IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M24 of 2012

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF VICTORIA

BETWEEN:

DIMITRIOS LIKIARDOPOULOS

Appellant

- and -

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED

2.1 This appeal raises the question of whether it is open at law for an accused person to be convicted of the crime of murder on the basis of counselling or procuring [accessory before the fact] in circumstances where no other person has been convicted of the crime as a principal offender; and particularly so where the prosecution does not seek to try any other person as a principal offender for the crime of murder.

2.2 Stated in the above form, this appeal raises for examination the conceptual basis and scope of derivative liability for criminal offences and the ambit of abuse of process in circumstances where the prosecution adopts a different approach to co-offenders in relation to the commission of a crime.

PART III: NOTICES UNDER SECTION 78B OF THE *JUDICIARY ACT 1903 (CTH)*

3. The Respondent certifies that the question of whether any notice should be given under section 78B of the *Judiciary Act 1903 (Cth)* has been considered; such notice is not thought to be necessary.

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Part IV: CONTESTED FACTS

4.1 The Respondent does not contest any of the material facts set out in the Appellant's Narrative of Facts and Chronology of Events.

4.2 The trial judge summarised the evidence at trial at pp 745 – 798, 801 – 819, 823 - 844 of the Charge and at [2] – [11] of the Reasons for Sentence.[1]

4.3 The Court of Appeal summarised the circumstances of the offending at [4] - [25] in their Judgment.[2]

Part V: STATEMENT REGARDING APPLICABLE PROVISIONS

5. The Respondent accepts the Appellant's Statement of Applicable Constitutional Provisions, Statutes and Regulations.

Part VI: ARGUMENT IN ANSWER TO THE APPELLANT

Proceedings against the offenders

6.1 On 15 August 2007 the Appellant, John Likiardopoulos, "CL", Antoniette Villella, Hakan Aydin, Darren Summers and Shalendra Singh were charged with the murder of Christopher O'Brien. The badly decomposed body of the victim had been discovered in the Dandenong Creek at Bangholme some 5 months after he had gone missing.

6.2 Prior to the commencement of the Appellant's trial for murder in the Supreme Court on 5 February 2009, the Crown settled the matter against all other offenders as follows –

- John Likiardopoulos – plea to manslaughter
- Hakan Aydin – plea to manslaughter
- "CL" – plea to accessory after the fact to manslaughter
- Darren Summers - plea to accessory after the fact to manslaughter
- Shalendra Singh - plea to accessory after the fact to manslaughter
- Antoinette Villella – charges withdrawn.

6.3 On 30 September 2008 John Likiardopoulos and Haykin Aydin were sentenced in the Supreme Court for their roles in the death of the victim. Aydin and Shalendra Singh were later called to give evidence for the prosecution at the Appellant's trial.

6.4 In sentencing John Likiardopoulos to 12 years imprisonment for his crime, Lasry J stated[3] –

> The evidence suggests that the person who oversaw this offending and who controlled the attempts to conceal it was your father, Dimitrios Likiardopoulos. However, ... you played a significant role in the cause of Christopher O'Brien's death.

6.5 In sentencing Hakan Aydin to 6 years imprisonment for his crime, Lasry J stated[4] –

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[1] See *R v Likiardopoulos* [2009] VSC 217
[2] See *Likiardopoulos v R* [2007] VSCA 344 [now reported at (2010) 208 A Crim R 84]
[3] See *R v Likiardopoulos* [2008] VSC 387, at [15]

> Your counsel submits that much of what occurred in this dreadful incident was a result of the hold that Dimitrios Likiardopoulos had on you and the other participants. That appears to be supported by the evidence that you rely on and there is a strong chorus that Dimitrios Likiardopoulos was very much in control of what was happening. However you remained and participated ...
>
> Your counsel further submits that your involvement in the assault of O'Brien needs to be viewed in the context of the control exerted over you by Dimitriois Likiardopoulos, who was in a position of power....
>
> The role that you played in this offence appears to me to be less prominent than the role played by Dimitrios and John Likiardopoulos. However you did participate ...

Case against the Appellant at trial

6.6 The Crown put its case against the Appellant on two alternative bases[5] –

1. that he acted with others in a joint criminal enterprise to assault the victim with the intention of causing him really serious injury (but not to kill), or
2. that he counselled or procured others to assault the victim with the intention of causing him really serious injury (but not to kill).

6.7 In relation to counselling or procuring, the Prosecutor in his closing address stated[6] –

> There is another way, another relevant way the prosecution says, I invite you to find that the accused was responsible for the death of the deceased, that is that he was the counsellor and procurer of the death of the deceased. He instigated the acts which led to the death of the deceased, and that makes him just as much a murderer as the person who acts as his agent and delivers the blows that caused the death.
>
> When you think about it, what I'm saying to you will strike you as basic common sense. There's nothing particularly esoteric, strange about what I'm saying to you. You can understand, readily I would think, why a person who (1) joins with others to cause the death of a person, and (2) counsels and procures, encourages, eggs on, directs *others* to cause someone else's death should be guilty of a person's murder. (emphasis added)

6.8 At trial, Counsel for the Appellant was able to establish before the jury that Aydin and Singh had already pleaded guilty to lesser offences and been sentenced on that basis. On this topic, however, the Prosecutor said this in his closing address[7] –

> For you to consider their position and what they were charged with, as important in this case would be to get it wrong. Your job in this case is to consider the evidence in this case. Does it support a finding of guilty of murder? It's irrelevant how they were dealt with, quite irrelevant. Irrelevant. Can have no bearing on your deliberations at all.
>
> ...
>
> It's the same thing when it comes to considering the concentration by the defence on the fact that Aydin pleaded to manslaughter and Singh pleaded to accessory to manslaughter, it's an irrelevant consideration. It would be completely wrong for you to reason, well, they went down for manslaughter or accessory to manslaughter, that must be how we deal with this accused. That would be completely wrong. You don't know, you will never know why that happened, why those two were dealt with in that way. You won't know, you don't know, there's no evidence about that, you couldn't consider that as a fact, a relevant fact at all.

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[4] See *R v Aydin* [2008] VSC 388, at [16], [25], [26]
[5] See *R v Likiardopoulos* [2009] VSC 217, at 675-679, 701-714, 732-734, 745, 874-878; *Likiardopoulos v R* [2007] VSCA 344, at [26]-[34]
[6] See *R v Likiardopoulos* [2009] VSC 217, at 574
[7] See *R v Likiardopoulos* [2009] VSC 217, at 582-583

> You might be wondering about Johnny and ["CL"], what happened to them. You just don't know and you can't speculate, you can't guess. That sort of consideration can have no part in your reasoning process.
>
> When you go into the jury room there's just one thing that you have to consider, one proposition of stark simplicity. Has the Crown proved to your satisfaction beyond reasonable doubt that the accused man was guilty of murder? (interpolation added)

6.9 The Appellant's defence at trial was that he was not guilty of murder or manslaughter; but did invite the jury to convict him of accessory after the fact to manslaughter.[8]

Relevant directions on counseling or procuring

6.10 The trial judge directed the jury in respect of counselling or procuring as follows[9] –

> The Crown also allege that Mr Likiardopoulos directed, encouraged and exhorted others present to inflict really serious injury to Mr O'Brien, and that he and the others did those acts with the intention of at least really seriously injuring Mr O'Brien which resulted in his death. I must therefore direct you about when a person will be held responsible for assisting or encouraging someone else to commit an offence.
>
> The law says if someone counsels or procures another to commit an offence then they will be equally guilty of that offence, regardless of the fact that they did not commit the crime themselves. This is one of the situations where the law holds the person responsible for the actions of other people.
>
> In order for Dimitrios Likiardopoulos to be guilty of committing murder by counselling and procuring, there are three elements, each of which the Crown must prove to your satisfaction beyond reasonable doubt. The first element the Crown must prove is that someone committed the offence of murder, that somebody murdered Christopher O'Brien, and throughout these directions I will call that person, that is the person who committed the offence of murder, whoever that be, the principal offender.
>
> The second element the Crown must prove is that the accused knew or believed in the essential circumstances needed to establish the crime of murder.
>
> The third element the Crown must prove is that the accused intentionally assisted or encouraged the principal offender to commit murder.
>
> Before you can find Dimitrios Likiardopoulos guilty of murder by counselling or procuring, you must be satisfied of all of those three elements beyond reasonable doubt.

6.11 It is the <u>first element</u> which in under examination in this appeal. The trial judge gave further directions on this aspect as follows[10] –

> The first element is that the Crown must prove that someone committed the offence of murder. This requires you to be satisfied that all of the elements of the crime of murder have proved beyond reasonable doubt, in respect of the acts performed by the others, and it does not matter if it is one or all of them or any number of them. This is looking at the acts performed by the others.
>
> That is, the Crown must satisfy you that whomever performed those acts, the principal offender, killed Mr O'Brien by a conscious, voluntary and deliberate act done with the intention of either killing him or inflicting really serious injury to him, and done without lawful justification or excuse.

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[8] See *R v Likiardopoulos* [2009] VSC 217, at 718-719, 745; See *Likiardopoulos v R* [2007] VSCA 344, at [36]
[9] See *R v Likiardopoulos* [2009] VSC 217, at 707-708
[10] See *R v Likiardopoulos* [2009] VSC 217, at 708

6.12 Though the principal offenders or actors were not named in the above passage, the trial judge did amplify this part of the direction at a later stage[11] –

> Or if you come to the view that the Crown has failed to satisfy you that Dimitrios Likiardopoulos was counselling and procuring Hakan Aydin, Johnny Likiardopoulos and Shalendra Singh and ["CL"] if he be involved to that extent, to either kill or to inflict really serious injury, but rather your view of the evidence is that the accused was counselling and procuring those actors to inflict injury less than really serious injury, then your verdict would be not guilty to murder and you would turn to consider the crime of manslaughter. (interpolation added)

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6.13 Just before the jury retired to consider their verdict, the trial judge provided a brief summary of the requirements for counselling or procuring as follows[12] -

> In respect of counselling and procuring, the Crown must prove to your satisfaction beyond reasonable doubt that someone committed murder or manslaughter as the case may be. That the accused knew or believed in the essential circumstances to establish murder or manslaughter, and that the accused intentionally assisted or encouraged the principal offender to commit murder or manslaughter by counselling or procuring the commission of that crime. So that is what the law says is counselling and procuring; equally applicable to murder as it is to manslaughter.

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6.14 No objection was taken by the Appellant to the relevant directions. Furthermore, no argument was raised that the pleas by the other offenders to lesser offences meant that the Crown could not lead evidence to prove that at least one of those other offenders had murdered the victim.[13]

Judgment in court below

6.15 The ground of complaint raised in this appeal conforms to ground 3(c) in the court below;
30 the Court of Appeal unanimously rejected the complaint at [114] – [129] of the Judgment. The Respondent, in general, supports that conclusion.

Issue estoppel

6.16 The first issue raised in this appeal is whether the prosecution was precluded at law from proving that the victim in this case had in fact been murdered. The prosecution had accepted pleas from all other actors involved in the death of the victim to lesser offences; and therefore was the jury being invited to determine an issue that had already been
40 resolved?

6.17 As determined by this Court in ***Rogers v R***[14] and ***R v Carroll***,[15] the doctrine of issue estoppel has no application to criminal proceedings. Thus, the course adopted by the prosecution in seeking to prove that the victim was murdered was open; but, of course, the real issue is whether it was an abuse of process to do so (see discussion below).

6.18 In short, that the jury in this case possibly found as part of their verdict that the victim was murdered did not controvert any judgment of the court on the pleas entered by the other offenders. Indeed, provided an accused person is not placed in double jeopardy, evidence

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[11] See *R v Likiardopoulos* [2009] VSC 217, at 713
[12] See *R v Likiardopoulos* [2009] VSC 217, at 875
[13] See *Likiardopoulos v R* [2007] VSCA 344, at [118]
[14] (1994) 181 CLR 251
[15] (2002) 213 CLR 635

may be led to show that an accused person was, in fact, guilty of an offence of which he has been previously acquitted.[16]

6.19 In support of his ground, the Appellant relies on observations made by Callinan J in ***Osland v R***[17] in relation to the decision of *Surujpaul v R* where his Honour states[18] –

> That was a case of one trial of five people. At the end of it, although all of the accused (including the appellant) were acquitted of murder as principals, and the other four of being accessories before the fact, the appellant was found guilty as an accessory before the fact to murder. It was the acquittal, and, I would emphasise, acquittal of everyone, of murder that made a guilty verdict of accessory to murder offensive to the law as to logic. In those circumstances there was, for juristic purposes no murder in respect of which any one of the accused could have been an accessory.

6.20 However, with respect, reliance on the above decision is misplaced because in this case there was no acquittal on a charge of murder by the jury and thus no occasion for inconsistency of verdicts arises. As the court below pointed out, it would have been open to the prosecution to prove the Appellant's accessorial liability for murder in circumstances where the other offenders had been adjudged guilty of lesser offences by a different jury.[19]

Evidentiary foundation for murder

6.21 As the court below noted, there was conflict in the evidence as to what was done and by whom.[20] However, there was ample evidence before the jury to affirmatively demonstrate that either Hakan Aydin, John Likiardopoulos, CL or Salendra Singh had inflicted really serious injury upon the victim.[21]

6.22 For example, a sample of Aydin's evidence as summed up by the trial judge is as follows[22] –

> After O'Brien admitted he took the items, Shalendra went nuts and crazy and started assaulting Chris, hitting him, punching, smacking him around, and Dimitrios was laughing at the whole thing, saying to Singh "Do you remember how it felt when it was happening to you? Is that all you've got?". Each time Dimitrios said that, Singh kept hitting Christopher harder and harder. He, Johnny, CL, Antoinette and Dimitrios were also in the room but only Shalendra assaulted O'Brien, and that went on for three or four hours.
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> ...
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> After that he told Aydin, John and CL to get into Chris. Aydin walked up and punched Chris and Johnny would walk past him and smack him. CL would walk past and punch him. Dimitrios would walk past and punch him and it just went from there. It was total madness and it was crazy."
>
> He was asked, "What actions were performed generally by everyone?" He said, "Punching, kicking, sticks, marble ashtrays, poles, anything else that was available in the kitchen got used and used by everyone." He was there meaning Dimitrios, Aydin, Johnny, CL and Singh.
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> ...
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> The assault when on from early afternoon right into the night.

6.23 And, a sample of Singh's evidence as summed up by the trial judge is as follows[23] –

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[16] See *R v Ollis* [1900] 2 QB 758; *Sambasivam v Public Prosecutor of Malaya* [1950] AC 458; *DPP v Humphrys* [1977] AC 1; *R v Z* [2000] 2 AC 483

[17] (1998) 197 CLR 316

[18] Ibid, at 406 [281]

[19] See *Likiardopoulos v R* [2007] VSCA 344, at [114], [120]

[20] Ibid, at [31]

[21] See *Likiardopoulos v R* [2007] VSCA 344, at [129]

[22] See *R v Likiardopoulos* [2009] VSC 217, at 749, 750, 751

[23] See *R v Likiardopoulos* [2009] VSC 217, at 770-771

> Johnny and Hakan tied him up and they were hitting and striking him in the face, chest and shoulders with their fists, a hammer and an ashtray. Jimmy was sitting in the lounge area in the dining room, in the same room asking the same questions and that went on into the evening.
>
> ...
>
> They started on him again in the evening and he was in that chair all day in that room. As people walked past, Johnny, Hakan or CL would hit him. In the evening, Johnny and Hakan started hitting him again and Jimmy was telling them to. He said, "Hit him, hit him" words like, "Bash the dog, hit him." He said that a couple of times. When he said that Johnny and Hakan were hitting him. They used an ashtray to hit Chris. John and Hakan were bashing him.

Doctrinal basis of complicity

6.24 The law of complicity has been described by one academic commentator as "one of the most conceptually confusing areas of criminal law theory".[24] As Professor Smith puts it[25] –

> Complicity's function is to determine the circumstances when one party (an accessory) by virtue of prior or simultaneous activity or association will be held criminally responsible for another's (the perpetrator's) criminal behaviour.

6.25 Complicity may arise in three defined circumstances –

1. where the accused and another person agree to pursue a criminal enterprise
2. where the accused assists or encourages another person to commit an offence
3. where the accused knowingly assists a person, who has committed a serious indictable offence, to avoid prosecution.

6.26 Much of the difficulty in this area lies in the historical terminology used to describe criminal responsibility, such as "principal" in the first and second degree and "accessories" before or after the fact.[26] For example, historically, aiders and abettors have been equated with principals in the second degree by virtue of presence, and counsellors and procurers with accessories before the fact by virtue of their absence from the scene.[27]

6.27 However, in Victoria, the modern nomenclature used is "principal offender" to describe those offenders falling into category (1); "aiders, abettors, counsellors or procurers" to describe those offenders falling into category (2);[28] and "accessories" to describe those offenders falling into category (3).[29] The old distinctions appear now to have no legal importance.[30]

6.28 There has also been statutory reform in this area. Section 323 of the ***Crimes Act 1958 (Vic)*** provides that "[a] person who aids, abets, counsels or procures the commission of an indictable offence may be tried or indicted and punished as a principal offender".[31] This section is declaratory of the common law;[32] liability as a secondary party is a notion of the

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[24] See McSherry B, *Criminal Law*, Freckleton and Selby (eds) (2009), at pp 302-303
[25] See Smith K J M, *A Modern Treatise on the Law of Criminal Complicity*, Clarendon Press, Oxford, 1991
[26] See Lanham D, *Limitations on Accomplice Liability* (1982) Criminal Law Journal, at 306
[27] See *R v Froggett* [1965] 1 QB 152; *R v Creamer* [1966] 1 QB 72
[28] See section 323, *Crimes Act* 1958 (Vic)
[29] See section 325, *Crimes Act* 1958 (Vic)
[30] See *Johns v R* (1980) 143 CLR 108, at 117
[31] The Victorian section replicates section 8, *Accessories and Abettors Act* 1861 (UK)
[32] See *Gould & Co Ltd v Houghton* [1921] 1 KB 509; *R v Maxwell* 1978] 1 WLR 1350, at 159; *Giorgianni v R* (1985) 156 CLR 473

commion law and not a statutory principle. Thus, as Mason J in ***Giorgianni v R***[33] points out, provisions such as section 323 do not create substantive offences but are merely procedural in nature. In this case, section 323 was invoked to try the Appellant as a principal offender but the prosecution relied on the common law principles of joint criminal enterprise and counselling and procuring to prove guilt.

Counsellor and procurer

6.29 The terms "counsellor" or "procurer" are applied to persons who are not present at the scene of the actual crime, but who have directed, encouraged or assisted the principal offender to commit the crime. A person who counsels or procures is an "accessory before the fact" in the old nomenclature.[34]

6.30 The Appellant contends that liability by way of counselling or procuring is truly derivative in nature; thus, unless the prosecution proves the commission of the offence (in this case murder) by a principal, there can be no liability for the crime as a counsellor or procurer. The Respondent submits whilst there is Australian authority to support such a broad proposition, the notion is contrary to modern English authority. Furthermore, this perfect symmetry between principal and accessory has been criticised by academic commentators.[35]

Derivative criminal liability

6.31 The second issue raised in this appeal is the precise nature or content of derivative liability in complicity. Given the Respondent's ultimate position on this issue, it has been considered necessary to file a Notice of Contention.[36]

6.32 Since the dawn of time, derivative criminal liability has played a role in society. In the biblical story of original sin, the serpent incites Eve and Adam to eat the forbidden fruit. As a result, the serpent was punished for the incitement although the fruit had not been forbidden to it.[37]

6.33 Derivative criminal liability has long been recognised in Greek, Roman and Hebrew law since the early 7th century BC.[38] Notwithstanding that the principle has been recognized for centuries, the real difficulty lies in giving content to this notion of derivative liability.

6.34 As Simon Bronitt points out in his journal article "*Defending Giorgianni – Part Two: New Solutions for Old Problems in Complicity*", derivative liability has created unnecessary complexity in the law of complicity[39] –

> In both England and Australia, the derivative nature of criminal complicity has been a major source of academic dissatisfaction with the common law. The derivative nature of complicity links the liability of the accessory to the *guilt* of the perpetrator. This produces many conceptual strains within complicity.

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[33] (1985) 156 CLR 473, at 490-491
[34] See *R v McCarthy* (1993) 71 A Crim R 395
[35] See Smith K J M, *A Modern Treatise on the Law of Criminal Complicity*, Clarendon Press, Oxford, 1991, at pp 110-135
[36] The Respondent will seek leave to file the Notice of Contention dated 1 May 2012 out of time pursuant to the *Rules*
[37] See *Genesis*, 3:1-6
[38] Hallevy G, *The Matrix of Derivative Criminal Liability*, Springer, 2012, at pp 2-11
[39] (1993) 17 *Criminal Law Journal* 305, at 316, 317-318

...

A rational system of secondary liability should be based on the accessory's own mental attitude and conduct. Culpability should not be determined by sharing the perpetrator's mens rea ..., nor should it depend upon the completion of the crime contemplated by the perpetrator.

6.35 The competing possibilities have been neatly summarized by Professor Fletcher under the chapter heading *"Perpetration versus Complicity"* in the following manner[40] –

> The substantive question with regard to the principal's liability is much more difficult. Suppose that the perpetrator is insane or diplomatically immune to prosecution. Should it follow that the people who aided him in committing robbery will not be liable at all? It would certainly seem odd to let the accessories go because the state could not secure a conviction against the principal. Yet what does it mean to say that the accessory's responsibility derives from that of the principal. It must derive from *something*. The problem is determining what that "something" is. The two extreme positions are these:
>
> 1. The principal must at least be guilty, in principle, of having committed the offense.
> 2. The principal need not be guilty of anything. Indeed, the intended principal need not have carried out the crime at all.
>
> There is much support, in theory at least, for the first doctrine. And as we shall see, there is growing support around the world for the opposite extreme, which renders liability for complicity independent of the actions of others.
>
> A middle position emerges by asking the questions: What is the minimal condition for liability? What must occur before we can think of holding anyone liable for the offense? The right answer, it seems to me, is that there must arise a criminal state of affairs. This means that some human act must constitute a wrongful violation of the law. Once we know that some individual has acted wrongfully, without justification, in violation of the law, then we can ask the question: To whom is this action attributable? Who shall be held responsible, and to what degree, for the unlawful state of affairs. Everyone who contributed causally to the occurrence of the unlawful state of affairs should then answer according to his or her personal culpability.
>
> This abstract way of putting the theory of complicity reduces it to a simple formula. The principal must act wrongfully or unlawfully .... The principal will be punished for the offense if and only if the principal is also culpable, that is, not excused, for acting wrongfully in violation of the law. An accessory can be punished if and only if the accessory is also culpable, that is, not excused, for having contributed to the occurrence of the wrongful violation of the law.

Analysis of English authority in relation to derivative liability

6.36 The decision of the Privy Council in ***Surujpaul v R***[41] perhaps represents the high watermark in English jurisprudence in the area of derivative liability. In that case the Council held that it was essential to the conviction of an accused as an accessory before the fact to murder for the prosecution to prove that he had counselled or procured at least one of the other accused persons to murder the victim and that such person had in fact murdered the said victim.

6.37 However, since the handing down of the above decision, the tide has turned in England; criminal liability may attach to a secondary party who either aids, abets, counsels or procures the principal party to commit a crime and that principal then commits the *actus reus* of the crime. Thus, liability is <u>not</u> truly derivative in nature; liability attaches to a secondary party even where there is no coincidence of the mens rea between the principal and secondary party at the time of commission provided there is proof of the *actus reus* of

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[40] See Fletcher G P, *Basic Concepts of Criminal Law*, Oxford University Press, 1998, at p 195

[41] [1958] 3 All ER 300; see also *R v Assistant Recorder of Kingston-upon-Hull; ex parte Morgan* [1969] 2 QB 58

the encouraged crime. Thus, there is no need to resort to the common law construct of innocent agency.

6.38 In ***R v Loukes***,[42] the appellant was a haulage contractor and his role was to oversee the maintenance of the fleet vehicles. One of the firm's employees (K) was driving a tipper truck, when a prop shaft broke free and collided with another vehicle killing the driver. Police charged K with causing death by dangerous driving and the appellant with aiding, abetting, counselling or procuring that offence. The prosecution case at trial was that the appellant caused the truck to be driven by K when he knew that it was in a dangerous state. At the end of the prosecution case, the trial judge directed the jury to acquit K because there was insufficient evidence that he knew of the dangerous condition of the truck. The appellant was convicted of procuring the offence of causing death by dangerous driving. He appealed on the ground that as K had been acquitted of the principal offence, the appellant could not be guilty of the secondary offence.

6.39 The Court of Appeal upheld the appeal; as there was no evidence of the commission of the *actus reus* of the principal offence, the appellant could not be convicted of procuring such an offence. Auld LJ summarised the position as follows[43] –

> The first ground of appeal is that the judge, having directed the jury to acquit Mr Kennedy of the principal offence, misdirected the jury by directing them that Mr Loukes could be found guilty of the secondary offence. His case, in reliance on the well-known authority of *Thornton v Mitchell* [1940] 1 All E.R. 339, is that the judge directed the acquittal of Mr Kennedy because there was no evidence that he had committed the *actus reus* of the offence, and that, therefore, he, Mr Loukes, could not be convicted of procuring it. He accepts, in reliance on *Millward* [1994] Crim. L.R. 527, that if the judge properly directed the acquittal of Mr Kennedy only for want of evidence of *mens rea*, he, Mr Loukes, could be convicted of the secondary offence.
>
> The principle upon which the Court proceeded in *Millward* was that the procurer of another to commit the actus reus of an offence may be convicted of procuring it even of the other is not guilty of it for want of *mens rea*.
>
> ... It held that a procurer could be found guilty even thought the driver was not, and that the *mens rea* of the procurer lay in the causing of that *actus reus* knowing of the vehicle's defective condition whether or not it was or should have been known to the driver. The decision has been expressly approved by another division of this court in *Wheelhouse* [1994] Crim. L.R. 756. As Professor Sir John Smith observed in a commentary in [1994] Crim L.R. 528-530, it:
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> > "... breaks new ground, being the first case to decide that procuring the *actus reus* of another offence is itself that offence".
>
> ... In our view, this case is governed by *Thornton v Mitchell*. A man cannot be convicted of procuring an offence where the *actus reus* is not established.

6.40 In ***R v Howe & Ors***,[44] the appellants were tried on a charge of murder. Burke's defence was that he agreed to shoot the victim because of a fear that Clarkson would kill him if he did not do so but that the gun was discharged accidentally. Both appellants were convicted of murder. On appeal against conviction, the House of Lords held that in circumstances where an accused person had procured or incited another to commit murder but that person was convicted of manslaughter, the accused could be convicted of the murder of the victim.

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[42] [1996] 1 Cr App R 444
[43] Ibid, at 447, 449, 450
[44] [1987] 1 AC 417

6.41 Lord Mackay of Clashfern approved of the approach adopted by Lord Lane CJ in the Court of Appeal on this issue. His Lordship stated[45] –

> ... I am of opinion that the Court of Appeal reached the correct conclusion upon it as a matter of principle.
>
> Giving the judgment of the Court of Appeal Lord Lane C.J. said [1986] Q.B. 626, 641-642:
>
> > "The judge based himself on a decision of this court in *Reg. v. Richards* [1974] Q.B. 776. The facts in that case were that Mrs. Richards paid two men to inflict injuries on her husband which she intended should 'put him in hospital for a month.' The two men wounded the husband but not seriously. They were acquitted of wounding with intent but convicted of unlawful wounding. Mrs. Richards herself was convicted of wounding with intent, the jury plainly, and not surprisingly, believing that she had the necessary intent, though the two men had not. She appealed against her conviction on the ground that she could not properly be convicted as accessory before the fact to a crime more serious than that committed by the principals in the first degree. The appeal was allowed and the conviction for unlawful wounding was substituted. The court followed a passage from *Hawkins' Pleas of the Crown*, vol. 2. c. 29, para. 15: 'I take it to be an uncontroverted rule that [the offence of the accessory can never rise higher than that of the principal]; it seeming incongruous and absurd that he who is punished only as a partaker of the guilt of another, should be adjudged guilty of a higher crime than the other.'
> >
> > "James L.J. delivering the judgment in *Reg. v. Richards* [1974] Q.B. 776 said, at p. 780: 'If there is only one offence committed, and that is the offence of unlawful wounding, then the person who has requested that offence to be committed, or advised that that offence be committed, cannot be guilty of a graver offence than that in fact which was committed.' The decision in *Reg. v. Richards* has been the subject of some criticism - see for example *Smith & Hogan, Criminal Law* , 5th ed. (1983), p. 140. Counsel before us posed the situation where A hands a gun to D informing him that it is loaded with blank ammunition only and telling him to go and scare X by discharging it. The ammunition is in fact live, as A knows, and X is killed. D is convicted only of manslaughter, as he might be on those facts. It would seem absurd that A should thereby escape conviction for murder. We take the view that *Reg. v. Richards* [1974] Q.B. 776 was incorrectly decided, but it seems to us that it cannot properly be distinguished from the instant case."
>
> I consider that the reasoning of Lord Lane C.J. is entirely correct and I would affirm his view that where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not, in my opinion in any way, result in a compulsory reduction for the other participant.

6.42 Finally, in ***Hui-Chi Ming v R***,[46] the Privy Council held that the acquittal of an alleged principal at an earlier trial is no bar to the subsequent conviction of a secondary party.[47] Their Lordships referred to the decisions of *R v Luk Siu-keung*[48] and *R v Burton*[49] in support of such a principle.

6.43 Thus, applying the above general principle, the direction given by the trial judge in this case was unduly favorable to the Appellant; for what the prosecution was required to prove was not that that a principal murdered the victim but rather that the *actus reus* of murder had been committed. In this case, there was no dispute at trial that the *actus reus* of murder (and manslaughter) could be established by the prosecution.[50]

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[45] Ibid, at 457-458
[46] [1992] 1 AC 34
[47] Ibid, at 43, 56
[48] [1984] HKLR 333
[49] (1875) 13 Cox CC 71
[50] See *R v Likiardopoulos* [2009] VSC 217, at 678-679, 728; *Likiardopoulos v R* [2007] VSCA 344, at [35]

6.44 In such circumstances, the common law harmonises the position between a secondary party and a principal who is an innocent agent (previously the secondary party could only be guilty by use of the doctrine of innocent agency) and a secondary party and an agent who commits the relevant act but with a lesser intent (previously the secondary party could only be found guilty of the lesser crime).

Analysis of Australian authority in relation to derivative liability

6.45 The starting point for any analysis is this Court's decision in ***Walsh v Sainsbury***.[51] In that case, the defendant was prosecuted for urging another person, X, to commit an offence against a law of the Commonwealth (union dispute in relation to the provision of labor to unload overseas ships). It was held, by a majority, that it was open on the evidence for the defendant to be properly convicted of urging X to commit the offence charged.

6.46 In his dissenting judgment, Issacs J referred to section 5 of the *Crimes Act 1914 (Cth)* [which is similar in substance to section 323 of the *Crimes Act 1958 (Vic)*] and stated[52] -

> That section, construed in accordance with a long continued and consistent judicial and legislative view is merely an "aiding and abetting" section. It creates no new offence. It does not operate unless and until the "offence" — which may be called, for convenience, the principal offence, though it really is the only substantive offence — has been committed. Then, and then only, does the section operate to make any person falling within the terms of the section a principal participating in that offence.

6.47 Next is this Court's decision in ***Cain v Doyle***.[53] In that case, D was charged that he did without reasonable cause terminate the employment of W contrary to section 18 of the *Re-establishment and Employment Act 1945 (Cth)* and section 5 of the *Crimes Act 1914 (Cth)*. W was a former employee at a munitions factory and, upon his return from war service, had been reinstated under the 1945 Commonwealth Act. D was the manager of the munitions factory conducted by the Commonwealth Government. W's employment was subsequently terminated, the reason stated being the reduction in demand for the factory's products.

6.48 A majority of the Court held that the 1945 Act did not create an offence of which the Commonwealth could be found guilty; and therefore D could not be convicted of aiding and abetting the Commonwealth in the commission of such an offence. In his judgment, Dixon J (Rich J agreeing) said[54] –

> On the foregoing grounds I am of opinion that s 18 (1) does not create an offence of which the Crown may be guilty. This means that the defendant could not be informed against under s 5 of the *Crimes Act* as an accessory offender.

6.49 A similar result was reach by this Court in ***Jackson v Horne***.[55] In that case, the Court held that an accessory charged under section 7 of the *Criminal Code 1899 (Qld)* could only be properly convicted if a principal had committed the relevant offence in question.

6.50 In the Victorian decision of ***R v Hewitt***,[56] the accused and the co-accused were presented on multiple counts of rape. The accused insisted that the victim engage in sexual activity with

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[51] (1925) 36 CLR 464
[52] Ibid, at 477
[53] (1946) 72 CLR 409
[54] Ibid, at 426
[55] (1965) 114 CLR 82
[56] [1997] 11 VR 301

the co-accused but he did not himself engage in any sexual acts. The co-accused's defence at trial was that he believed the victim was consenting. The trial judge directed the jury that it was open to convict the accused while acquitting the co-accused on the basis that the accused forced the victim to engage in the sexual activity with the co-accused knowing that she did not consent. The jury acquitted the co-accused but found the accused guilty on the counts of rape.

6.51 In dismissing an appeal against conviction, the Court of Appeal held that the concept of innocent agency could be utilised to justify the verdict. However, Winneke P expressed doubts as the correctness of a view that an accessory can be convicted even though the principal offender has been acquitted[57] –

> It is true that, in the cases of *Matusevich*, *Giorgianni* and *Schultz v Pettitt*, the courts appeared to regard *Cogan's* case as authority for the proposition that an accused person could be convicted as an aider and abettor even though the principal offender had been acquitted: *Matusevich* at 430, *Giorgianni* at 205 and *Schultz v Pettitt* at 437-8. However when the case of *Matusevich* went on appeal to the High Court ((1977) 137 C.L.R. 633), the Chief Justice (Sir Harry Gibbs) was the only member of the court who specifically commented on this aspect of the Court of Criminal Appeal's decision. He said at 638:
>
> > However, the reasoning in *Reg v Bourne* ... suggests that there are cases in which a person may be liable for aiding and abetting another to commit a crime, although the actual perpetrator is not criminally responsible. The law on this question remains unsettled (see *Reg v Cogan*) but it is unnecessary to pursue this matter.
>
> As I have already said, I have some conceptual difficulty in supporting the proposition that a person can be convicted as an aider and abettor when the principal offender has been acquitted. The proposition appears to have been justified on the basis that if the principal offender's act has been wrongful but excusable (e.g. on the grounds of insanity or duress or status or mistaken belief) a conviction of a co-accused as an aider and abettor is nonetheless supportable provided that the aider and abettor has the requisite mens rea: see Professor Fletcher, *Rethinking Criminal Law*, (1978), pp. 664-5; R. D. Taylor, "Complicity and Excuses", [1983] *Crim L.R.* 656. Indeed it would seem that this was the justification for supporting the convictions in such cases as *Bourne* and *R. v Austin* [1981] 1 All E.R. 374.
>
> However it seems to me that the principle so espoused runs counter to the basic proposition of the common law that the liability of the accessory is derivative from the liability of the principal offender. The general rule is, and so far as I am aware, always has been that unless there is a perpetrator of a crime, there cannot be an accessory: *R. v Tyler and Price* (1838) 8 Car. & P. 616; 173 E.R. 643; *Cain v Doyle* (1946) 72 C.L.R. 409. As Professor Glanville Williams commented in his aforesaid *Textbook of Criminal Law* at p 368:
>
> > The general rule is not merely a piece of pedantry. The law of complicity cannot turn non-crimes into crimes.
>
> Notwithstanding, there does appear to be a growing body of authority to support the view that, in some circumstances, an accused person can be convicted of aiding and abetting when the principal offender has been acquitted: cf. per Street C.J. in *Giorgianni* at 205. It is unnecessary in the resolution of this case to determine whether that is correct or what those circumstances might be.

6.52 In ***Giorgianni v R***,[58] the appellant possessed a truck whose brakes failed when driven by R down a road colliding with other vehicles, killing 5 persons and seriously injuring 1 other person. The appellant was said to have procured the commission by R of the offences of manslaughter and culpable driving by sending him on to the road in a vehicle with defective brakes. The appellant was convicted of 5 counts of manslaughter and 1 count of culpable driving, but R was convicted of culpable driving as an alternative to the manslaughter

[57] Ibid, at 311
[58] (1981) 7 A Crim R 204

counts. On appeal against conviction, the New South Wales Court of Criminal Appeal ordered a retrial stating[59] –

> In presenting the case to the jury the learned trial judge did not avert to the requirements that in a case such as the present, that is to say a case introducing *no exceptional circumstances such as might displace the ordinary rule*, the appellant could not be found guilty as an accessory before the fact to manslaughter in the event of the jury acquitting Renshaw of manslaughter and only finding him guilty of the lesser offence of culpable driving. To permit this consequence to ensue would involve holding the appellant criminally liable as an accessory before the fact to an offence in respect of which the principal actor has been found not guilty. (emphasis added)

6.53 In ***Giorgianni v R (No 2)***, the applicant had been presented on his re-trial; this time he was convicted of six counts of culpable driving in reliance upon sections 52A and 351 of the *Crimes Act 1900 (NSW)*. On appeal against conviction to the High Court,[60] the appeal was allowed and a retrial ordered.

6.54 In his judgment, Mason J refers to the notion of derivative liability[61] –

> It is essential to conviction on the basis of secondary participation, however, both (a) that the person charged aids, abets, counsels or procures the commission of the misdemeanour, and (b) that the misdemeanour is actually committed (*Thornton v Mitchell* [1940] 1 All ER 339; cf *Walsh v Sainsbury* (1925) 36 CLR 464 at 477; *Cain v Doyle* (1946) 72 CLR 409 at 419), though there is no requirement that commission of the misdemeanour result in the conviction of another person (*R v Williams* (1932) 32 SR (NSW) 504; *O'Sullivan v Thurmer* [1955] SASR 76; *Schulz v Paige* [1961] SASR 258).

6.55 Thus, this case represents a gradual softening in the approach of the courts to the notion of derivative liability in Australia; that there are cases in which an accessory can be found guilty of a crime notwithstanding the absence of a conviction for a principal offender.

6.56 Finally, in ***Osland v R***,[62] this Court dealt with the issue of liability of one accused for the acts of a co-accused in circumstances where the relevant acts are performed pursuant to an agreement or understanding. The Court, by majority, held that the conviction of the accused for murder was not inconsistent with the jury's failure to reach a verdict in respect of the co-accused. Importantly, this case did not deal directly with the issue of derivative liability as the accused was presented as a principal rather than as an accessory.

6.57 However, in their dissenting judgment, Gaudron and Gummow JJ observed[63] -

> The conviction of a person charged as accessory is not necessarily inconsistent with the acquittal or failure to convict the person charged as the principal offender. That is because the evidence admissible against them concerning the commission of the offence may be different. Even so, an accessory cannot be convicted unless the jury is satisfied that the principal offence was committed. Thus, if two people are tried together as principal and accessory and the evidence as to the commission of the crime is the same against both, acquittal of the person charged as principal is inconsistent with the conviction of the other.

6.58 McHugh J, in his judgment dismissing the appeal, also commented on the derivative nature of the liability for secondary parties to a crime[64] –

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[59] Ibid, at 205
[60] (1985) 156 CLR 473
[61] Ibid, at 491
[62] (1998) 197 CLR 316
[63] Ibid, at 323-324 [14]
[64] Ibid, at 341-342 [71]; see also at 351 [95]; see also Callinan J, at 400 [207]

> Those who aided the commission of a crime but were not present at the scene of the crime were regarded as accessories before the fact or principals in the third degree. Their liability was purely derivative and was dependent upon the guilt of the person who had been aided and abetted in committing the crime. Those who were merely present, encouraging but not participating physically, or whose acts were not a substantial cause of death, were regarded as principals in the second degree. They could only be convicted of the crime of which the principal offender was found guilty. If that person was not guilty, the principal in the second degree could not be guilty. Their liability was, accordingly, also derivative.

6.59 But, more importantly, his Honour went on to state the correct principle in respect of actors participating in a joint criminal enterprise or acting in concert, that is, "all are equally liable for the acts that constitute the *actus reus* of the crime".[65] Accordingly[66] -

> As a result, a person may be found guilty of murder although he or she did not commit the acts which physically caused the death of the victim and the person who did is found guilty only of manslaughter....
>
> This statement is conclusive in England [reference to *R v Howe*], at all events, in showing that it is the acts, and not the crime, of the actual perpetrator which are attributed to the person acting in concert. If the latter person has the relevant mens rea, he or she is guilty of the principal offence because the actus reus is attributed to him or her by reason of the agreement and presence at the scene. It is irrelevant that the actual perpetrator cannot be convicted of that crime because he or she has a defence such as lack of mens rea, self-defence, provocation, duress or insanity. (interpolation added)

Criticism of derivative liability as a requirement for secondary parties

6.60 In ***Osland v R***, Callinan J referred to the distinction between principal and accessories and commented[67] –

> The distinctions generally owe their existence to technical and substantive differences with respect to modes of trial, jurisdiction, punishment and benefit of clergy, all matters of diminished or no importance in modern times. For more than a century, legislative attempts have been made to simplify the law in these areas. This court should not reverse that process.

6.61 Professor Gillies, in his chapter on "*The Derivative Nature of Accessorial Liability*", puts the argument for reform in a compelling manner[68] –

> Can the secondary participant be convicted of a more serious crime than the principal? Often this will be just. D may persuade P to place a substance in V's food, after telling P that is laxative and that it will be fun to watch V's discomfort. In fact, as D knows, but not P, it is a deadly poison, and its administration causes V's death. P at most can be convicted of manslaughter, but D, obviously, should be convicted of murder.
>
> The derivative status of accessorial liability is an obstacle to convicting D of murder. Can the doctrine of innocent agency be relied upon to convict D of murder on the basis that D is a constructive principal? It cannot be applied directly, because P is not innocent. It would have to be extended in scope; or a quite new exception to the basic rule, that a person only becomes an accessory to a crime when that crime has been committed by another, formulated.

6.62 In terms of logic and public policy, there is no sound reason to draw a distinction between actors in a crime who are principals and actors who are accessories in circumstances where all contribute to the commission of the *actus reus* of a crime. In fact, in terms of culpability, it is often arguable that an accessory in the form of a counseller or procurer may be more

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[65] See also *Matusevich v R* (1977) 137 CLR 633; *Markby v R* (1978) 140 CLR 108; *Johns v R* (1980) 143 CLR 108
[66] Ibid, at 343-344 [75]; Kirby J agreeing, at 383 [174]
[67] (1998) 197 CLR 316, at 399-400 [204]
[68] See Gillies P, *Criminal Law*, 4th ed, LBC Information Services, 1997, at pp 185-186

morally culpable for the death of a person than a principal.[69] That was the prosecution case in this matter; the Appellant was the "ringleader" or "controller" whose actions brought about the involvement of others to inflict the fatal assault upon the hapless victim.[70]

6.63 Furthermore, given that the law no longer divides crimes into felonies and misdemeanours,[71] the rationale for the distinction no longer exists. As Callinan J in ***Osland v R*** observed[72] –

> The common law originally divided all crimes into three categories: treasons, felonies and misdemeanours. It was only in relation to felonies that there were different levels of participation recognised by law. Originally, the categories of participation were principals, accessories *before* the fact, accessories *at* the fact and accessories *after* the fact. The reason for the lack of differentiation between the parties in misdemeanours and treasons was said to be that treasons were regarded as too serious, and misdemeanours as not serious enough, to justify such fine distinctions.

6.64 As his Honour notes, "[d]ifferent penalties were typically imposed for the various classifications of participation".[73] But that is no longer the case, as modern sentencing proceeds on the basis that an offender is punished for what he or she does rather than by reference to role categorisation as a principal or accessory.[74]

6.65 Thus, the Respondent's position is a simple one – this Court should now finally sweep away all the outdated distinctions between principals and accessories in favour of a single coherent principle underlying the law of complicity. Stated succinctly, a person is criminally responsible for the acts of another when that person can be shown to have either acted as part of a common enterprise (or in concert) [principals in the first degree], or aided and abetted such person [principals in second degree] or counselled or procured such person [principals in third degree]; as to what actual crime the person has committed that will be determined by his or her own *mens rea* and not that of any other actor in the commission of the *actus reus*.

6.66 Support for the above general principle can also be drawn from the judgment of Callinan J in ***Osland v R***[75] –

> Section 323 of the Crimes Act 1958 (Vic) made its first appearance in that State in a form slightly different than now appears. Its apparent source was the *Accessories and Abettors Act* 1861 (UK). The object of the enactments seems to have been to do away with derivative liability.
>
> ...
>
> If it were necessary to decide the point I would be inclined to hold that the practical effect of the section is to make it irrelevant to decide whether the accused actually struck the blow or did a final act to complete a crime. The section appears to eliminate the need for a trial of a person formerly thought to be an accessory only, to await and depend upon the attainment or conviction of the principal. The one exception would be punishment which will always look to the particular role of an offender in carrying out a crime.
>
> No matter whether the section is to be taken as procedural or substantive (a matter which it is not necessary to decide), there is no modern need for any difference in the test to determine the liability of a participant (as a principal in the first degree if that nomenclature still be appropriate) from that provided by Brennan J and McHugh J in *Royall v R*. Their Honours adopted a test of sufficient significant contribution.

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[69] See, for example, *Johns v R* (1980) 143 CLR 108, at 117
[70] See *R v Likiardopoulos* [2008] VSC 387, at [15]
[71] See section 322B, *Crimes Act* 1958
[72] (1998) 197 CLR 316, at 400 [205]
[73] Ibid, at 400 [206]
[74] See, for example, *R v Storey* [1998] 1 VR 359, at 366; *R v Olbrich* (1999) 199 CLR 270, at 279
[75] (1998) 197 CLR 316, at 402-403 [218]-[221]

6.67 The importance of contribution in attaching criminal liability to a secondary party was recognised by the plurality in ***Clayton v R***[76] –

> The history of the distinction between joint enterprise liability and secondary liability as an aider, abettor, counsellor or procurer of an offence has recently been traced by Professor Simester. As that author demonstrates, liability as an aider and abettor is grounded in the secondary party's contribution to another's crime.

10 **Abuse of process**

6.68 The final question raised in this appeal is whether it was an abuse of process for the Crown to seek to convict the Appellant on the basis of counselling or procuring murder in circumstances where the Crown had accepted pleas to lesser offences from the principals. Of course, if the Respondent is correct in its submission that counselling or procuring does not entail derivative liability, then no issue as to an abuse of process can arise.

6.69 The Appellant's submission is this – that the administration of justice was brought into disrepute by the Crown contending in the Appellant's trial that other persons had murdered
20 the victim in circumstances where the Crown had already accepted pleas from those other persons to lesser offences.

6.70 In seeking to answer that complaint, the Respondent submits that it is important to understand the nature of this case. The victim had been killed and his body was discovered badly decomposed. The pathology evidence could not establish a cause of death. There was little in the way of forensic evidence linking any person to the killing. Witness accounts showed a number persons involved in the assault upon the victim; however there was no single account of all the happenings over the two days. There were very limited admissions made by the offenders. In short, it was a weak circumstantial case of murder.

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6.71 The Crown had evidence demonstrating that the Appellant was the "controller" at the house, but little evidence linking him to the physical beatings which occurred over along period of time. Importantly, no witness could say that any particular assault had caused the fatal injuries; and thus no witness could say that the Appellant had been present when the fatal injuries were inflicted. In such circumstances, the Appellant stood a real chance of acquittal on charges of murder and manslaughter if brought to trial.

6.72 Each offender had been charged with murder and presented on those charges at a committal hearing. However, Hakin Aydin was already showing signs of co-operation with the
40 prosecution. After arrest, he had made a police statement on 15 August 2007 which provided an account of the events in question; and led investigating police to the body and the scene of the fatal attack. Aydin then made a written offer on 23 November 2007 to plead to intentionally causing serious injury and give evidence for the prosecution. That offer was rejected.

6.73 However, on the second day of the committal hearing (13 May 2008), Aydin varied his offer to a plea to manslaughter. The prosecution accepted the offer;[77] the account of Aydin was crucial in linking all offenders, and in particular the Appellant, to the attack on the victim. The Crown case had now changed from a weak circumstantial one to a strong direct one.

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[76] (2006) 231 ALR 500, at 505 [20]

[77] The prosecution also accepted plea offers from John Likiardopoulos and CL on the understanding they would provide police statements against the Appellant, but both subsequently declined when asked to do so

6.74 Is there any unfairness in the Crown acting in the manner that it did? If all had been jointly presented at trial for murder, the Crown case against all offenders was likely to fail because, principally, the prosecution could not prove who did what, who caused the fatal injuries and who was present when those fatal injuries were inflicted. Put simply, the jury would not have had the benefit of a witness who could provide a compelling narrative of what unfolded over the two days in question.

6.75 But, on the other hand, if the Crown could produce such an eyewitness, then a case for murder could be viably maintained before a jury. This practical reality meant that difficult choices had to be made. That this was a case of murder was plainly obvious. And, that the Appellant was the ringleader in the attack was simply compelling.

6.76 Again, concentrating on Aydin, if placed on trial by himself or jointly with all the others for murder, the Crown case would have inevitably failed. He did not make any significant admissions as to his involvement in any fatal attack in either his record of interview or police statement. The witness minimised his involvement at the committal hearing.[78] In accepting the plea to manslaughter, the Crown acknowledged the limitations of the evidence in the aforementioned scenario; but more importantly that was the only charge which enjoyed a real prospect of success at trial.

6.77 However, by the commencement of the Appellant's trial, circumstances had fundamentally changed. The case against Aydin for murder was considerably stronger given the late indication in the proceedings by Shalendra Singh that he would now give evidence for the prosecution (he did not seek a discount in sentence for any future co-operation at the time and only came forward after service of his sentence). In combination, the testimony of Aydin and Singh with the other pieces of evidence, amply demonstrated Aydin's involvement, and that of the others, in an assault with the requisite murderous intent.

6.78 Thus, the case against Aydin (and for that matter John Likiardopoulos, CL and Singh) materially changed between the time the Crown accepted the plea for manslaughter and the commencement of the Appellant's trial. This change is important in assessing the argument for abuse of process.

Hui Chi-Ming v R

6.79 The Court of Appeal held that the Crown's acceptance of pleas to lesser offences did not render the Appellant's trial an abuse of process so far as the Crown relied upon proof of their participation in a murder as means of proving guilt. The Court reasoned that the decision of the Privy Council in ***Hui Chi-ming v R*** stood in the way.[79]

6.80 In ***Hui Chi-ming v R***,[80] the Privy Council considered the question of abuse of process constituted by the prosecution of a defendant for murder after the alleged principal offender had been convicted only of manslaughter. The facts consisted of AP telling his friends, including the defendant, that his girlfriend had been bullied by AH. AP wanted his friends to look for AH and "to look for someone to hit". They travelled to an estate and eventually singled out a man who might have fitted the description of AH. The man was attacked, and

[78] See *R v Likiardopoulos* [2009] VSC 217, at 757
[79] See *Likiardopoulos v R* [2007] VSCA 344, at [121]-[122]
[80] [1992] 1 AC 34

struck by AP with a metal pipe. The man, who was not AH, later died from his injuries. No witness saw the defendant strike a blow, or play any part in the assault on the victim.

6.81 AP and three other men were indicted for murder. AP pleaded not guilty at his trial. In relation to the three other men, two pleaded guilty to manslaughter and the other was acquitted by direction of all charges at trial. AP's defence at trial was that he had nothing to do with the incident. AP was acquitted of murder and convicted of manslaughter. The defendant and another man (SH) were later arrested and charged by police with manslaughter. However, both were indicted for murder by the Crown. SH offered to plead guilty to manslaughter which was accepted by the Crown. The Crown also offered to accept a plea to manslaughter from the defendant, but the defendant refused. He was convicted of murder at trial.

6.82 At trial, the prosecution case was that the group of men, including the defendant, had encouraged and assisted AP to attack the victim and inflict grievous injury. Thus, the prosecution case against the defendant was put on the basis that AP had been guilty of murder even though he had been earlier acquitted by a different jury of that charge. And, like this case, no application was made to the trial judge to stay the prosecution on the ground of abuse of process.

6.83 In rejecting the ground, Lord Lowry, delivering the judgment of the Judicial Committee, stated[81] -

> Having reviewed the facts, their Lordships find no aspect of the case which can credibly be described as an abuse of process, that is, something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding. There can be no suggestion that the defendant was the victim of a plea bargaining situation since he did not plead guilty to the lesser offence. There was no sign of fraud or deceit and, as between the Crown and the defendant, the charge was fair.
>
> Their Lordships recognise that it would be permissible to ask whether the Crown should have persisted in seeking a verdict of guilty of murder when a finding of manslaughter would have produced equality among the accused. There seem to be two answers. One is that, provided the case was conducted with propriety, it is difficult to see how the judge could properly have intervened to prevent counsel from seeking or the jury from returning a verdict which was justified by the evidence. The other answer is that, if it was not an abuse to indict and prosecute for murder, it could scarcely be an abuse to seek a verdict which was justified by the evidence.
>
> That a serious anomaly occurred cannot be denied, but
>
> > "As long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another:" *Reg. v Andrews-Weatherfoil Ltd* [1972] 1 WLR 118 at 125, per Eveleigh J.

6.84 The Appellant in the court below sought to distinguish ***Hui Chi-ming v R*** on a number of bases. The Court of Appeal rejected those arguments and the Respondent supports the court's conclusions[82] –

> Counsel sought to distinguish *Hui Chi-ming* on the footing that in that case joint criminality was alleged, rather than criminal liability for counselling and procuring an offence. He submitted, as we understood it, that alternative verdicts were available in the first situation, but that it was otherwise where an accused's guilt was based upon counselling or procuring an offence. He also submitted that it was significant that here the Crown had accepted pleas to manslaughter, whereas in *Hui Chi-ming* the attacker had been found guilty of manslaughter. His argument was, as we understood it,

[81] Ibid, at 57
[82] See *Likiardopoulos v R* [2007] VSCA 344, at [126]-[128]

> that the Crown had adopted an inconsistent position with respect to the others on the one hand and the applicant on the other.
>
> In our opinion the first point of distinction was no point. Different verdicts are possible not only in the case of joint offenders but also in the case of a joint offender and an accessory.
>
> The second point of distinction disappears when one has regard to the matters raised on Hui Chi-ming's behalf. The appellant relied not only upon the attacker having been acquitted of murder, but also upon the fact that the Crown had accepted pleas of guilty from three others.

6.85 The Court also added the following observations, which the Respondent supports[83] –

> Second, the abuse of process was said to consist of permitting the Crown to argue its case in a particular way; not that there was an abuse of process in presenting the applicant on a count of murder. There was even less reason than in *Hui Chi-ming* to conclude that an abuse of process was made out. Third, emphasising the point just noted, it was not contended for the applicant that it was an abuse of process for the Crown to have argued its case (as it did) on the footing of joint criminal enterprise.

6.86 As to the uncertainty of the identity of the principal offender, the jury was instructed that it needed to be satisfied that at least one or more of the nominated men had murdered the victim. Whilst in ***Hui Chi-ming v R*** the identity of the principal offender was obvious, there is no unfairness occasioned in this case because of the possibility that one or more of a number of offenders had caused the death of the victim. The Crown put its case on the basis that the Appellant had counselled "others" present to inflict really serious injury and the Appellant was able to mount an effective defence at trial notwithstanding the uncertainty as to who caused the death.

6.87 Notwithstanding academic criticism of the decision in ***Hui Chi-ming v R***,[84] the decision has been cited with approval in subsequent cases.[85] For example, in ***R v Carter***,[86] the accused had been convicted of murder. The Crown case was that she had either acted in concert with, or aided and abetted, a co-accused in the murder of the deceased. After the trial of the accused, the Crown accepted a plea of guilty to manslaughter from the co-accused when informed the accused was no longer willing to give evidence against the co-accused. The Court of Appeal held there was no miscarriage of justice and rejected an argument that was an affront to justice that the accused may have been convicted of aiding and abetting the co-accused when the Crown later accepted that he was guilty of manslaughter. A similar result was reached in ***R v Petch & Coleman***.[87]

Dated: this 1st day of May 2012.

Gavin J.C. Silbert S.C.	**Brett L. Sonnet**
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[83] See *Likiardopoulos v R* [2007] VSCA 344, at [129]
[84] See Choo A, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd ed, Oxford University Press, 2008, at p 51
[85] See, for example, *R v Howard* (1992) 29 NSWLR 242
[86] (2000) 1 VR 175
[87] [2005] 2 Cr App R 40