107 to the assault, so that there is no requirement for an offender to intend to cause physical damage or death in the aggravated forms of the offence. However, several specific textual justifications were offered in support of this interpretation for principal offenders: see **5.39**. Applying the same rule to secondary participation would require the predicate offence principle to be more directly invoked. This might be a step too far for a jurisdiction in which s 6 of the Penal Code has expressly addressed the general principles of criminal responsibility. The matter remains to be resolved by the courts.

Counselling and procuring

14.20 The terms 'counselling' and 'procuring' are used to describe cases where the secondary party does something which encourages or induces the principal to commit the offence rather than something which facilitates its commission. These terms are not defined in the Code s 30 but are generally taken to mean the following:

- 'Counselling' involves encouraging the commission of the offence by word or deed. It has been explained as urging or advising the principal offender to commit an offence: *Stuart v R* (1974) 134 CLR 426 at 445. More that 'suggesting' is required. In *MKP Management Proprietary Ltd v Shire of Kalamunda* [2020] WASCA 130 at [93], it was said: 'However, a person does not 'counsel' another person to commit an offence … if he or she merely 'instigates' the commission of an offence, in the sense of suggesting it, without urging, advising or soliciting the commission of the offence.'
- 'Procuring' involves intentionally causing the commission of the offence. In *Humphry v R* (2003) 138 A Crim R 417; [2003] WASCA 53, the Court of Criminal Appeal approved the trial judge's direction that 'procure' meant to produce by endeavour, and that a person procured a thing by setting out to see that it happened. Offering material inducements for someone to commit an offence is an obvious example of procurement. Mere encouragement is not sufficient, but successful persuasion can amount to procurement: *R v Hawke* [2016] QCA 144 at [59].

In *MKP Management Proprietary Ltd v Shire of Kalamunda* [2020] WASCA 130, it was said:

> [94] The term 'procure' …connotes 'to produce by endeavour'. A person procures something 'by setting out to see that it happens and taking the appropriate steps to produce that happening'. A person cannot procure another person to commit an offence unless 'there is a causal link between what [the person does] and the commission [by the other person] of the offence'. See *Attorney-General's Reference No 1 of 1975*.
> [95] Procurement requires successful persuasion to do something. A person will not procure another person to commit an offence merely by attempting to induce. The person must have induced the other person actually to have commit-

ted the offence.

14.21 A person who induces the principal to commit the offence by means of a threat or a trick is sometimes categorised as a procurer. However, in such instances where the 'principal' may well have a defence, the doctrine of causation (see **3.14–3.19**) is sometimes used to establish direct liability for the procurement without resort to liability for secondary participation. Under the Australian Criminal Code (Cth), this is called 'commission by proxy': see s 11.3.

14.22 No fault element is specified for counselling or procuring under the Code ss 30 and 35. However, it has been said of the Queensland Criminal Code that the implicit requirement that 'aiding' be done 'knowingly' applies also to counselling and procuring: see *Jervis v R* [1993] 1 Qd R 643. The reasoning in *Jervis* was that the conditions of liability for the various forms of secondary liability should be the same because the Code provisions often overlap in practice.

14.23 It is immaterial whether the offence is committed in the way counselled or procured or in a different way as long as what occurs is the type of offence that is counselled procured. See also **14.15** regarding the position on aiding. A secondary party need not foresee the precise details of the principal offence.

Foreseeable consequences

14.24 The Code s 33 extends the scope of secondary liability in cases where two or more persons are in complicity or agreement to commit an offence and in consequence another, foreseeable offence is committed.

> Any accomplice or co-offender in the commission or attempted commission of an offence shall be equally responsible for any other offence committed or attempted as a foreseeable consequence of the complicity or agreement.

The section applies to both a principal and an accomplice and to co-offenders. All

participants to the criminal enterprise are liable for any other offence committed by any one of them that was a foreseeable consequence of carrying out the plan. For example, where an intentional homicide is committed in the course of an armed robbery or burglary, the rule may operate to make all the participants liable for the homicide even though it was an unplanned consequence of their enterprise. This is commonly known as the 'common purpose' rule. Similar versions are found in many other jurisdictions.

14.25 The common purpose rule contains both subjective and objective components: the test for a 'common purpose' is subjective; for a 'foreseeable consequence' it is objective. In *Luavex v R* [2007] SBCA 17, the Solomon Islands Court of Appeal said:

> It depends on formation of an actual intention or purpose to do something unlawful. Otherwise it is objective: *Stuart v The Queen* (1974) 134 CLR 420, 437; in particular, whether or not the offence committed is of such a nature as to be a probable consequence of carrying out or 'prosecuting' the common purpose depends not on what the parties themselves in fact foresaw or contemplated, but on whether or not it was such a consequence.

It is therefore immaterial that the participants do not foresee the commission of the consequential offence. Moreover, age and personal characteristics are not relevant in determining what is foreseeable; foreseeability is an entirely objective consideration in this context.

14.26 In many other jurisdictions with similar rules of common purpose' liability, the test is whether the additional offence is a 'probable consequence' of carrying out the common purpose. In *Darkan v R* (2006) 227 CLR 373; 228 ALR 334; [2006] HCA 34 at [81], the High Court of Australia held that a 'probable consequence' is an outcome that 'could well have happened'. The High Court at [78] rejected the view that a consequence would be 'probable' if it was just 'a substantial or real chance'. However, the adoption of 'foreseeable consequence in Vanuatu suggest a looser test under which 'a substantial or real chance' would suffice.

14.27 The scope of a complicity or agreement may require careful characterization before an assessment of foreseeable consequences can be made. This will often be a matter of inference. In *R v Keenan* (2009) 236 CLR 397; [2009] HCA 1 at [119]-[120], it was said:

> It is not to be expected that every plan involving the infliction of physical harm will be detailed and include the means by which it is to be inflicted. However it may be possible to infer what level of harm is intended and from that point to determine whether the actual offence committed was a probable consequence of a purpose so described…An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors.

14.28 In *R v Huston* [2017] QCA 121, murder was an unplanned consequence a robbery. The Court allowed an appeal from the accused's conviction on the basis that the judicial directions were inadequate to require the jury to consider first the level of violence intended by the parties for the robbery before moving on to assess the probable consequences. The Court said, at [77], that this was a case that:

> … required the jury to do more than determine whether there had been a common intention to rob the deceased. … a robbery could involve any level of violence and, indeed, only a threat of violence.

14.29 It has been suggested that, where a plan contemplates contingencies, the issue is simply whether the offence was a foreseeable consequence of carrying out the contingent plan: see *Hind and Harwood v R* (1995) 80 A Crim R 105 at 116–7, 141–2. The likelihood of the contingency eventuating can be discounted.

Joint criminal enterprise

14.30 Joint criminal enterprise is a common law doctrine which applies to two or more

persons who reach an understanding or arrangement to commit a crime. The doctrine attributes liability to all the parties for acts committed by any one of them in effecting the agreement: see *IL v The Queen* (2017) 245 ALR 375; [2017] HCA 2 at [26]–[40]. A person who is a party to the agreement may become liable even though they have no personal involvement in putting the agreement into effect. The doctrine of joint criminal enterprise is therefore distinguishable from the traditional doctrine of joint-principalship, which applies where persons work together to perform the elements of an offence.

14.31 In light of the lack of textual underpinning for the doctrine of joint criminal enterprise in the Penal Code, it is likely that courts in Vanuatu would rule that the doctrine has no place in the scheme of liability. Queensland courts have refused to import principles of joint criminal enterprise liability into the Criminal Code (Qld). In *R v Sherrington* [2001] QCA 105 at [11], McPherson JA said:

> For my part I would prefer to avoid importing into the Code words which do not appear there. Incorporating the expression 'in concert' in s 7(1)(a) involves a reversion to the common law which (unless perhaps all else fails) is considered a form of heresy.

The non-responsible principal; the lesser principal; the greater principal

14.32 A secondary party may be convicted even though the principal is not convicted: for example, the principal may have died or evaded arrest. In some unusual circumstances, there need not even be a person who could be convicted as the principal. Cases can arise where the person who plays the role of the principal has some special defence not available to the secondary party. For example, the person who plays the role of the principal may be insane or under the age of criminal responsibility. See, for example, *Pickett v State of Western Australia* [2020] HCA 20. In that case, the High Court upheld convictions of murder on the basis of aiding even though the fatal wound may have been inflicted by a person who did not meet the test

for the age of criminal responsibility. The High Court in *Pickett* interpreted the references to the commission of an 'offence' in the Criminal Code (WA) ss 7-9 to mean only the conduct elements of an offence. It is likely that the same interpretation would be given to the word 'offence' in the Vanuatu Penal Code s 30.

14.33 The broad interpretation of 'offence' adopted in *Pickett* would also cover a case where the principal does commit some offence but the secondary party has greater culpability and, therefore, commits a more serious offence. For example, a secondary party may procure the death of a victim; the principal may then attack the victim but death may be caused accidentally. The secondary party may then be convicted of intentional homicide, while the principal commits only intentional assault causing death.

14.34 It is also possible for a secondary party to be convicted of a lesser offence than that committed by the principal. For example, one person might have knowingly aided an attack upon a victim without realising that the principal intended to kill. If the victim died, the secondary party might be convicted of intentional assault causing death even though the principal committed intentional homicide. This was the conclusion of the High Court of Australia in *R v Barlow* (1997) 188 CLR 1; [1997] HCA 19. The Court interpreted the references to being a party to an 'offence' to mean only the conduct elements of an offence: the same interpretation as that later affirmed by the High Court in *Pickett.* The same interpretation should apply to the word 'offence' in the Code s 30.

Exempt parties

14.35 There is some uncertainty about the application of the law of secondary participation to offences involving transactions between more than one party where the express terms of the offence apply only to one of the parties: for example, an offence of supplying drugs. Is the party who is exempt from liability as a principal also exempt from liability as a secondary party? In some cases, the view has been taken

that liability under the law of secondary participation would be inconsistent with the exemption from liability as a principal. Thus, in *R v Starr* [1969] QWN 23, it was held that a child was not an accomplice to the commission of an offence of incest upon herself.

Withdrawal

14.36 Unlike the law of inchoate liability (see **13.32**), principles of secondary liability generally permit a defence where the secondary participant has withdrawn from participation. The common law has accepted an exculpatory defence of withdrawal, but subject to the requirement that the contribution must be cancelled out or, according to some looser versions, that at least the secondary party must have done everything that could have reasonably been expected to neutralise the contribution and matters must not have progressed so far that the withdrawal action was incapable of being effective. See *R v Menniti* [1985] 1 Qd R 520, where the majority took the view that common law principles respecting withdrawal could be considered in interpreting the scope of all forms of secondary liability under the Criminal Code (Qld). This general approach is readily applicable to the forms of secondary participation identified in the Vanuatu Code s 30. For example, it can be argued that a material contribution may be later counterbalanced in a way which makes it inappropriate to hold that the offence has been 'aided'. Similarly, it can be argued a forceful communication of withdrawal from a complicity or agreement coupled with reasonable steps to prevent the commission of the offence may preclude any liability under the Code s 35.