HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Rohan (a pseudonym)
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet publication certification

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

Part II: Statement of issue on appeal

2. Whether all liability created by ss 323 and 324 of the *Crimes Act 1958* (Vic) (***the Crimes Act***) is wholly derivative in nature, or whether the distinction that existed at common law — between derivative accessorial liability, and primary liability of a party to an agreement to pursue an unlawful common purpose — is retained.
3. Whether on a proper construction of s 323(1)(c) of the *Crimes Act*,[1] the fault element of intentionally — requiring proof that the accused knew or believed the essential facts that make the proposed conduct an offence — is to be implied.
4. Whether the term "offence" as it appears in s 323 of the *Crimes Act* is to be read to mean 'the acts or omissions which constitute the offence', or is to be read to mean 'the combination of facts and circumstances that render an accused liable to criminal punishment'.

[1] Which provides that a person is involved in the commission of an offence if they enter into an agreement, arrangement or understanding with another person to commit the offence.

Part III: Notice under section 78B of the *Judiciary Act 1903* (Cth)

5. Notice is not required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations of the reasons of the primary and intermediate courts

6. The reasons of the primary court are cited as: *Director of Public Prosecutions v [MK]*[2] *& Ors* (County Court of Victoria, Judge Carlin, 10 September 2021) ('**primary reasons**').[3]

7. The reasons of the intermediate court are cited as: *Andre Rohan (a pseudonym) v The King* [2022] VSCA 215 ('**judgment below**').[4]

Part V: Statement of the relevant facts

8. The respondent was jointly charged, with co-offenders MK and WF, on indictment C1912407.1. A trial proceeded on all charges.

9. On 29 April 2021, the jury found each of the offenders — the respondent, MK[5] and WF[6] — guilty of two charges of supplying a drug of dependence to a child[7] ('**supply offence**') (in relation to two complainants, Daisy[8] and Katie[9]); seven charges of sexual penetration of a child under 12[10] ('**penetration offence**') (in relation to Daisy) and two charges of sexual assault of a child under 16[11] ('**sexual assault offence**') (in relation to Daisy).

Circumstances of the offending[12]

10. The prosecution case was put clearly on the basis that the respondent, MK and WF had reached an agreement, arrangement or understanding[13] to supply cannabis to Daisy (aged 11) and Katie (aged 12), and then engage in sexual activity — including penetrative sexual activity by each of the three co-offenders — with both Daisy and Katie.[14]

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[2] A pseudonym, pursuant to the judgment of the Court below (**Core Appeal Book ('CAB')** pp 137–160).
[3] **CAB** pp 90–127.
[4] **CAB** pp 137–160.
[5] A pseudonym, pursuant to the judgment below (**CAB** pp 137–160).
[6] A pseudonym, pursuant to the judgment below (**CAB** pp 137–160).
[7] Contrary to s71B of the *Drugs, Poisons & Controlled Substances Act 1981* (Vic).
[8] A pseudonym, pursuant to the judgment below (**CAB** pp 137–160).
[9] A pseudonym, pursuant to the judgment below (**CAB** pp 137–160).
[10] Contrary to s 49A(1) of the *Crimes Act*.
[11] Contrary to s 49D(1) of the *Crimes Act*.
[12] The factual background to this case can be found in the primary reasons, [7]–[22] (**CAB** pp 93–97) and in the judgment below, [9]–[17] (**CAB** pp 141–142).
[13] Pursuant to s 323(1)(c) of the *Crimes Act*.
[14] The offenders were charged with, yet acquitted of, sexual penetration offences against Katie (charges 10, 11 and 12 on indictment C1912407.1) (**CAB** pp 5–10).

11. In accordance with the elements of each offence — none of which include knowledge of the victim's age[15] — the trial Judge did not direct the jury that the prosecution was required to prove: in respect of the supply offences (charges 1 and 2), that the respondent knew that Daisy and Katie were under 18;[16] in respect of the sexual assault offences (charges 5 and 14), that the respondent knew that Daisy was under 16; or in respect of the sexual penetration offences (charges 3, 4, 6, 7, 8, 9 and 13), that the respondent knew that Daisy was under 12. The trial judge directed the jury in these same terms, regardless of whether the respondent was charged as the principal offender, or as a secondary offender.[17]

Sentence

12. On 10 September 2021 the respondent, MK and WF were sentenced.[18]

Appeal

13. The respondent appealed against his conviction on charges 1, 2, 3, 7, 8 and 9 (all charges where he was not nominated as the principal offender). The sole ground of appeal was that: "a substantial miscarriage of justice was caused by the failure of the trial judge to direct the jury that they had to be satisfied beyond reasonable doubt that the parties to the agreement knew the age of the complainants".

14. In the Court below, the respondent argued that, in order to rely on the extension of liability created by ss 323(1)(c) and 324(1) of the *Crimes Act*, the prosecution needed to establish a specific mental state where he was charged as the secondary offender (rather than the principal), namely that he knew the complainants were aged under 18 years (supply offences) and under 12 years (penetration offences) in order to establish that he *intentionally* came to an agreement, arrangement or understanding (hereafter referred to as an 'agreement') to commit the offence.[19]

15. The Court below recognised that the appeal turned on whether an agreement to commit the offence is constituted by:

    a. an agreement to commit the offending acts; or

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[15] Though a defence of reasonable belief in age does apply to the supply offence, pursuant to s 71B(4) of the *Drugs, Poisons & Controlled Substances Act 1981* (Vic), and the sexual assault offence, pursuant to s 49W of *the Crimes Act*.

[16] Noting that the prosecution did not, because it could not, nominate a principal offender for these charges.

[17] The trial judge did direct the jury separately, as required, about the elements for complicity, see transcript of charge in the Court below (**CAB** pp 11–87).

[18] Order of the primary court (**CAB** pp 128–130).

[19] Judgment below, [48] (**CAB** p 150).

b. an agreement to commit the offending acts, complete with knowledge of, or belief in, the facts that make the conduct an offence.

16. In determining the latter to be the position at law, the Court below said:[20]

> The language of s 323(1)(c) provides some assistance in determining whether 'the offence' the subject of agreement is simply the *actus reus*, that is, the supply or the penetration, or whether it is the *actus reus* and knowledge of the age factor. The use of the word 'intentionally' in sub-para (1)(a) in relation to assistance, encouragement and direction, and the hinging of 'involvement' in para (1)(c) on a deliberate act such as an agreement, arrangement or understanding, plainly requires there be knowledge of what is being assisted, encouraged or directed, and as to what is being agreed to, arranged or understood. Parties must intend to enter into an agreement and must intend the substance of that agreement. Proof of intention to commit an offence therefore requires proof of the accused's knowledge of, or belief in, the facts that make the proposed conduct an offence. The applicant is correct to point out that s 323(3)(b) is based on the person involved having knowledge of 'the facts' that constitute the offence, even if not aware that those facts constitute an offence.
>
> In this case, it cannot be doubted that the facts that made the proposed (agreed) sexual penetration an offence under s 49A of the *Crimes Act* included the age factor. The facts that made the proposed (agreed) supply of drugs an offence included that the complainants were children, that is, under 18 years of age.

17. The Court below made it clear that their conclusion was based on the premise that all liability as defined by s 323 of the *Crimes Act* is derivative.[21]

18. Ultimately, the Court below determined that where the prosecution relied on s 323(1)(c) to charge the respondent, the prosecution bore the onus of first proving that the respondent had knowledge of the complainants' ages because, the Court below reasoned, the 'age factor' constituted an 'essential fact', notwithstanding that it was not an element of any of the offences charged.[22] The Court below therefore held that the respondent suffered a substantial miscarriage of justice on charges 1, 2, 3, 7, 8 and 9, because the jury was not directed that it had to be satisfied to the criminal standard as to the complainants' respective ages.

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[20] Judgment below, [58]–[59] (**CAB** p 152).
[21] Judgment below, [60] (**CAB** p 152).
[22] Judgment below, [60] and [83]–[84] (**CAB** pp 152–158).

Part VI: Outline of the appellant's argument

19. The approach that the Court below took to the construction of s 323(1)(c) was to imply into the text an additional fault element of intentionally, which in turn requires proof that the accused had knowledge of, or belief in, the essential facts of the offence.[23] The Court below determined that the implication of this fault element, derived from the principles in *Giorgianni v The Queen*[24] (a case which involved an offence of accessorial liability[25]) and the principles in *The Queen v LK*[26] (a case which involved the offence of conspiracy), was justified by the derivative nature of the respondent's liability for the relevant charges.

20. It is submitted that, in so concluding, the Court below erred.

21. Properly construed, s 323(1)(c) requires the prosecution to prove that the accused has entered into an agreement with another person to commit the acts or omissions which constitute the offence. Upon proof of such an agreement, the acts done by parties to the agreement, that are within the scope of the agreement, are attributed to the accused. The accused's criminal liability is then determined by reference to other prescribed circumstances (such as a prescribed result, a prescribed state of mind, and any excuses or defences that may be available to them). Accordingly, the liability of each party to the agreement is not derivative, but a form of primary liability, analogous to the common law principles of joint criminal enterprise.

Complicity at common law

22. Prior to the introduction of the statutory provisions for complicity, the law of complicity in Victoria was governed by the common law.

23. The base principles for a secondary offender's liability in a criminal offence were stated by Brennan CJ, Deane, Dawson, Toohey and Gummow JJ in *McAuliffe v The Queen*:[27]

> The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms – common purpose, common design, concert, joint criminal enterprise – are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. The liability which attaches to the traditional classifications of

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[23] Judgment below, [58] (**CAB** p 152).
[24] (1985) 156 CLR 473 ('***Giorgianni***').
[25] Aiding, abetting, counselling or procuring.
[26] *The Queen v LK* (2010) 241 CLR 177 1 ('***LK***').
[27] *McAuliffe v The Queen* (1995) 183 CLR 108, 113–114 ('***McAuliffe***') (citations omitted).

accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the Court below the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the Court below the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.

24. In *Osland v The Queen,*[28] McHugh J (with whom Kirby and Callinan JJ agreed on this point) made clear that, unlike accessorial liability, joint criminal enterprise (there specified as acting in concert) is a form of primary liability.[29] In other words, a party to a joint criminal enterprise is deemed to be a principal in the first degree and 'is equally responsible for the acts of the other or others'.[30]

25. There can be no doubt that the common law doctrine of joint criminal enterprise (or common purpose) affixes primary liability to each party who has entered into an agreement with another (or others), to embark on a common criminal enterprise. In the recent judgment of *Mitchell & Ors v The King,*[31] Gordon, Edelman and Steward JJ explained that:[32]

Joint criminal enterprise is a principle of primary liability based on a form of agency. The acts of the perpetrator that are within the scope of the agreement, and therefore done with the authority of the other parties, are attributed to the other parties to the agreement. That is, "if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all". It is in this sense that joint criminal enterprise is a form of primary liability: all parties are liable as principals in the first degree because those persons who do not physically perform the acts are acting in concert and have the relevant mens rea. Accordingly, the liability of each party is not derivative, but primary. Hence, all those things

[28] (1998) 197 CLR 316 ('***Osland***').
[29] Ibid. per McHugh J at 341-351; Kirby J at 383 [174] and Callinan J at 402 [217].
[30] Ibid. per McHugh J at 342 [72]. The position was also expressed clearly in *The Queen v Lowery and King (No 2)* [1972] VR 560 at 560 per Smith J, which McHugh J cited with approval in *Osland* at 324 [72].
[31] *Mitchell & Ors v The King* (2023) 97 ALJR 172 ('***Mitchell***').
[32] Ibid. at 184 [55] (citations omitted).

done "in accordance with the continuing understanding or arrangement ... which are necessary to constitute the crime" are attributed to all parties to the agreement and "they are all equally guilty of the crime regardless of the part played by each in its commission".

26. In *IL v The Queen*,[33] the plurality reiterated, by reference to McHugh J's judgment in *Osland*, the important ways in which the liability of accessories (who aid, abet, counsel or procure), differs from that of joint criminal enterprise:[34]

> As McHugh J (with whom Kirby J and Callinan J agreed on this point) explained, the liability of persons as accessories before the fact to murder (ie persons not present at the commission of the crime) was a form of derivative liability. So too was the liability derivative for persons who were "merely present, encouraging but not participating physically, or whose acts were not a substantial cause of death". But where two or more persons act in concert then any liability is primary. The acts of one are attributed to the others because they reached an understanding or arrangement that together they would commit a crime and the acts were performed in furtherance of that understanding or arrangement.

27. Upon introduction of the statutory provisions in Victoria, the laws of complicity at common law, including aiding, abetting, counselling or procuring, and the doctrines of acting in concert, joint criminal enterprise and common purpose (including extended common purpose), were expressly abolished.[35] However, for the reasons explained below, the principles relevant to each of the distinct categories of complicity at common law remain relevant to construing the statutory text.

Statutory provisions for complicity in Victoria

28. The statutory provisions covering the law of complicity in Victoria were introduced in September 2014, by the insertion of Part II, Division 1 into the *Crimes Act*.[36] As observed by the Court below, the broad purpose of the codification of the laws relating to criminal complicity in Victoria was described in the Explanatory Memorandum for the Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic) as follows:[37]

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[33] *IL v The Queen* (2017) 262 CLR 268 ('***IL***').

[34] Ibid at 283 [30] (Kiefel CJ, Keane and Edelman JJ) (citations omitted).

[35] Pursuant to s 324C of the *Crimes Act*. With the exception of the circumstances in which a person may withdraw from an offence in which the person would otherwise be complicit.

[36] Inserted by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*.

[37] Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 ('**Explanatory Memorandum**'), p 12. See also Second Reading Speech to the Crimes Amendment (Abolition of Defensive Homicide) Bill 2014: Victoria, Parliamentary Debates, Legislative Council, 25 June 2014 ('Second Reading Speech'), pp 2128, 2129–2130.

This Subdivision will improve the substantive law of complicity by introducing simpler, internally consistent laws and abolishing problematic common law rules. These amendments will facilitate simpler, more understandable jury directions on complicity. These issues were comprehensively examined in the 'Simplification of Jury Directions Project' report produced by a team [led] by the Honourable Justice Mark Weinberg in August 2012. The Bill draws extensively from the recommendations in that report to reform the law of complicity.

29. In the 'Simplification of Jury Directions Project' report ('**the Weinberg report**'),[38] the authors proposed that (what is now) s 323(1)(a) of the *Crimes Act*, should cover the traditional forms of accessorial liability (aid, abet, counsel and procure) and, consistent with the common law, should retain the requirement to prove knowledge of the essential facts, stating that:[39]

> Proposed subsection (1)(a) is intended to cover the same circumstances as the 'aid, abet, counsel and procure' formula used at common law and in s 323 of the *Crimes Act 1958*, and to re-express that formula in modern language…
>
> …
>
> The word intentionally in proposed subsection (1)(a) ensures, in keeping with *Giorgianni*, that a purposive state of mind is required for complicity. For the avoidance of doubt, the mental state described by the use of the term 'intentionally' is not just an intention to assist or encourage, but an intention to assist or encourage another to commit a particular offence…

30. However, when proposing (what is now) s 323(1)(c), the authors of the Weinberg report recommended a substantial departure from the common law of joint criminal enterprise and common purpose and suggested that complicity arising from an agreement to enter into a criminal enterprise should be aligned with the principles that apply to the offence of conspiracy. As will be detailed below, this approach was not adopted by the legislature.

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[38] Weinberg, J. M., O'Connor, J., Bursac, M., Luzza, M., Weatherson, M., Walvisch, J. M., Bunjevac, T., Briggs, M., & Pathmanathan, J., *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group. Complicity inferences and circumstantial evidence other misconduct evidence jury warnings/unreliable evidence*, Supreme Court of Victoria, August 2012 ('**Weinberg report**'), (**Further Materials** pp 4–104).
[39] Ibid. pp 96–97 [2.276]–[2.277].

31. The authors of the Weinberg report proposed importing the "fault element" from *Giorgianni*[40] into group activity forms of complicity, noting that it is consistent with the requirement of a specific knowledge for an offence of conspiracy: [41]

> This proposed subsection covers group activity in which an accused has entered 'into an agreement, arrangement or understanding with another person to commit the offence or an offence of the same general character.' It is, in truth, a 'completed conspiracy offence'. That is to say that liability under this ground will be made out if a conspiracy has been proved which has resulted in the commission of the substantive offence which was the subject of the conspiracy.
>
> The fault element required for this mode of participation will be in line with that specified for traditional forms of accessorial liability in *Giorgianni*. That is because it seems implicit in the terms 'agreement, arrangement or understanding' that there must be a specific degree of knowledge, and intent, in order to fall within the notion of a conspiracy.

32. The proposal to apply the principles in *Giorgianni,* to complicity arising from entry into an agreement to commit an offence, would have had the effect of removing the important distinctions in liability that exist at common law between those who are accessories, by aiding, abetting, counselling or procuring, and those who are acting pursuant to a joint criminal enterprise (the former being derivative and the latter being primary).

33. Similarly, the proposal to import the principles of conspiracy where a person is charged as having agreed to the commission of the offence, would have significantly altered the substance of the agreement required to be proved. For an offence of conspiracy, the prosecution must prove that the course of conduct agreed upon would involve the commission of a *specified* criminal offence, rather than some different offence.[42] Such matters are well beyond that which is required to prove a joint criminal enterprise at common law.

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[40] In *Giorgianni* (at 504–505), the majority (Wilson, Deane and Dawson JJ) stipulated that, when relying on the law of complicity in relation to aiding, abetting, counselling or procuring (all of which have traditionally been regarded as forms of derivative liability), actual 'knowledge of all the essential facts' of the offence had to be proved, and the prosecution could not rely upon imputed or presumed knowledge 'where possession of knowledge is necessary for the formation of a criminal intent'. The majority explained that actual knowledge of all the essential facts of the offence had to be proven in order to prove intent.

[41] Weinberg report, pp 97–98 [2.279]–[2.280] (citations omitted).

[42] *The Queen v McCaul and Palmer* [1983] 2 VR 419; *The Queen v Moran & Mokbel* [1999] 2 VR 87. The provisions also require that the accused must 'intend that the offence the subject of the agreement be committed', and that the accused must 'intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time when the conduct constituting the offence is to take place'. See s 321(2)(b) of the *Crimes Act*.

34. These dramatic changes to the fundamental common law principles of joint criminal enterprise, proposed by the authors of the Weinberg report for what is now s 323(1)(c), were not adopted.

35. While the legislature adopted the form of s 323(1)(a)[43] proposed by the authors of the Weinberg report, there is a discernible departure from the recommendations for what is now s 323(1)(c), as the relevant sections of the Explanatory Memorandum demonstrate:[44]

> New section 323(1)(a) covers the behaviour that would be covered by aiding, abetting, counselling and procuring at common law. The reference to "intentionally" is consistent with the fault element required by *Giorgianni v R* (1985) 156 CLR 473. That is, the person must have intended to assist etc. another to commit a particular offence.
>
> New section 323(1)(c) covers group activity that would be covered by the common law doctrines of acting in concert, joint criminal enterprise and common purpose'.

36. Notably, where the legislature intended that the statutory provisions would represent a substantial departure from the doctrines of complicity as existed at common law — namely for the doctrine of 'extended common purpose' — that intention was expressed with clarity in the Explanatory Memorandum and in the Second Reading Speech.[45]

37. By contrast, there is no reference — in the Explanatory Memorandum or the Second Reading Speech — to an intention to depart from the principles of joint criminal enterprise (acting in concert and common purpose), nor to importing the fault element required by *Giorgianni,* or the notion of a "completed conspiracy", into s 323(1)(c). It is to be expected that, had the legislature intended to depart from the fundamental scope of those principles, such an intention would have been expressed in equally clear terms as have been used to explain the significant changes made to extended common purpose.

38. Rather, just as s 323(1)(a) was expressly intended to cover the forms of accessorial liability that existed at common law, including the fault element of intentionally, it was made clear that s 323(1)(c) was intended to cover that which would be covered by the common law doctrines of acting in concert, joint criminal enterprise and common purpose.

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[43] With the exception of the recommendation to include extended liability for an accused who "assists, encourages or directs", which the legislature has separately enumerated in sub-section (b).

[44] Explanatory Memorandum, p 13.

[45] Explanatory Memorandum, p 13, and Second Reading Speech, p 2130. The new provisions expressly expanded the operation of extended liability to aiding, abetting, counselling and procuring, and narrowed the application of extended liability for common purpose (requiring that the accused foresees the probability (rather than the possibility) that another offence will be committed). These changes also find clear expression in the provisions of ss 323(1)(b) and (d) of the *Crimes Act*.

39. Hence, rather than reform or abolish the traditional differences between accessorial liability and primary liability arising from a shared common purpose, the legislature clearly intended to retain them.

The construction of s 323(1)(c) of the Crimes Act by the Court below

40. The Court below recognised[46] that while the starting point for construing s 323(1)(c) is the statutory text, context and purpose remain important, citing *SZTAL v Minister for Immigration and Border Protection* (Kiefel CJ, Nettle and Gordon JJ).[47] There is no dispute about the correctness of that approach.[48]

41. Accordingly, the Court below commenced with a plain reading of the text, to ascertain 'whether "the offence" the subject of agreement is simply the *actus reus* — that is, the supply or the penetration — or whether it is the *actus reus* and knowledge of the age factor'.[49] As outlined above, on a plain reading of s 323(1)(c), the Court below determined that:

> The use of the word 'intentionally' in sub-para (1)(a) in relation to assistance, encouragement and direction, and the hinging of 'involvement' in para (1)(c) on a deliberate act such as an agreement, arrangement or understanding, plainly requires there be knowledge of what is being assisted, encouraged or directed, and as to what is being agreed to, arranged or understood.

42. This implication of the word "intentionally" into s 323(1)(c) involves a significant departure from the language of the provision. It is not justified by a plain reading of the text, nor by reference to the context and purpose of the legislative provisions.

43. The Court below acknowledged that the effect of this implication was that:[50]

> in order to be convicted, the person 'involved' must be shown to know more about the facts constituting the offence (in this case, the age factor) than the principal offender. The difference in the state of mind to be proved for the complicit offender relative to the principal offender significantly raises the bar to securing a conviction against the complicit offender, but this might be said to reflect the purely derivative nature of the offending by the complicit offender.

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[46] Judgment below, [57] (**CAB** p 152).
[47] (2017) 262 CLR 362.
[48] The relevant principles of statutory construction are well established. See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46–47 [47] (Hayne, Heydon, Crennan and Kiefel JJ [47]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38] (French CJ, Crennan and Bell JJ; *Stuart v The Queen* (1974) 134 CLR 426 at 437 (Gibbs J); and *Brennan v The King* (1936) 55 CLR 253 at 263 (Dixon and Evatt JJ). See also *Pickett v Western Australia* (2020) 270 CLR 323 ('***Pickett***') at 337 [23] per Kiefel CJ, Bell, Keane and Gordon JJ, and at 360 [92] (Nettle J).
[49] Judgment below, [58] (**CAB** p 152).
[50] Judgment below, [60] (**CAB** p 152).

44. In so doing, the Court below failed to recognise, as set out above, that the legislature did not adopt the construction of s 323(1)(c) proposed by the authors of the Weinberg report and that, rather, the legislature specified that s 323(1)(c) should reflect the doctrine of joint criminal enterprise (and related doctrines). In turn, the Court was in error to find that the fault element of intentionally, derived from the principles in *Giorgianni* (and also observed in *LK*), has application in respect of s 323(1)(c).

45. Consequentially, the Court below has, unjustifiably, removed the primary liability that affixes to an accused who enters into an agreement with another or others to commit the offence, or an offence within the scope of the agreement. The Court below has also, again unjustifiably, shifted the substance of the agreement that the prosecution must prove, from an agreement to commit the acts constituting the offence, to an agreement to cause the result the subject of the offence coupled with knowledge of any requisite state of mind of the parties to the agreement.

46. In short, the Court below's construction of the provision in s 323(1)(c) dramatically alters the nature of criminal liability by complicity in Victoria. The construction of s 323(1)(c) favoured by the Court below 'significantly raises the bar to securing a conviction against the complicit offender'[51] and substantially narrows the scope of persons who may be held criminally responsible for an offence committed pursuant to an agreement from that which existed at common law.

47. This narrowing is inconsistent with the express purpose of the provisions, which, as detailed, was to reflect the forms of complicity (accessorial and joint criminal enterprise) that existed at common law.

Removal of primary liability for parties to an agreement

48. Removing the primary liability of those who embark on joint criminal ventures creates two different thresholds for criminal liability depending on the role a person played.

49. Applied to the facts of this case, this would have required the trial judge to direct the jury in the following terms. First, that even though knowledge of the complainants' ages is not an element of any of the offences on the indictment, on charges 1 and 2 (supply offences), they must be satisfied beyond reasonable doubt that the respondent knew that Daisy and Katie were under 18,[52] regardless of whether the defence of reasonable belief as to age is

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[51] Judgment below, [60] (**CAB** p 152).
[52] As the prosecution did not, because it could not, nominate a principal offender for these charges. See Judgment below, [60]–[64] (**CAB** p 152–153).

raised or not. Second, on charge 3 (penetration of Daisy by MK), they must be satisfied beyond reasonable doubt that the respondent knew Daisy was under 12, even though there is no defence of reasonable belief as to age for that offence. Third, on charges 4, 5, 6, 13 and 14 (penetration and sexual assault of Daisy by the respondent) they do not need to be satisfied that the respondent knew Daisy was under 12 or 16, as relevant to each charge. Fourth, on charges 7, 8 and 9 (penetration of daisy by WF), they must again be satisfied beyond reasonable doubt that the respondent knew Daisy was under 12, even though, again, there is no defence of reasonable belief as to age for that offence.

50. The task for a trial judge to direct a jury in those terms — in a form that they can reasonably be expected to understand and not think illogical — is an unenviable one.

51. The perverse effect of removing the primary liability from parties who agree to commit an offence can be further highlighted by considering if the respondent and one other of the accused men, having entered into an agreement to sexually penetrate the complainant, sexually penetrated that complainant simultaneously. If the decision of the Court below is correct, where it is the respondent who physically sexually penetrates the complainant (and therefore is the principal offender), the prosecution need not prove that the accused knew that the child was under 12, however, where the respondent is complicit in the act of sexual penetration by the co-offender — even though it is the same criminal offence, with the same elements, involved the same complainant, and occurred at precisely the same time — the prosecution *is* required to prove that the accused knew the complainant was under 12. It leads to an absurd result.

52. The correct approach is to retain the principle of primary liability that affixes to persons who agree, with another or others, to do the *acts or omissions* which constitute the offence. This is consistent with the longstanding approach expressed in *Osland* by McHugh J: [53]

> Where the parties are acting as the result of an arrangement or understanding, there is nothing contrary to the objects of the criminal law in making the parties liable for each other's acts and the case for doing so is even stronger where they are at the scene together. If any of those acting in concert but not being the actual perpetrator has the relevant mens rea, it does not seem wrong in principle or as a matter of policy to hold that person liable as a principal in the first degree. Once the parties have agreed to do the acts which constitute the actus reus of the offence and are present acting in concert when the acts are committed, the criminal liability of each should depend upon the existence or non-existence of mens rea or upon their having a lawful justification for the acts, not upon the criminal liability of the actual perpetrator. So even if the

[53] *Osland* per McHugh, with Kirby and Callinan JJ agreeing, at 350 [93].

actual perpetrator of the acts is acquitted, there is no reason in principle why others acting in concert cannot be convicted of the principal offence. They are responsible for the acts (because they have agreed to them being done) and they have the mens rea which is necessary to complete the commission of the crime.

53. As a matter of logic, once a person has agreed to do the "acts which constitute the actus reus of the offence", they are in the same position as all parties to the agreement, given they stand as equal principals in the first degree.[54] There is no justification for requiring the prosecution to prove different levels of knowledge depending on the role each person has played in commission of the offence. It also matters not if the offence is one involving strict or absolute liability; once a person is shown to have agreed to do the acts which constitute the offence, they are as answerable to the absolute or strict liability of the offence as a primary offender.

<u>*Alteration of the substance of the agreement to be proven*</u>

54. Another consequence that flows from the judgment below is to expand the substance of the agreement to commit an offence that the prosecution must prove existed between the accused parties.

55. In the Court below, the respondent argued that, in contrast to the position that existed at common law, the express language of s 323(1)(c) requires the prosecution to establish the existence of an agreement to commit *the* offence, which he argued brought with it the requirement to show that he knew *the essential facts* constituting the offence with which he was charged — i.e., knowledge of the requisite age of the complainants.

56. The Court below acceded to this submission, thereby requiring the prosecution prove the existence of an agreement to commit, in a literal sense, the offence with which an accused is charged.

57. This is in contrast with joint criminal enterprise at common law, which required the prosecution prove the existence of an agreement between accused persons to act together to effect a common criminal purpose. On the facts of this case, the common criminal purpose (agreement) was to supply cannabis to the complainants and then engage in sexual activity (including penetrative sexual activity) with the complainant, Daisy.

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[54] Ibid.

58. As is clear from McHugh J's passage in *Osland,* extracted at paragraph 52 above,[55] on a charge of joint criminal enterprise, the prosecution was only required to prove that the parties agreed to do the acts (or omissions) which constitute the offence. The agreement need not be as to the result, as the relevant mens rea of each participant to the agreement must be considered separately. Any excuses or defences are also considered separately for each accused.

59. In *Gillard v The Queen*, Hayne J explained that proof of an agreement to commit the acts necessarily requires identifying what the parties agreed upon, but not by reference to a particular crime:[56]

> Where common purpose is alleged, it is essential to identify what the parties did agree upon and what it was that each contemplated might occur. That requires attention to, and identification of, the acts and omissions which the parties agreed upon, rather than the identification of the particular crime constituted by the acts which each intends should be performed. To show that not everything that each party had in mind was agreed by all other participants does not deny that there was an arrangement or understanding, amounting to an agreement, to commit a crime.

60. Accessorial liability at common law also requires proof as to an awareness of the acts (or omissions), as opposed to a specific criminal offence. However, as outlined above, the additional requirement to prove *intentional* assistance in the commission of an offence requires proof of knowledge of the essential facts that go to making the conduct an offence.[57]

61. The rationale for the distinct points of proof between joint criminal enterprise and accessorial liability rests in the (usually) derivative nature of accessorial liability. As Mason J observed in *Giorgianni*, a person might do something to bring about, or render more likely, the commission of an offence by another in circumstances in which, through ignorance of the facts, it appears to him to be an innocent act.[58]

62. In contrast, once a person has entered into an agreement with another or others to do the acts (or omissions) which constitute the offence, they acquire primary liability;[59] they and

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[55] More recently, in *Mitchell* at [54], Gordon, Edelman and Steward JJ, reiterated that 'each party to an agreement to commit a crime will be guilty of the agreed crime and any crime "within the scope of the agreement"' and (citing Hayne J in *Gillard v The Queen* (2003) 219 CLR 1 ('***Gillard***')) emphasised the importance of identifying what acts and omissions the parties agreed upon.

[56] *Gillard* at 39 [124].

[57] *Giorgianni* at 505.

[58] *Giorgianni* at 494.

[59] It is then the acts of the other participant/s that are attributed to the accused. In *IL* (at 282 [29]) Kiefel CJ, Keane and Edelman JJ explained:

their co-offender/s are equal parties to the offence and there can be no requirement to prove more than would be required for a principal in the first degree.

63. The term "offence" as it is used in s 323(1) is not defined. As recognised in other states, the term may be attributed a different meaning according to the context in which it is used.[60]

64. Noting, again, that the legislature expressly stated that the Victorian statutory provisions for complicity were intended to have a similar scope to the common law doctrines, the term "offence" as it appears in s 323(1), must be taken to mean the acts or omissions which constitute the offence, not the actual criminal offence charged.

65. A similar approach has long applied in relation to the comparable provisions for complicity that appear in the Criminal Codes in Queensland and Western Australia.

66. In *R v Barlow*, Brennan CJ, Dawson and Toohey JJ, explained that the term "offence", as it appears in ss 7 and 8 of the Code (Qld) is to be understood as referring to the element of conduct (being an act or omission) which, if combined with the other prescribed circumstances, renders the offender liable to punishment.[61] As their Honours explained, the term "offence" is capable of more than one meaning:[62]

> "Offence" is a term that is used sometimes to denote what the law proscribes under penalty and sometimes to describe the facts the existence of which render an actual offender liable to punishment. When the term is used to denote what the law proscribes, it may be used to describe that concatenation of elements which constitute a particular offence (as when it is said that the Code defines the offence of murder) or it may be used to describe the element of conduct (an act or omission) which attracts criminal liability if it be accompanied by prescribed circumstances or if it causes a prescribed result or if it be engaged in with a prescribed state of mind (as when it is said that a person who strikes another a blow is guilty of the offence of murder if the blow was unjustified or was not excused, if death results and if the blow is struck with the intention of causing death). Correspondingly, when the term "offence" is used to denote the facts the existence of which renders an actual offender liable to punishment, the term denotes

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There should not be anything surprising in the notion of attributing the acts of one person to others with a common criminal purpose where the person's acts are in the course of, or incidental to, carrying out a common criminal purpose. The same principle applies in civil cases, where, apart from cases of employment or agency, "to constitute joint tortfeasors two or more persons must act in concert in committing the tort". The important point is that it is the acts which are attributed from one person (the actor) to another who shares the common purpose and, by attribution, becomes personally responsible for the acts. It is not the liability of the actor which is attributed. Nor is it the actus reus of some notional crime without a mental element that might be committed by the actor. These points were established in the decision of the majority of this Court in *Osland* (citations omitted).

[60] See, for example, *The Queen v Barlow* (1997) 188 CLR 1 ('***Barlow***') and *Pickett.*

[61] *Barlow* at 9.

[62] Ibid. See more recently *Pickett* at 341[66].

either the concatenation of facts which create such a liability (as when it is said that Barlow's co-accused committed the offence of murder) or the conduct of the offender (an act or omission) which, with other facts of the case, create such a liability (as when it is said that the co-accused who struck Vosmaer the blow which caused his death and who did so with the intention of killing him or doing him grievous bodily harm is guilty of the offence of murder).

67. That the term "offence" as it appears in s 323(1), similarly refers to the conduct element of an offence, is consistent with how s 323(3) (which imposes liability whether or not the person realises that the facts constitute an offence) and s 324(1) (which imposes liability upon any person found to have been involved in the commission of an offence) must necessarily be read.

Section 323(3) provides:

> A person may be involved in the commission of an offence, by act or omission—
>
> (a) even if the person is not physically present when the offence, or an element of the offence, is committed; and
>
> (b) whether or not the person realises that the facts constitute an offence.

Section 324(1) relevantly provides:

> … if an offence (whether indictable or summary) is committed, a person who is involved in the commission of the offence is taken to have committed the offence and is liable to the maximum penalty for that offence.

68. As can be seen, the focus in the language of the text shifts from the element of conduct by which a person may be involved in the commission of an offence in s 323(1), to the "concatenation of elements which constitute a particular offence", whether indictable or summary, in ss 323(3) and 324(1).

69. The term "offence" necessarily has the same meaning throughout s 323(1). That accessorial liability is (usually) derivative does not require the term "offence" as it appears in ss 323(1)(a) or (b) to mean the facts which render the accused liable to punishment. It is the prescribed mental element of "intentionally" included within ss 323(1)(a) and (b) which places the additional burden on the prosecution to prove knowledge of the essential facts for accessorial liability.

70. That the term "offence" as it appears in s 323(1) refers to only the conduct element of an offence is consistent with a plain reading of the statutory provisions. It is also consistent with the principles that applied at common law.

Conclusion

71. The approach taken by the Court below, to imply the fault element of intentionally into s 323(1)(c), fails to recognise the distinct differences in criminal liability between s 323(1)(a) and 323(1)(c). The effect is to render all forms of complicity in Victoria derivative and significantly alter the substance of the agreement required to be proved. This was not the intention of the legislature in enacting the statutory provisions for complicity.

Part VII: Orders sought by the appellant

72. The orders sought by the appellant are:

    a. That the appeal to this Court be allowed;

    b. That the orders of the Supreme Court of Victoria, Court of Appeal ('Court below') given on 4 October 2022 be set aside;

    c. That the appeal to the Court below against conviction be dismissed; and

    d. That the appeal to the Court below against sentence be remitted for rehearing.

Part VIII: Time required for presentation of appellant's oral argument

73. The appellant estimates 2 hours are required for presentation of the appellant's oral argument.

Dated: 7 July 2023

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ANNEXURE

Pursuant to item 3 of the Practice Direction No 1 of 2019, below is a list of each of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions above.

Number	Description	Version	Provision
1	*Crimes Act* 1958 (Vic)	283 (as at 28 October 2018)	ss 49A, 49D, 49ZC, 49W, 321, 323–324C
2	*Drugs, Poisons and Controlled Substances Act 1981* (Vic)	120 (as at 1 July 2018)	s 71B
3	*Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic)	No 63 of 2014	-
4	*Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*	-	-
5	*Criminal Code Act 1899* (Qld)	9 (7 December 1992 and 23 November 1993)	ss 7 and 8