HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M33/2023
File Title:	The King v. Rohan (a pseudonym)
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument
Filing party:	Respondent
Date filed:	12 Oct 2023

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

The King
Appellant

and

Rohan (a pseudonym)
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: INTERNET PUBLICATION CERTIFICATION

1.1 This outline is in a form suitable for publication on the internet.

Part II: OUTLINE OF PROPOSITIONS

2.1 The enactment of Pt II, Div 1 of the *Crimes Act 1958* (ss 323-343C) effected fundamental changes to the law of complicity and abolished the common law doctrines of acting in concert, joint criminal enterprise and common purpose (including extended common purpose).[1]

2.2 Liability under ss 323 and 324 is derivative. So much is the natural result of the statutory text, properly construed.

2.3 The concept of 'involvement' utilised by the legislature in s 323(1) gave effect to the recommendations made by the authors of the Weinberg report. That 'new' proposed model, in the context of group activity and joint liability, is based upon the law of conspiracy.[2]

2.4 The fault element for s 323(1)(c) is 'in line with that specified for traditional forms of accessorial liability' in *Giorgianni*[3] because it is implicit in the terms 'agreement, arrangement or understanding' that there must be a specific degree of knowledge and intent to fall within the notion of a (completed) conspiracy.[4]

2.5 Section 323(1)(c) speaks to a criminal agreement, arrangement and understanding. To attract

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1 See *Crimes Act 1958*, s 324C **[JBA Part A Vol 1, p23]**

2 Judgment below, [67]-[81] **[CAB p152]**; *DPP v Gebregiorgis and Kassa* [2023] VSCA 166 ('*Gebregiorgis*'), [5]-[6] (Emerton P); **[JBA Part D Vol 5 p846]** Weinberg report, 97-98 [2.279]-[2.280]. **[BFM p97 – 98]**

3 (1985) 156 CLR 473 ('*Giorgianni*'), **[JBA Part C Vol 3 p224]** 487-88 (Gibbs CJ) **[p238 -239]**, 493-94 (Mason J) **[p244 -245]** and 506-07 (Wilson, Deane and Dawson JJ) **[p257 – 258]**.

4 *Judgment below*, [69]-[81] **[CAB p154 - 157]**; *Gebregiorgis*, [7] (Emerton P) **[JBA Part D Vol 5, p847]**; Weinberg report, 97-98 [2.280] **[BFM p97 – 98]**; cf *The Queen v LK* (2010) 241 CLR 177 ('*LK*') **[JBA Part C Vol 4 p765]**, 206-09 [59] – [67] (French CJ) **[p794]**, 225 [110] **[p813]** and 228 [117] **[p816]** (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

liability, a person involved in the commission of an offence need not realise that he or she is party to a crime[5] but must know the essential facts comprising the offence committed.

2.6 'Offence' in Pt II, Div 1 means all the essential facts that constitute the offence, not just the physical conduct or *actus reus* of a given crime.[6]

2.7 The case for the claim that the legislature intended all liability under ss 323 and 324 to be derivative is compelling. It finds support in the statutory text, and in the secondary material.[7]

2.9 *First*, and by s 324C, the legislature explicitly abolished not just the common law as it pertained to complicity but also those doctrines by which offenders had attached to them primary liability for group activity. It discarded its nomenclature and replaced it with its own.

2.10 *Second*, ss 323(1) and 324(1) make all forms of liability derivative. Liability is not primary, arising from a type of agency,[8] but accessorial and in keeping with the basis of liability under s 323(1)(a).[9]

2.11 *Third*, s 323(1)(c) must be read in its more immediate and wider statutory context. Sub-s (1)(a) employs the word 'intentionally' in the context of assistance, encouragement, and direction. 'Intentional' assistance requires knowledge. Properly construed, ss 323(1)(a) and (c) share the same fault element.

2.12 *Finally*, the meaning given to the term 'offence' in Pt II, Div 1 – and more widely throughout the *Crimes Act* – is instructive. Section 323(3)(b) provides that a person may be involved in the commission of an offence even if that person does not realise that 'the facts constitute an offence'. The reference in context extends the term's meaning beyond the physical conduct or *actus reus* of the crime in which that person is complicit.[10] Similarly, s 323(3)(a) distinguishes between 'offence', the 'act or omission' that might be performed by a complicit party and the 'element' of an offence committed in his or her absence.

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5 Section 323(3)(b) **[JBA Part A Vol 1 p22]**

6 *Barlow*, 9 (Brennan CJ, Dawson and Toohey JJ) **[JBA Part C Vol 4 p726]**

7 Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 ('Explanatory Memorandum'), pp 12-14 **[JBA Part E Vol 6 pp935 -937]** ; Second Reading Speech to the Crimes Amendment (Abolition of Defensive Homicide) Bill 2014: Victoria, Parliamentary Debates, Legislative Council, 25th June 2014 ('Second Reading Speech'), 2129-30 **[JBA Part E Vol 6 p922 -923**]

8 Cf *Gebregiorgis* **[JBA Part D Vol 5 p845]**, [58]-[60] (Priest and Kaye JJA) **[p859 – 861]**; cf [6]-[7] (Emerton P) **[846 – 847]**. See, generally, *Mitchell v The Queen* (2023) 407 ALR 587, 599-600 [54]-[55] (Gordon, Edelman and Steward JJ), and the cases cited therein **[JBA Part D Vol 5, pp875 - 876]**.

9 And indeed under sub-s (1)(b) and (1)(d) [**JBA Part A Vol 1, pp21 – 22**].

10 *Judgment below*, [49] and [58] [**CAB p150 and p152**].

2.13 There is no support to be found for the Appellant's claim in the meaning of 'offence' in the Code states (Qld and WA).[11] In both Codes the term 'offence' is explicitly defined, and appears in statutory provisions which are materially different in their terms and scope to Pt II, Div 1.[12]

2.14 The object of the agreement, arrangement or understanding is 'the offence', and not just its physical or conduct element.

2.15 A number of the claims advanced by the Appellant in support of its construction of s 323(1)(c) do not withstand scrutiny.

2.16 That the doctrines which defined criminal liability for group activity at common law imposed a form of primary liability is uncontroversial.[13]

2.17 The historical context in which a statute is enacted must not be permitted to swamp the task of determining what the legislature intended by enacting its provisions. Still less can it be permitted to supplant the statutory text or distort its true meaning.

2.18 The Appellant's submission that there is support to be found –in the statutory text or in the secondary material - for the legislature's 'clear intent' to retain the traditional differences between accessorial and primary liability is wrong.[14]

Dated: 11th October 2023

Theo Kassimatis KC

Senior Counsel for the Respondent

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11 Appellant Submissions, [64]-[66] **[p17 – 18]**.

12 The Appellant inaccurately calls the Victorian and Code provisions 'comparable'.

13 See, eg, Appellant's Submissions, [22]-[27] **[pp6 – 8]**; citing *McAuliffe v The Queen* (1995) 183 CLR 108, 113-14 **[JBA Part C Vol 3 pp368 – 369]**; *Osland v The Queen* (1998) 197 CLR 316 **[JBA Part C Vol 3 ,463]**, 341-51 (McHugh J) **[p488 – 498]**; 383 [174] (Kirby J) **[p531]**; 402 [217] (Callinan J) **[p549]**; *IL v The Queen* (2017) 262 CLR 268, 283 [30] (Kiefel CJ, Keane and Edelman JJ) **[JBA Part C Vol 3 p276]**; and *Mitchell & Ors v The King* (2023) 407 ALR 587, 599-600 [54]-[55] (Gordon, Edelman and Steward JJ) **[JBA Part D Vol 5, p875 – 876]**.

14 Appellant's Submissions,]39] **[p11]**.