HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND GORDON JJ

Matter No P45/2019

ROBERT CHRISTOPHER JAMES PICKETT — APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA — RESPONDENT

Matter No P46/2019

STEFAN LAZBA MEAD — APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA — RESPONDENT

Matter No P47/2019

CLINTON FREDRICK MEAD — APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA — RESPONDENT

Matter No P48/2019

DYLAN TERRANCE WAYNE ANTHONY — APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA — RESPONDENT

Matter No P49/2019

TSM (A CHILD) APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Pickett v Western Australia
Mead v Western Australia
Mead v Western Australia
Anthony v Western Australia
TSM (a child) v Western Australia
[2020] HCA 20
Date of Hearing: 13 March 2020
Date of Judgment: 29 May 2020
P45/2019, P46/2019, P47/2019, P48/2019 & P49/2019

ORDER

In each matter:

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

S Vandongen SC with A J Robson for the appellants in all matters (instructed by Legal Aid WA)

A L Forrester SC with L M Fox for the respondent in all matters (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Pickett v Western Australia
Mead v Western Australia
Mead v Western Australia
Anthony v Western Australia
TSM (a child) v Western Australia

Criminal law – Parties to offences – Where group of eight males assaulted victim – Where group included appellants and a youth aged 11 years ("PM") – Where one member of group stabbed victim causing death – Where appellants charged with murder under *Criminal Code* (WA) – Where Crown alleged seven males who did not stab victim deemed to have taken part in committing offence under s 7(b), s 7(c) or s 8 of *Criminal Code* – Where ss 7(b), 7(c) and 8 of *Criminal Code* operated when "an offence is committed" – Where reasonably possible that PM inflicted fatal stab wound – Where PM could not be criminally responsible for acts unless he had capacity to know he ought not to do act under s 29 of *Criminal Code* – Where prosecution adduced no evidence to establish capacity – Where trial judge declined to direct jury that they could not convict appellants of murder unless satisfied beyond reasonable doubt PM did not cause death – Where appellants convicted of murder – Whether trial judge erred in declining to direct jury that they could not convict appellants of murder unless satisfied that PM did not cause death – Whether "offence" committed for purposes of ss 7(b), 7(c) and 8 where failure to prove criminal responsibility of person who may have done act constituting offence.

Words and phrases – "accessorial criminal liability", "an offence is committed", "authorised or justified or excused by law", "commission of an offence", "common law antecedents", "construction of the Code", "criminally responsible", "enabler or aider", "excuse", "justification", "liable to punishment", "offence", "participants in the offence", "parties to the offence", "party to an unlawful common purpose", "principal offender", "unlawful killing".

Criminal Code (WA), Chs V, XXVI; ss 1, 2, 7, 8, 29, 36, 268, 277, 279.

1 KIEFEL CJ, BELL, KEANE AND GORDON JJ. The issue in these appeals is whether ss 7(b), 7(c) and 8 of the *Criminal Code* (WA) ("the Code") apply to render an enabler or an aider, or a party to an unlawful common purpose, guilty of murder in circumstances where the deceased may have been actually killed by a child who had not been shown to be criminally responsible for the killing because of the operation of s 29 of the Code. The appellants contend for a negative answer to this question. Their contention should be rejected and their appeals dismissed.

2 The provisions of ss 7(b), 7(c) and 8 of the Code operate to attribute to an accused person who is respectively an enabler or an aider, or a party to an unlawful common purpose the prosecution of which had, as a probable consequence, the killing or causing of grievous bodily harm to another, the acts of another person who actually killed the deceased. But they do not attribute to another participant circumstances personal to the actor that, under Ch V of the Code, relieve the actor of criminal responsibility for his or her acts.

3 In the present case, the circumstance that the person who actually killed the deceased may not have been criminally responsible for his act by reason of s 29 of the Code is immaterial to the guilt of each of the appellants under s 7(b), s 7(c) or s 8 of the Code. The liability of each of the appellants to punishment for the murder of the deceased did not depend on proof beyond reasonable doubt that the child who may have fatally wounded the deceased had the capacity to know that he ought not strike that blow.

The facts

4 On 27 January 2016, at about 3.30 am, Patrick Steven Slater ("the Deceased") died as a result of a stab wound to his chest[1]. The wound was inflicted during an attack by a group of eight male persons. That group included the appellants: Clinton Mead, Dylan Anthony, Robert Pickett, Stefan Mead and a youth identified as TSM[2].

5 The stabbing took place on the first floor of The Esplanade Train Station complex in Perth[3]. It occurred at the conclusion of the third of three altercations that took place in the early hours of 27 January 2016, between two groups of

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1 *Birdsall v Western Australia* (2019) 54 WAR 418 at 427 [1].

2 *Birdsall v Western Australia* (2019) 54 WAR 418 at 427 [3], [6].

3 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [17].

people[4]. One group comprised the five appellants as well as three other persons: Christopher Birdsall and the juveniles PM and JW ("the Appellants' Group"). PM was aged 11 at the time of the stabbing; it is uncontested that he may have been the person who inflicted the fatal wound to the Deceased. The other group consisted of the Deceased and his acquaintances ("the Deceased's Group")[5].

6 The first altercation commenced about 2.45 am and lasted for about five minutes[6]. Physical fighting broke out between members of the two groups[7]. It involved the Deceased producing a machete without striking or threatening anyone with it[8]. Another member of the Deceased's Group hit Robert Pickett with a tomahawk[9].

7 The second altercation occurred about 15 minutes after the first had concluded[10]. It involved members of both groups throwing rocks and pieces of concrete at one another[11]. The Deceased's Group ran up the escalators or stairs to the first floor of the complex; members of the Appellants' Group ran after them[12]. Some members of the Appellants' Group threw objects towards the Deceased and another member of the Deceased's Group, but the objects did not strike anyone[13].

8 After the conclusion of the second altercation, Christopher Birdsall, Robert Pickett, TSM, Stefan Mead, JW and PM entered Stefan Mead's motor vehicle and drove a short distance away from The Esplanade where they met with

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4 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [18].

5 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [18].

6 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [19].

7 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [19].

8 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [19].

9 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [19].

10 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [20].

11 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [20].

12 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [20].

13 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428 [20].

Clinton Mead and Dylan Anthony, who had not been involved in the first two altercations[14]. The Appellants' Group collected various items capable of being used as weapons, before walking back towards The Esplanade[15].

9 The third altercation began shortly before 3.30 am[16]. Each of the eight members of the Appellants' Group was captured by CCTV footage proceeding to the first floor of The Esplanade Train Station complex using either the stairs or the escalators[17]. Each appeared to be carrying weapons or objects that could be used as weapons in their hands, although the nature of some of those objects could not readily be discerned[18]. Robert Pickett was seen on the footage walking up the stairs holding pieces of blue and white cloth in his left hand and reaching into his pocket with his right hand to retrieve an apparently flat object[19]. PM was seen walking up the stairs carrying a bottle in his right hand and a socket bar in his left hand[20].

10 As appears from the CCTV footage, the Deceased ran across a concrete concourse towards a grassed area, and the Appellants' Group followed him[21]. At the conclusion of the chase, the Appellants' Group assaulted the Deceased for about 50 seconds, but there was no CCTV footage of the assault[22]. The Deceased suffered 23 external injuries as a result of actions undertaken by the Appellants' Group during the assault[23]. There was evidence that during the assault, Christopher Birdsall kicked the Deceased on the head and other parts of his body,

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14 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428-429 [21].

15 *Birdsall v Western Australia* (2019) 54 WAR 418 at 428-429 [21].

16 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [22].

17 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [22].

18 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [22].

19 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [23].

20 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [23].

21 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [24].

22 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [24].

23 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [25].

Clinton Mead struck the Deceased with the metal star picket and Dylan Anthony struck the Deceased with a long wooden pole[24]. At some stage, one of the Appellants' Group used a screwdriver to stab the Deceased in the chest, puncturing his aorta and both lungs and causing him to bleed to death shortly afterwards[25].

11 The Appellants' Group fled, making no attempt to assist the Deceased[26]. CCTV footage showed that as the Appellants' Group descended the stairs, Robert Pickett was carrying a piece of red cloth under his left arm and PM was carrying the socket bar and a screwdriver[27].

The proceedings

12 Each of the eight males of the Appellants' Group was charged with murder[28]. JW pleaded guilty to manslaughter, and his plea was accepted by the Crown[29]. PM was tried separately in the Children's Court of Western Australia[30]. He was convicted of manslaughter[31].

13 The appellants and Christopher Birdsall pleaded not guilty and were tried together in the Supreme Court of Western Australia before a judge and jury[32].

The appellants' trial

14 At the trial of the appellants and Christopher Birdsall, the case for the prosecution was put on the basis that one member of the Appellants' Group

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24 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [25].

25 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [26].

26 *Birdsall v Western Australia* (2019) 54 WAR 418 at 429 [27].

27 *Birdsall v Western Australia* (2019) 54 WAR 418 at 430 [29].

28 *Birdsall v Western Australia* (2019) 54 WAR 418 at 427 [3].

29 *Birdsall v Western Australia* (2019) 54 WAR 418 at 427 [5].

30 *Birdsall v Western Australia* (2019) 54 WAR 418 at 427 [4].

31 *Birdsall v Western Australia* (2019) 54 WAR 418 at 427 [11].

32 *Birdsall v Western Australia* (2019) 54 WAR 418 at 427 [8].

inflicted the stab wound which killed the Deceased during the third altercation[33]. While that person, and only that person, actually caused the death of the Deceased for the purposes of s 7(a) of the Code[34], the prosecution case was that each of the other seven males was, on one or more of the following bases, deemed to have taken part in committing the offence[35]:

(1) As a person who did an act for the purpose of enabling or aiding one of the other seven males to commit the offence, pursuant to s 7(b) of the Code.

(2) As a person who aided another one of the seven males in committing the offence, pursuant to s 7(c) of the Code.

(3) As a person who formed a common intention, with the person who committed the offence, to prosecute an unlawful purpose (being assault to the Deceased or another member of the Deceased's Group) with that other person, and in the prosecution of that purpose an offence of murder was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, pursuant to s 8 of the Code.

15 The prosecutor, in her final address, invited the jury to conclude that Robert Pickett had a screwdriver in his hands when he arrived at the third altercation, that this screwdriver was the weapon that inflicted the fatal wound, and that Robert Pickett could have been the person who stabbed the Deceased in the chest and killed him[36]. It is now not in dispute, however, that the prosecution had not proved beyond reasonable doubt that it was Robert Pickett, rather than PM, who stabbed the Deceased. The argument in this Court and in the Court of Appeal thus proceeded on the basis that it was reasonably possible that PM stabbed the Deceased.

16 By reason of s 29 of the Code, because PM was under the age of 14 at the time of the offending, but over the age of ten, he could not be criminally responsible for his acts in killing the Deceased unless it was proved by the prosecution that, at the time of the killing, he had the capacity to know that he

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33 *Birdsall v Western Australia* (2019) 54 WAR 418 at 430 [31].

34 *Birdsall v Western Australia* (2019) 54 WAR 418 at 430 [31].

35 *Birdsall v Western Australia* (2019) 54 WAR 418 at 430 [32].

36 *Birdsall v Western Australia* (2019) 54 WAR 418 at 430 [34].

ought not to do the act. It is common ground that the prosecution adduced no evidence to establish PM's capacity beyond reasonable doubt at the appellants' trial[37].

17 It was argued that because the prosecution had not proved that PM had the capacity to know that he ought not to have killed the Deceased, he could not be guilty of the murder of the Deceased, and the appellants could not have been parties to the offence of murder unless the jury were satisfied beyond reasonable doubt that the fatal blow was struck by an assailant other than PM. The trial judge (Martino J) declined to direct the jury that it was not open to them to convict any of the appellants or Christopher Birdsall of murder unless they were satisfied beyond reasonable doubt that PM was not the person who stabbed the Deceased[38].

18 Each of the appellants and Christopher Birdsall was convicted of murder[39]. Appeals to the Court of Appeal of the Supreme Court of Western Australia by the appellants were unsuccessful.

The Court of Appeal

19 The majority of the Court of Appeal (Buss P and Mazza JA) held that in ss 7 and 8 of the Code, the expression when "an offence is committed" refers to the doing of an act or the making of an omission, being the element of conduct that constitutes an offence under the Code[40]. Their Honours further held that ss 7 and 8, when engaged, operate to attribute those acts to the other participants in the offence[41]. This approach reflected the view of the proper construction of the Code that prevailed in *R v Barlow*[42]. That view had earlier been taken by the Queensland

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37 *Birdsall v Western Australia* (2019) 54 WAR 418 at 434 [60].

38 *Birdsall v Western Australia* (2019) 54 WAR 418 at 433 [55].

39 *Birdsall v Western Australia* (2019) 54 WAR 418 at 427 [8].

40 *Birdsall v Western Australia* (2019) 54 WAR 418 at 449-450 [158]-[159], 450 [162].

41 *Birdsall v Western Australia* (2019) 54 WAR 418 at 449-450 [158]-[159], 450 [162].

42 (1997) 188 CLR 1 at 11.

Court of Criminal Appeal in *R v Jervis*[43]. A contrary view was subsequently taken in *Hind and Harwood*[44]; and that contrary view was overruled by the decision of this Court in *Barlow*.

20 Buss P and Mazza JA went on to hold that each of the appellants was rightly convicted of the murder of the Deceased by reason of the operation of s 7(b), s 7(c) or s 8 of the Code notwithstanding that PM, as the hypothetical killer, was not criminally responsible for killing the Deceased[45]. Their Honours said[46]:

> "[C]riminal responsibility is not an element of an offence. The fact that a person has actually done or is deemed to have done all of the acts or made all of the omissions which constitute an offence is separate and distinct from whether the person is criminally responsible for those acts or omissions."

21 Beech JA, in dissent, reasoned that the operation of ss 7 and 8 was dependent on the commission of an offence by a "principal offender"[47]. His Honour held that because PM was not criminally responsible for killing the Deceased, no offence was committed by him, and so ss 7(b), 7(c) and 8 of the Code had no operation in relation to the appellants[48]. Accordingly, in the view of Beech JA, the trial judge erred in law in failing to direct the jury that in the circumstances, they could convict the appellants only if satisfied beyond reasonable doubt that PM was not the person who inflicted the injury that caused the death[49].

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43 [1993] 1 Qd R 643 at 652-653.

44 (1995) 80 A Crim R 105 at 136-137, 140; cf at 142-143.

45 *Birdsall v Western Australia* (2019) 54 WAR 418 at 455 [194].

46 *Birdsall v Western Australia* (2019) 54 WAR 418 at 452 [177].

47 *Birdsall v Western Australia* (2019) 54 WAR 418 at 507 [495].

48 *Birdsall v Western Australia* (2019) 54 WAR 418 at 492-493 [422].

49 *Birdsall v Western Australia* (2019) 54 WAR 418 at 507 [495].

The Code determines the issue

22 The issue that divided the Court of Appeal in this case is an issue as to the proper construction and application of the Code. In *Brennan v The King*[50], Dixon and Evatt JJ, having observed that s 8 of the Code "appears to be based in some respects" upon Sir Michael Foster's statement of the position under the common law, said:

> "But it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered".

23 In *Stuart v The Queen*[51], Gibbs J, with whom Menzies and Mason JJ agreed, referred to this passage as stating the correct approach to the interpretation of a section of the *Criminal Code* (Qld) ("the Code (Qld)"). Gibbs J went on to say[52]:

> "This passage does not mean that it is never necessary to resort to the common law for the purpose of aiding in the construction of the Code – it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground: see *Robinson v Canadian Pacific Railway Co*, cited in *R v Scarth*. If the Code is to be thought of as 'written on a palimpsest, with the old writing still discernible behind' (to use the expressive metaphor of Windeyer J in *Vallance v The Queen*), it should be remembered that the first duty of the interpreter of its provisions is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance."

24 The proper approach to the resolution of the issue before the Court is illuminated by the exposition of ss 7 and 8 by Brennan CJ, Dawson and Toohey JJ,

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50 (1936) 55 CLR 253 at 263.

51 (1974) 134 CLR 426 at 437. See also *R v Jervis* [1993] 1 Qd R 643 at 647 per McPherson A-CJ.

52 *Stuart v The Queen* (1974) 134 CLR 426 at 437 (footnotes omitted).

who constituted the majority in *Barlow*. It will be necessary to pay close attention to that exposition; but at this stage it is sufficient to note that in *Barlow* their Honours focused, not upon the common law antecedents of ss 7 and 8, but upon the text of these provisions in their context in the Code (Qld), and upon the guidance afforded by the structure of the Code (Qld). Indeed, their Honours referred to the common law only to note, having concluded their discussion of the proper construction of the Code (Qld), that "[s] 8 operates in the same way in this respect as the common law"[53].

25 It is desirable now to set out the relevant provisions of the Code before addressing the arguments advanced by the appellants in this Court.

The relevant provisions of the Code

26 Chapter II of the Code makes provision in relation to the parties to an offence. Section 7 of the Code provides:

> "When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> (a) Every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) Every person who aids another person in committing the offence;
>
> (d) Any person who counsels or procures any other person to commit the offence.
>
> In the fourth case he may be charged either with himself committing the offence or with counselling or procuring its commission.
>
> A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or

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53 *R v Barlow* (1997) 188 CLR 1 at 14. See also at 12.

omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission."

27 Section 8 of the Code provides:

"(1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

(2) A person is not deemed under subsection (1) to have committed the offence if, before the commission of the offence, the person –

(a) withdrew from the prosecution of the unlawful purpose; and

(b) by words or conduct, communicated the withdrawal to each other person with whom the common intention to prosecute the unlawful purpose was formed; and

(c) having so withdrawn, took all reasonable steps to prevent the commission of the offence."

28 The terms "criminally responsible" and "criminal responsibility" are defined in s 1(1) of the Code as follows:

"The term ***criminally responsible*** means liable to punishment as for an offence; and the term ***criminal responsibility*** means liability to punishment as for an offence".

29 Section 2 of the Code explains the meaning of the term "offence":

"An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence."

30 Chapter V of the Code sets out circumstances relevant to questions of criminal responsibility generally. Within Ch V, s 36 provides:

"The provisions of this Chapter apply to all persons charged with any offence against the statute law of Western Australia."

31 In the same chapter, s 29 provides:

"A person under the age of 10 years is not criminally responsible for any act or omission.

A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission."

32 Section 279 of the Code relevantly provides:

"(1) If a person unlawfully kills another person and –

(a) the person intends to cause the death of the person killed or another person; or

(b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or

(c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life,

the person is guilty of murder."

33 As to whether a killing is unlawful, s 268 provides:

"It is unlawful to kill any person unless such killing is authorised or justified or excused by law."

34 Chapter XXVI of the Code makes provision for the circumstances in which it is lawful to kill a person. It is sufficient to note here that none of the provisions of Ch XXVI were relied upon by the appellants.

The appellants' argument

35 Beech JA, in order to determine whether "an offence is committed" for the purposes of ss 7 and 8, focused upon the criminal responsibility of PM as the possible "principal offender", rather than the responsibility of the appellants for

the acts or omissions that caused the death of the Deceased. In this regard, his Honour said[54]:

> "The definition of offence directs attention to whether the person doing the act is rendered liable to punishment by having done the act. In other words, the language of the definition of offence directs attention to the liability to punishment of 'the person doing the act'. If that person is not criminally responsible for the act, the act is not one which 'renders the person doing the act ... liable to punishment'."

36 The appellants, following that approach, argued that, having regard to the definition of "criminally responsible" in s 1(1), and "offence" in s 2 of the Code, a person to whom s 29 applies is not liable to punishment for his or her acts or omissions. Because, by virtue of s 29, PM is not liable to punishment for any offence, it was said that in the killing of the Deceased, no offence was committed by PM or, by reason of the non-operation of s 7 or s 8, by anyone else.

37 One may note immediately that the appellants' argument slides from the proposition that PM is not liable to punishment for any offence in relation to the killing of the Deceased to the proposition that no offence has been committed by anyone. The error in the reasoning of Beech JA (and the appellants' arguments based on it) can be seen from the passage cited. His Honour concluded that if the person who does the act "is not criminally responsible for the act, the act is not one which 'renders the person doing the act ... liable to punishment'". This conclusion was said to follow from the focus in the language of the definition of "offence" upon "the liability to punishment of 'the person doing the act'". This focus led Beech JA to read the definition of "offence" as if it referred to "an act ... which of *itself* renders the person doing the act liable to punishment". In other words, his Honour equated "an act ... which renders the person doing the act ... liable to punishment" with "an act ... which suffices to establish the liability of the person doing the act ... to punishment". As will be seen, the majority in *Barlow* explained that the definition of "offence" refers, not to the concatenation of elements and circumstances that establish liability to punishment, but to the conduct element of an offence (being an act or omission), which, if combined with other circumstances, renders the offender liable to punishment.

38 On the hypothesis that PM struck the fatal blow, one may accept, in the absence of any evidence regarding his capacity, that PM was not criminally responsible for the murder of the Deceased because of his immature age. But it is another thing to say that it follows that no offence was committed by him or by

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54 *Birdsall v Western Australia* (2019) 54 WAR 418 at 497 [445].

those of mature age who enabled or aided him to stab the Deceased. Given the circumstances of the death of the Deceased, it is, to say the least, surprising that it could be suggested that the death of the Deceased did not involve the commission of an offence. The evidence that the Deceased was stabbed in the chest with a screwdriver and died as a result was unchallenged; and the inference that whoever struck that blow did so with murderous intent is compelling, as the jury's verdict confirms. And there is no suggestion that it was not open to the jury to conclude that each of the appellants either struck the fatal blow himself with murderous intent or aided the person who did so knowing that person was possessed of such an intention.

39 In cases like the present, it may be practically impossible to identify the participant who struck the killing blow. That this is so has not been suggested to be an obstacle to the operation of ss 7 and 8. It has not been suggested that there was any deficiency in the terms of the indictment presented by the prosecution in this case. The indictment alleged simply that "[o]n 27 January 2016 at Perth [the appellants] murdered [the Deceased]". None of the appellants was alleged to be the "principal offender" whose offence the others enabled or aided. It has not been suggested that it was necessary for the jury in the present case to come to a conclusion as to the identity of the person who actually struck the blow that fatally wounded the Deceased as a condition precedent to a determination of the guilt of the alleged participants who were on trial. To the extent that it is now an integral part of the appellants' argument that proof that the fatal blow was not struck by PM as the "principal offender" is a condition precedent to the application of ss 7 and 8 against any of the appellants, the argument rests upon a view of the Code that is not supported by the terms of the Code.

40 Even without the instruction afforded by this Court's exposition of ss 7 and 8 in *Barlow*, it can be seen that the appellants' argument departs from the terms of the Code in its suggestion that ss 7 and 8 have no operation unless liability to punishment of a "principal offender" is established. Neither s 7 nor s 8, by its terms, distinguishes between principal and secondary offenders. Rather, each section makes each of the persons within its scope a principal offender. Section 7 is explicit in this regard; and there is no reason to regard s 8 as operating upon a different basis. While it is, no doubt, convenient to speak of a person who actually does an act or makes an omission which constitutes an offence as "the principal offender", the use of that short-hand for the purposes of discussion should not be allowed to obscure the point that s 7 expressly attributes to the persons mentioned in s 7 the acts or omissions that constitute the offence. In this regard, it proceeds from the assumption that an "offence is committed".

41 The appellants' argument also departs from the Code by suggesting that, by the operation of ss 7 and 8, it is the criminal responsibility of the "principal

offender", rather than his or her acts or omissions, that is imputed to other participants. It is to be noted that s 7(a) refers expressly to "the act or ... omission which constitutes the offence". It is hardly to be supposed that the word "offence" in the introductory words of s 7, "[w]hen an offence is committed", bears a meaning different from that spelt out in terms in s 7(a). And it is noteworthy that neither s 7 nor s 8 speaks of "criminal responsibility" or "liability to punishment" in relation to that which is attributed to the other participants.

42 As to the appellants' reliance upon the definition of "criminal responsibility" in s 1(1), and the description of "offence" in s 2, it has long been accepted that the freedom from criminal responsibility conferred by s 36 and the other provisions of Ch V of the Code must be negatived in order to establish criminal responsibility where an issue arises in the case as to the possible application of those provisions[55]. Whether the act or omission that constitutes an offence entails the conclusion that the person doing the act or making the omission is liable to punishment may depend upon whether, in the circumstances of the case, the possible application of the provisions of Ch V of the Code has been negatived by the prosecution. But it has never been suggested that the freedom from criminal responsibility enjoyed by an individual participant in a crime, by reason of circumstances personal to that individual that are apt to engage the provisions of Ch V, also enures to confer a like freedom on others not similarly circumstanced.

43 The provisions of Ch V of the Code do not alter the terms of the Code's proscriptions or defences. If PM, as the hypothetical killer of the Deceased, had struck the lethal blow in self-defence in accordance with s 248(4), which is to be found in Ch XXVI of the Code, his assault upon the Deceased would not have been unlawful. It might be said that PM's act was not the conduct element of an offence because his assault was a lawful act under s 248(4). But there was no suggestion that PM acted in self-defence and so no issue arises in that regard. Nor, for that matter, was there any suggestion that the stabbing occurred in any of the other circumstances that might make an assault lawful under Ch XXVI of the Code.

44 Chapter V of the Code applies, by virtue of s 36, to "all persons charged with any offence against the statute law of Western Australia". Reading s 36 epexegetically, it applies the provisions of Ch V to "all persons charged with any act or omission against the statute law of Western Australia". Accordingly, as has previously been said[56], an act or omission that otherwise constitutes an offence

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55 *Hunt v Maloney; Ex parte Hunt* [1959] Qd R 164 at 172, 182-183; *Kehoe v Dacol Motors Pty Ltd; Ex parte Dacol Motors Pty Ltd* [1972] Qd R 59 at 64-65, 77, 79-81.

56 See *Pickering v The Queen* (2017) 260 CLR 151 at 159 [21].

under the Code may not entail liability to punishment by reason of the application of one or more of the provisions of Ch V. As will be seen, this view of the operation of s 2 of the Code draws support from the reasons of the majority of this Court in *Barlow*.

Barlow

45 In *Barlow*, the accused, a prisoner in gaol in Brisbane, was alleged to have been a party with other prisoners to a plan to kill their fellow inmate, Bart Vosmaer. Barlow's co-offenders were convicted of murder. The jury acquitted Barlow of murder but convicted him of manslaughter, evidently on the basis that he was a party to a plan to assault Vosmaer, but not to kill him or inflict grievous bodily harm on him. The Court of Appeal of Queensland, following its earlier decision in *Hind and Harwood*, allowed Barlow's appeal against his conviction for manslaughter on the ground that, where the prosecution relies on s 8 to found a charge of murder against an accused person, a verdict of manslaughter is not open to the jury where they find the actors who actually assaulted the deceased guilty of murder.

46 The particular issue that fell to be resolved in *Barlow* was whether s 8 of the Code (Qld) allows for alternative verdicts of murder and manslaughter against participants in the prosecution of an unlawful purpose to inflict physical harm on another. In *Hind and Harwood*[57], the Court of Appeal of Queensland had held that alternative verdicts were not permitted on the basis that the expression "the offence" in s 8 refers to the offence for which the actual assailant is convicted and punished. This approach produced an "all or nothing" outcome whereby, if one of the parties to an unlawful purpose is convicted of murder, s 8 requires that other parties to the purpose must be either convicted of murder or acquitted. In the course of rejecting this approach, Brennan CJ, Dawson and Toohey JJ said[58]:

> "As the doing of an unlawful act by the principal offender has to be proved by evidence admitted against the secondary party – and not by a verdict in the case of the principal offender – should the secondary party be entitled to an acquittal if the jury be left in a reasonable doubt on the evidence in his case as to whether the principal offender had the intention that would make him liable for a more serious offence? So bizarre an interpretation of s 8 confirms, in our respectful opinion, the correctness of the majority view in

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57 (1995) 80 A Crim R 105 at 136, 141.

58 *R v Barlow* (1997) 188 CLR 1 at 11 (footnote omitted).

Jervis and the consequent error of the view espoused in *Hind and Harwood*."

47 The fundamental error in *Hind and Harwood* that was decisively corrected by the decision in *Barlow* was the notion that ss 7 and 8 were concerned to impute to other participants in an offence the criminal responsibility of the person who did the act or made the omission that constituted the offence. As Brennan CJ, Dawson and Toohey JJ explained in relation to s 8 in particular, it is the conduct of the actor, that is to say, his or her acts or omissions, upon which the Code fastens[59]. The circumstances of the offence, including its result and the state of mind which accompanied the acts or omissions that constituted it, establish the offence as being of a particular "nature" for the purposes of s 8 of the Code[60].

48 In overruling *Hind and Harwood*, Brennan CJ, Dawson and Toohey JJ said that s 8 "sheets home to the secondary offender such conduct (act or omission) of the principal offender as (1) renders the principal offender liable to punishment but (2) only to the extent that that conduct (the doing of the act or the making of the omission) was a probable consequence of prosecuting a common unlawful purpose"[61]. These observations were directed to the issue raised by the invocation of s 8 in the case before them. Their Honours' observations were concerned, not to assert that criminal responsibility on the part of the actor (which was not in issue in that case) is necessary to the operation of the section against a participant, but to make the point that s 8 does not operate to deem a participant to be criminally responsible to the same extent as the actor.

49 The majority in *Barlow* held that a participant other than the actor may be criminally responsible for a lesser offence than that for which the actor is criminally responsible, by reason of a difference in the states of mind accompanying their participation in the acts that constitute the offence. Consistently with that holding, ss 7 and 8 may apply so that a participant other than the actor may be criminally responsible for an act or omission of the actor, even though the actor is not criminally responsible by reason of a difference in his or

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59 *R v Barlow* (1997) 188 CLR 1 at 10. See also *R v Keenan* (2009) 236 CLR 397 at 436 [132].

60 *R v Barlow* (1997) 188 CLR 1 at 10. See also *R v Keenan* (2009) 236 CLR 397 at 436 [132].

61 *R v Barlow* (1997) 188 CLR 1 at 10.

her personal circumstances and the engagement of different provisions of the Code as a result of those circumstances.

When "an offence is committed"

50 In ss 7 and 8, the expression when "an offence is committed" is not to be taken as suggesting that the actor's liability to punishment for that offence is a condition precedent to the operation of the provisions. That this is so is apparent in s 7 itself because s 7(a) expressly deems "[e]very person who actually does the act or makes the omission which constitutes the offence" to be guilty of the offence. That deeming would be otiose, and indeed would make little sense, if proof of the commission of the offence by that person was a pre-condition to the operation of s 7 at all.

51 As has been observed, neither s 7 nor s 8 suggests that it is necessary to identify a principal offender who has committed an offence. Rather, as reference to the analysis in *Barlow* shows, the relevant issue in the trial of an accused participant where the prosecution relies upon ss 7 and 8 is whether the prosecution has proved against the accused that an act or omission has occurred which constitutes the conduct element of an offence, and in relation to which the accused participant has such a connection as to be deemed to have taken part in that act or omission.

An offence

52 In *Barlow*, Brennan CJ, Dawson and Toohey JJ held that in ss 7 and 8 of the Code (Qld), the term "offence" refers to the element of conduct (an act or omission) which, subject to the operation of the other provisions of the Code (Qld) based upon the personal circumstances of the particular accused participant, may render the accused liable to punishment[62]. Their Honours began by acknowledging that "offence" in s 8 was capable of more than one meaning. In their Honours' view, "offence" might mean "an offence as defined in the Code" or "what a principal offender has actually done or omitted that renders the principal offender liable to punishment"[63]. Their Honours concluded that the term was not to be understood as the concatenation of elements which constitute a particular offence under the Code (Qld), nor as the combination of facts which together render an actual offender liable to punishment. Rather, the term was to be understood as

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62 (1997) 188 CLR 1 at 9-10.

63 *R v Barlow* (1997) 188 CLR 1 at 8.

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[64].

53 It is necessary to pay close attention to what their Honours said[65]:

> "'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 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)."

54 Their Honours resolved the competing possibilities as to the meaning of "offence" in ss 7 and 8 in favour of the view that it means 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"[66]. That resolution is inconsistent with the understanding of "offence" that lies at the heart of the reasons of Beech JA.

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64 *R v Barlow* (1997) 188 CLR 1 at 9. See also *R v KAR* [2019] 2 Qd R 370 at 392 [57].

65 *R v Barlow* (1997) 188 CLR 1 at 9 (emphasis in original).

66 *R v Barlow* (1997) 188 CLR 1 at 9.

Their Honours found contextual support for their conclusion in s 2 of the Code (Qld)[67]:

> "Section 2 of the Code makes it clear that 'offence' is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment. Section 7(a) confirms that 'offence' is used to denote the element of conduct in that sense. By the ordinary rules of interpretation, the term must bear the same meaning in pars (b), (c) and (d) of s 7 as it bears in par (a). Section 8, which complements s 7 and extends the net of criminal liability for an offence to the parties who have formed a common intention of the kind therein mentioned, reveals no ground for attributing a different meaning to 'offence' in s 8."

55 In *R v Keenan*[68] Kiefel J, with whom Hayne, Heydon and Crennan JJ agreed, referred to this passage with evident approval.

56 Importantly, in *Barlow*, Brennan CJ, Dawson and Toohey JJ went on to support their preferred construction of "offence" by reference to the structure of the Code (Qld). Their Honours explained[69]:

> "The structure of Ch V of the Code shows this to be the meaning of 'offence' generally in the Code. The first paragraph of s 23 deals first with criminal responsibility for an act or omission then with criminal responsibility for the result. It then adverts in the second paragraph of s 23 to specific intent to cause a result as a state of mind distinct from the voluntariness referred to in the first paragraph of s 23. The element of specific intent is dealt with again by the third paragraph of s 28 which makes provision for the effect of intoxication. Section 24 deals with mistake as to the circumstances in which an act is done or an omission is made. Section 27 and the first paragraph of s 28 relate to disorders of the mind that might affect voluntariness in the doing of an act or the making of an omission or a mistake in circumstances accompanying an act or omission

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67 *R v Barlow* (1997) 188 CLR 1 at 9.

68 (2009) 236 CLR 397 at 435-436 [130]-[131].

69 *R v Barlow* (1997) 188 CLR 1 at 9-10.

as well as a capacity 'to know that he ought not to do the act or make the omission'."

57 It is convenient also to note here that s 23A(2) of the Code provides that "[a] person is not criminally responsible for an act or omission which occurs independently of the exercise of the person's will". In *Kaporonovski v The Queen*[70], Gibbs J (with whom Stephen J agreed) said of the Queensland analogue to s 23A(2) that the "act" to which the provision refers is a physical action apart from its consequences. His Honour gave as examples the firing of the gun rather than the wounding in *Vallance v The Queen*[71], and the wielding of the stick rather than the killing of the baby in *Timbu Kolian v The Queen*[72]. Here, the "act" that constitutes the offence for the purposes of ss 7 and 8 is the physical act of stabbing the Deceased rather than the physical harm the Deceased suffered as a consequence[73]. In this case, the stabbing of the Deceased was an act that constituted the conduct element of the offence of murder, having regard to the murderous intent of the assailant and the consequences of the stabbing. But, consistently with the view that prevailed in *Barlow*, it was the stabbing that was the "offence" that was committed so as to engage the operation of ss 7 and 8 of the Code.

58 The observations of Brennan CJ, Dawson and Toohey JJ acknowledge that the provisions of Ch V of the Code apply where an act has been committed for which the offender would be liable to punishment, depending on the circumstances[74]. Consistently with that view, an offence within the meaning of ss 7 and 8 may be committed even though the person who did the act or made the omission that constituted the offence is not criminally responsible for the offence by reason of the application of Ch V of the Code. True it is that in *Barlow*, there was no suggestion that the equivalent of the provisions of Ch V of the Code were in play. But the guidance afforded by their Honours' acknowledgement of the significance of Ch V to the proper understanding of ss 7 and 8 is important.

59 The personal circumstances referred to in the provisions of Ch V adverted to by their Honours are immaterial to whether an act has been done, and so to

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70 (1973) 133 CLR 209 at 231.

71 (1961) 108 CLR 56.

72 (1968) 119 CLR 47.

73 See *Pickering v The Queen* (2017) 260 CLR 151 at 159-160 [22].

74 See also *Pickering v The Queen* (2017) 260 CLR 151 at 159 [21].

whether an offence has been "committed" for the purposes of ss 7 and 8. Rather, as their Honours recognised, these provisions operate upon the hypothesis that liability to punishment as for an offence would otherwise be established under the provisions of the Code or other statutes. It would be inconsistent with their Honours' reasoning to treat the possible application of the provisions of Ch V to one participant in the doing of an act that constitutes an offence as an obstacle to the operation of s 7 or s 8 of the Code in relation to others. The overarching application of Ch V of the Code means that while the commission of an offence is a necessary condition of criminal responsibility, the commission of an offence is not always sufficient of itself to establish liability for punishment.

60 One may illustrate this aspect of the operation of the Code by reference to ss 24 and 27, which, like s 29, are to be found in Ch V of the Code. First, it is to be noted that ss 24 and 27(2)[75] speak in terms of a person being criminally responsible for an act or omission to an "extent". The notion that a person may be criminally responsible for an act or omission only to the extent contemplated by ss 24 and 27(2) confirms that an offence may be committed that incurs only limited criminal responsibility on the part of the offender. That is because, as explained in *Barlow*, the determination of a person's criminal responsibility is a question distinct from whether the act that constitutes an offence has been committed.

61 Secondly, on the approach urged by the appellants, a person who aids an insane person intentionally to strike and thereby kill another person could not be held criminally responsible for murder. But the understanding of the meaning of "offence" in ss 7 and 8 explained in *Barlow* means that the Code does not have that result. On that understanding, a person who enables or aids a person of unsound mind to strike a blow that kills another is not relieved of criminal responsibility for what is an unlawful killing by the circumstance that the person who intentionally struck the killing blow is not criminally responsible by reason of insanity. Similarly, a person who enables the doing of the act or the making of the omission by another, and is thereby deemed by s 7(b) to have taken part in the act or omission, will not be criminally responsible for the offence constituted by it if the

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75 Section 27(2) provides that "[a] person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist". Section 27(1) provides relevantly that "[a] person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing".

enabler has acted under a mistake of fact within the meaning of s 24 of the Code. On the other hand, if the person who actually does the act or makes the omission that constitutes the offence does so under a mistake of fact within the meaning of s 24, but the enabler has not been under any such mistake, the enabler will be criminally responsible for the offence even though the actor is not. And so, in the present case, a person who enables or aids a person of immature age to murder another person is not relieved of criminal responsibility for his participation in the murder.

62 As noted above, the circumstances of the death of the Deceased were such that it was open to the jury to infer that the person who actually plunged the screwdriver into the chest of the Deceased, thereby killing him, acted with the intention of causing death or grievous bodily harm so that murder had been committed. On the hypothesis that it was PM who actually struck the lethal blow, s 29 operates with ss 1(1) and 2 of the Code, not to say that no offence had been committed, but to say that PM was not liable to punishment for the act that constituted the offence. And so, even on that hypothesis, it was open to the jury to apply ss 7 and 8 to conclude that the appellants were guilty of the offence of murder constituted by the acts of PM in stabbing the Deceased with murderous intent.

63 The appellants argued that the observations of Gageler, Gordon and Edelman JJ in *Pickering v The Queen*[76] are an obstacle to this construction of ss 7 and 8. *Pickering* was concerned with the application of s 31 of the Code (Qld), which provides that a person is "not criminally responsible" for an act if the person does the act in one of the circumstances prescribed by s 31(1). Gageler, Gordon and Edelman JJ said that "an act done in one of the circumstances specified in s 31(1) is not an *offence*; the act does not constitute an offence"[77].

64 This observation was concerned, not with the criminal responsibility of a participant under ss 7 and 8 of the Code (Qld), but with the exculpatory effect of a provision invoked by an individual as a defence to a charge of murder. There was no occasion in *Pickering* to attend to the difference between whether an offence has been committed and whether a particular accused is criminally responsible for the offence. The issue was whether s 31(1) of the Code (Qld) was available in the

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76 (2017) 260 CLR 151.

77 *Pickering v The Queen* (2017) 260 CLR 151 at 165 [40] (emphasis added).

circumstances to exculpate the accused in relation to the offence charged[78]. That being so, it was convenient and relevantly innocuous to speak of s 31(1) of the Code (Qld) as having the effect that no offence had been committed[79]. Issues requiring more nuanced attention, such as those thrown up by ss 7 and 8 of the Code, did not arise for consideration. Certainly, their Honours cannot be taken to have been expressing disapproval of the analysis in *Barlow*.

65 The appellants advanced a further argument, adopting the view of Beech JA, that the final paragraph of s 7 of the Code supported their preferred construction. Beech JA considered that this paragraph was an express and exhaustive statement of the only circumstances in which a participant may be criminally responsible where the doing of the relevant act does not render the actor liable to punishment[80]. But the last paragraph of s 7 cannot be read as having a limiting operation upon the scope of paras (a) to (d) of s 7. The last paragraph has a different scope: it is apt to cover cases to which the earlier paragraphs do not apply. The last paragraph of s 7 is apt to cover cases where the act done or omitted simply does not, for some reason such as ignorance of facts on the part of the person doing the act, constitute an element of any offence at all[81]. Given that the last paragraph of s 7 has work to do, it is not to be seen as implying a more limited operation for the provisions which it follows.

Conclusion

66 On the authoritative exposition of the Code in *Barlow*, s 7, in referring to "an offence", refers to the act or omission which constitutes the offence. In its operation, s 7 deems each category of person referred to in paras (a) to (d) to be a person who may be charged with the offence constituted by the act or omission. Similarly, s 8 of the Code deems each of two or more persons to have done the act, the doing of which was a probable consequence of the prosecution of an unlawful purpose. It is the doing of the act or the making of the omission by the actor that is attributed to another person or other persons, not the criminal responsibility of the

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78 *Pickering v The Queen* (2017) 260 CLR 151 at 165 [43].

79 Compare *Walden v Hensler* (1987) 163 CLR 561 at 573.

80 *Birdsall v Western Australia* (2019) 54 WAR 418 at 496-497 [438]-[444].

81 See *White v Ridley* (1978) 140 CLR 342 at 346-347; *R v Webb* [1995] 1 Qd R 680 at 684-685. See also *Kehoe v Dacol Motors Pty Ltd; Ex parte Dacol Motors Pty Ltd* [1972] Qd R 59 at 75-76.

actor. Sections 7 and 8 of the Code render a person other than the actor liable to criminal punishment for those acts or omissions, subject to the personal circumstances of that other person having regard to the other provisions of the Code. The circumstance that one of those persons may have an immunity from criminal responsibility by reason of his or her personal circumstances addressed in Ch V of the Code does not prevent the operation of ss 7 and 8 against the other persons[82].

67 Accordingly, paras (b) and (c) of s 7 apply to an enabler or aider of another person to do an act or make an omission that is the element of conduct of an offence under the Code, whether or not that other person is criminally responsible for the act or omission. And s 8 of the Code applies to a person who, with one or more other persons, forms a common intention to prosecute an unlawful purpose with another, where in the prosecution of that purpose an "offence" is committed of such a nature that its commission was a probable consequence of the prosecution of the purpose; and that is so, whether or not those other persons or some of them are criminally responsible for the act or omission.

68 When regard is had to the evidence in the present case of the nature and extent of the injuries inflicted upon the Deceased including the circumstances of the fatal wounding, it was open to the jury to conclude that whichever of the Deceased's assailants stabbed the Deceased did so without lawful excuse for the act and with murderous intent, and that that intent was shared by each participant in the attack. That the particular assailant who stabbed the Deceased may not have been criminally responsible for the offence of murder by reason of some personal circumstance peculiar to that assailant did not affect the operation of ss 7 and 8, which was to attribute the stabbing to any person who aided or enabled the stabbing, or who participated in the pursuit of the common purpose of assaulting the Deceased in the course of the prosecution of which an assault on the Deceased with murderous intent was a probable consequence. In the circumstances of the attack upon the Deceased, such a person was liable to criminal punishment as for the offence of murder unless his personal circumstances were also such as to relieve him from criminal responsibility for the murder.

69 In the present case, the liability of each of the appellants to criminal punishment for the murder of the Deceased did not depend upon proof beyond reasonable doubt either that PM had the capacity to know that he ought not to strike

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82 The position has been held to obtain in cases arising otherwise than under the Code. See *Osland v The Queen* (1998) 197 CLR 316 at 329-330 [27], 342 [72], 346 [81]; *IL v The Queen* (2017) 262 CLR 268 at 272-273 [2], 282 [29], 296-297 [65].

the blow that killed the Deceased, or that he did not strike that blow. Accordingly, the trial judge did not err in declining to instruct the jury that it did.

Order

70 Each appeal should be dismissed.

71 NETTLE J. These appeals are from a decision of the Court of Appeal of the Supreme Court of Western Australia[83] concerning the meaning of ss 7 and 8 of the *Criminal Code* (WA) ("the Code (WA)"), contained in the Schedule to Appendix B of the *Criminal Code Act Compilation Act 1913* (WA) ("the Compilation Act"). The question is whether the majority of the Court of Appeal were correct in holding that a person could be convicted of an offence of murder contrary to s 279 of the Code (WA) as an aider under s 7(b) or (c) of the Code (WA) or as a party to a common unlawful purpose under s 8 of the Code (WA) where it was reasonably possible that the killing was committed by another person, under the age of 14 years, who was not proven to be criminally responsible pursuant to s 29 of the Code (WA). For the reasons which follow, the majority were correct, and the appeals should be dismissed.

The facts

72 Following a trial before judge and jury in the Supreme Court of Western Australia, the five appellants and another male person (Birdsall) were convicted of murder contrary to s 279 of the Code (WA). The prosecution case at trial was that, shortly before 3.30 am on 27 January 2016, the appellants – along with Birdsall and two male persons then aged 11 and 14 ("PM" and "JW", respectively) – were engaged in an altercation with the deceased, Mr Slater; that one of the group unlawfully killed the deceased within the meaning of s 279 of the Code (WA), and thus was guilty of murder under s 7(a) of the Code (WA), by plunging a screwdriver some 25 cm into his chest, thereby puncturing his aorta, from which he bled to death; and that the other members of the group were guilty of murder under s 7(b) or (c) or s 8 of the Code (WA). It was open to the jury to find that PM was the member of the group who killed the deceased. The prosecution did not, however, adduce evidence sufficient to establish beyond reasonable doubt that PM had the capacity to know that he ought not do the act which killed the deceased and was thus criminally responsible under s 29 of the Code (WA), and the trial judge declined to direct the jury that it was not open to convict any of the appellants or Birdsall pursuant to s 7(b) or (c) or s 8 of the Code (WA) unless satisfied beyond reasonable doubt that PM was not the person whose act killed the deceased.

73 The appellants sought leave to appeal to the Court of Appeal on grounds including that the trial judge erred in law by failing to give that direction. In support of that ground, they asserted, in substance, that none of them could be convicted unless the jury were satisfied beyond reasonable doubt that the person whose act killed the deceased had thereby committed the offence of murder, and that PM, who was possibly the killer, could not be found to have committed that offence in the absence of proof beyond reasonable doubt that he had the capacity to know that he ought not do the act which killed the deceased. By majority (Buss P and

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83 *Birdsall v Western Australia* (2019) 54 WAR 418.

Mazza JA; Beech JA dissenting), the Court of Appeal dismissed the appeals. By grant of special leave, the appellants now appeal to this Court.

Relevant legislative provisions

The offence of murder

74 Section 2 of the Code (WA) defines an "offence" as follows:

> "An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence."

75 Section 268 of the Code (WA) provides that:

> "It is *unlawful* to kill any person unless such killing is authorised or justified or excused by law." (emphasis added)

76 Section 277 of the Code (WA) provides that:

> "Any person who *unlawfully* kills another is guilty of a crime which, according to the circumstances of the case, may be murder or manslaughter." (emphasis added)

77 Section 279(1) of the Code (WA) defines the circumstances in which a person who unlawfully kills another person is guilty of "murder" as follows:

> "If a person *unlawfully* kills another person and –
>
> (a) the person intends to cause the death of the person killed or another person; or
>
> (b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or
>
> (c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life,
>
> the person is guilty of murder." (emphasis added)

78 Section 279(4) provides in substance that a person other than a child who is guilty of murder must be sentenced to life imprisonment unless that sentence would be clearly unjust in the circumstances and the person is unlikely to be a threat to the safety of the community, in which event the person is liable to imprisonment for a term of 20 years. Section 279(5) provides in substance that a

child who is guilty of murder is liable to either life imprisonment or detention at the Governor's pleasure.

Justifications and excuses

79 Section 5 of Appendix B to the Compilation Act, which is headed "No civil action for lawful acts; saving", provides, so far as is relevant, that:

> "When, by the Code, any act is declared to be lawful, no action can be brought in respect thereof."

80 Section 1(1) of the Code (WA) provides, inter alia, that:

> "The term ***criminally responsible*** means liable to punishment as for an offence; and the term ***criminal responsibility*** means liability to punishment as for an offence".

81 Chapter XXVI of the Code (WA) is headed "Assaults and violence to the person generally: Justification, excuse and circumstances of aggravation". It includes s 222, which defines "assault" in terms of the application of force to the person without consent, and s 223, which provides that an assault is "unlawful", and constitutes an offence, unless it is "authorised or justified or excused by law". It also includes two further types of provisions relevant to the disposition of these appeals.

82 Provisions of the first type specify circumstances in which an act or omission that could otherwise constitute an unlawful application of force to the person is "lawful". Thus, in general terms, s 224 provides for the execution of a lawful sentence by a person charged with doing so; ss 225 and 226 provide for arrest or detention by a person charged with executing the lawful process of a court or a lawful warrant, or by anyone assisting that person; s 231 provides for the use of necessary force by a person lawfully executing a sentence, process or warrant or making an arrest, or by anyone assisting such a person, to overcome forcible resistance; ss 233 and 235 provide for the use of necessary non-lethal force by a person who is seeking to make or has made an arrest, or by anyone assisting that person, to prevent escape[84]; s 238 provides for the use of necessary and proportionate force by any person to suppress a riot; ss 239 and 240 provide for the use of force by a police officer, and by any person in obedience to an order of a justice, as believed to be necessary and proportionate to suppress a riot; s 241 provides for the use by any person of force believed to be necessary and proportionate to prevent serious mischief from a riot; s 242 provides for obedience

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84 cf Code (WA) (as enacted), s 233, referring to arrest only by "a police officer", repealed and replaced by *Criminal Law Amendment Act 1985* (WA), s 6.

by a member of the military to the command of a superior to suppress a riot; s 243 provides for the use of necessary force by any person to prevent another person believed to be mentally impaired from doing violence to person or property[85]; s 244 provides for the use of such non-lethal force by the occupant in peaceable possession as is believed to be necessary to prevent a home invader from wrongfully entering, to cause a home invader to depart or to defend against violence used or threatened by the home invader; s 247 provides for the use of necessary non-lethal force by any person to prevent the repetition of an act or insult of such nature as to provoke an assault; s 248 relevantly provides for the doing of a "harmful act"[86] by a person in "self-defence"[87], which does not include defence of a person from "a harmful act that is lawful", although, for that purpose, "a harmful act is not *lawful* merely because the person doing it is *not criminally responsible* for it" (emphasis added)[88]; ss 251 to 256 provide for the use of necessary non-lethal force by a person acting under a claim of right, or by anyone acting by that person's authority, to defend or obtain possession of property; s 257 provides for the use of reasonable force by a parent or a person *in loco parentis* towards a child by way of correction; and s 258 provides for the use of reasonable force by the person in command of a vessel or aircraft, or by anyone acting under that person's instruction, as believed to be necessary to maintain good order and discipline. Finally, s 260 provides in substance that, in any case in which the use of force is lawful, "the use of more force than is *justified* by law under the circumstances is *unlawful*" (emphasis added).

83 Provisions of the second type specify circumstances in which a person whose act or omission could constitute an unlawful application of force, and thus who would otherwise be liable to punishment as for an offence, is "not criminally

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85 cf Code (WA) (as enacted), s 243, referring to prevention of violence by a person believed to be "of unsound mind", amended by *Criminal Law Amendment Act 1996* (WA), s 13 and *Mental Health (Consequential Provisions) Act 1996* (WA), s 9 and repealed and replaced by *Criminal Investigation (Consequential Provisions) Act 2006* (WA), s 23.

86 See s 248(1), defining "harmful act" as "an act that is an element of an offence under [Pt V] other than Chapter XXXV".

87 See s 248(4), defining circumstances of "self-defence" in terms of a person's belief that the harmful act is necessary to defend the person or another and a reasonable response in the circumstances as the person believes them to be, and the existence of reasonable grounds for such belief.

88 cf Code (WA) (as enacted), s 248, referring to defence against an unlawful and unprovoked "assault", repealed and replaced by *Criminal Law Amendment (Homicide) Act 2008* (WA), s 8.

responsible". Unlike provisions of the first type, they do not declare that such conduct is itself lawful, but rather deny the person's liability to criminal punishment for the conduct[89]. Thus, in general terms, s 228 operates in favour of a person who executes or assists in executing a sentence, process or warrant in good faith and with a mistaken belief that the court, justice or other person who passed or issued it had authority to do so and who would have been "justified" under ss 224 to 227 had that been so; s 229 operates in favour of a person who, pursuant to warrant, arrests a person in good faith and with a mistaken belief on reasonable grounds that the person so arrested is the person named in the warrant; s 230 operates in favour of a person who acts on a warrant in good faith and with a mistaken belief on reasonable grounds that it is good in law; s 246 operates in favour of a person who commits an assault upon the sudden while deprived by provocation of the power of self-control, provided the force used is not disproportionate to the provocation; and ss 259 and 259A operate in favour of a person who administers a reasonable treatment or performs an inoculation procedure in good faith and with reasonable care and skill.

84 Chapter V of the Code (WA), which is headed "Criminal responsibility" and which, perforce of s 36, applies with some exceptions to "all persons charged with any offence against the statute law of Western Australia", stipulates further circumstances in which a person is "not criminally responsible" for an act or omission that could otherwise constitute an offence. Thus, s 22 provides in substance that, while ignorance of the law affords no "excuse" for an act or omission that would otherwise constitute an offence, a person is not criminally responsible as for a property offence for an act or omission in the exercise of an honest claim of right without intention to defraud; ss 23A and 23B provide that, subject to provisions on negligent acts and omissions[90], a person is not criminally responsible for an act or omission that occurs independently of the exercise of the person's will or by accident; s 24 provides in substance that a person is not criminally responsible for an act done or omission made under an honest and reasonable mistake of fact to any greater extent than if the real state of things had been as believed to be; ss 25 and 32 provide in substance that a person is not criminally responsible for an act done or omission made "in an emergency"[91] or

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89 See [80] above.

90 See Ch XXVII, s 444A.

91 See s 25(3), defining "an emergency" in terms of a person's belief that an act or omission is a necessary response to a sudden or extraordinary emergency, the reasonableness of the response and the existence of reasonable grounds for such belief.

"under duress"[92]; s 27 provides in substance that a person is not criminally responsible for an act done or omission made in such a state of mental impairment as to deprive him or her of capacity to understand what he or she is doing, to control his or her actions or to know that he or she ought not do the act or make the omission; s 29 provides in substance that a person under the age of ten years is not criminally responsible for any act or omission and that a person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that, at the time of the act or omission, he or she had the capacity to know that he or she ought not do the act or make the omission[93]; s 30 provides in substance that except as expressly provided, a judicial officer is not criminally responsible for an act or omission in the exercise of his or her judicial function; and s 31 provides in substance that a person is not criminally responsible for an act or omission in execution of the law or obedience to the order of a competent authority that is not manifestly unlawful.

Parties to an offence

85 Chapter II of the Code (WA), which is headed "Parties to offence", includes s 7, headed "Principal offenders", and s 8, headed "Offence committed in prosecution of common purpose".

86 Section 7 provides as follows:

> "When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> (a) Every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) Every person who aids another person in committing the offence;

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92 See s 32(2), defining "duress" in terms of a person's belief that an act or omission is necessary to prevent a threat being carried out, the reasonableness of the response and the existence of reasonable grounds for such belief.

93 cf Code (WA) (as enacted), s 29, specifying seven years as the age under which a person is not criminally responsible for any act or omission and providing for a presumption against the capacity of a male person under the age of 14 years to have carnal knowledge, amended by *Acts Amendment (Sexual Assaults) Act 1985* (WA), s 4 and *Acts Amendment (Children's Court) Act 1988* (WA), s 44.

(d) Any person who counsels or procures any other person to commit the offence.

In the fourth case he may be charged either with himself committing the offence or with counselling or procuring its commission.

A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission."

87 Section 8 provides as follows:

"(1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

(2) A person is not deemed under subsection (1) to have committed the offence if, before the commission of the offence, the person –

(a) withdrew from the prosecution of the unlawful purpose; and

(b) by words or conduct, communicated the withdrawal to each other person with whom the common intention to prosecute the unlawful purpose was formed; and

(c) having so withdrawn, took all reasonable steps to prevent the commission of the offence."

The reasoning of the Court of Appeal

88 In the Court of Appeal, the majority reasoned[94] that:

"The exemption or immunity [conferred by s 29 of the Code (WA)] is personal to the child in that s 29 is concerned with whether, at the material

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94 *Birdsall v Western Australia* (2019) 54 WAR 418 at 452 [175].

time, the particular child had the capacity to know that his or her acts or omissions were 'wrong'."

89 From this, their Honours deduced[95] that:

"the child's personal exemption or immunity from criminal responsibility for his or her acts or omissions which caused the death does not, of itself, exculpate from criminal responsibility any other person to whom s 7(b), s 7(c), s 7(d) or s 8, read with s 268, s 270, s 277, s 279 and s 280, applies".

90 And, more generally, their Honours concluded[96] that:

"A person who is charged with an offence may or may not be criminally responsible for his or her actual and deemed acts or omissions. *However, criminal responsibility is not an element of an offence*. The fact that a person has actually done or is deemed to have done all of the acts or made all of the omissions which constitute an offence is separate and distinct from whether the person is criminally responsible for those acts or omissions.

The provisions of s 7(a) with respect to an alleged 'principal', and the provisions of s 8 with respect to an alleged 'principal', are concerned with acts or omissions committed by the alleged 'principal', and not with the criminal responsibility of the alleged 'principal' for those acts or omissions." (emphasis added)

91 In dissent, Beech JA reasoned[97] to the contrary that, if a person who does an act or makes an omission is not criminally responsible for the act or omission by reason of any of the provisions of Ch V of the Code (WA), the person commits no "offence" within the meaning of s 2; accordingly, that no "offence is committed" within the meaning of ss 7 and 8; and, consequently, that neither of those provisions is engaged. It followed, in his Honour's view[98], that the trial judge had erred in failing to direct the jury of the need to be satisfied beyond reasonable doubt of PM's criminal capacity.

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95 *Birdsall v Western Australia* (2019) 54 WAR 418 at 452 [176].

96 *Birdsall v Western Australia* (2019) 54 WAR 418 at 452 [177]-[178].

97 *Birdsall v Western Australia* (2019) 54 WAR 418 at 487 [395], 492-493 [422].

98 *Birdsall v Western Australia* (2019) 54 WAR 418 at 487 [396].

The common law origins of the Code provisions

92 As Mason, Wilson and Deane JJ indicated in *Boughey v The Queen*[99], a "basic objective of any general codification of the criminal law" is to ensure the accessibility and comprehensibility of the field of law codified for those "obliged to observe the law", as well as those who "participate in its enforcement"[100]. Such an objective would be frustrated by an inflexible method of construction which involved, in the words of Dixon and Evatt JJ in *Brennan v The King*[101], "finding how the law stood before the Code" and then proceeding "to see if the Code will bear an interpretation which will leave the law unaltered". At the same time, as Windeyer J explained in *Vallance v The Queen*[102], "general provisions" intended to codify "established principles of criminal responsibility" that formed part of a "coherent general system" cannot be interpreted "as if they were written on a *tabula rasa*, with all that used to be there removed and forgotten". Hence, although it may be that the first duty of the interpreter of a provision of a code is to look to the natural and ordinary meaning of its terms[103] – and, if that be clear, the common law will likely prove irrelevant – where, for example, a provision of a code is ambiguous or imports terms to which the common law or statute has assigned a special meaning, there is good reason to seek guidance in the provision's common law or statutory antecedents[104]. A fortiori, where the interaction between the

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99 (1986) 161 CLR 10 at 21.

100 See Bentham, "Letter IV: II Of Completeness, as applied to the Body of the Laws: – and herein of Common Law", in Bentham, *Papers Relative to Codification and Public Instruction* (1817), supp, 104 at 115; Field, "Codification of the Law", in Sprague (ed), *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (1884), vol 1, 349 at 350, 352; Stephen, "Codification in India and England" (1872) 12 *Fortnightly Review (New Series)* 644 at 654; Griffith, *Draft of a Code of Criminal Law* (1897) at iv; cf Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 5th ed (1885), vol 2 at 653-654.

101 (1936) 55 CLR 253 at 263.

102 (1961) 108 CLR 56 at 75-76, citing *Thomas v The King* (1937) 59 CLR 279 at 304 per Dixon J.

103 See and compare *Stuart v The Queen* (1974) 134 CLR 426 at 437 per Gibbs J; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *R v A2* (2019) 93 ALJR 1106 at 1117 [32] per Kiefel CJ and Keane J; 373 ALR 214 at 223.

104 *Bank of England v Vagliano Brothers* [1891] AC 107 at 145 per Lord Herschell. See also and compare *Robinson v Canadian Pacific Railway Co* [1892] AC 481 at 487 per Lord Watson for the Board; *Stuart* (1974) 134 CLR 426 at 437 per Gibbs J;

general provisions of a code turns on the meaning of an ambiguous term of legal art, such as the word "offence" at issue here[105], it is not only logical but entirely in accordance with current conceptions of statutory interpretation to look to the common law and the available extrinsic materials as to how much of the common law the code was intended to embrace[106].

Sections 7 and 8

93 Sections 7 and 8(1) of the Code (WA) derive from ss 7 and 8 of the Criminal Code contained in Sch 1 to the *Criminal Code Act 1899* (Qld) ("the Code (Qld)"), which, in turn, derive from ss 8, 9 and 10 of Sir Samuel Griffith's *Draft of a Code of Criminal Law* (1897) ("the Draft Code"). Specifically, paras (a), (b) and (c) of s 7 of the Code (WA), and of the Code (Qld) (as enacted), are identical to paras (a), (b) and (c) of s 8 of the Draft Code, which is headed "Principal Offenders"[107]; the remainder of s 7 of the Code (WA), and of the Code (Qld), is substantially identical to the remainder of s 8 and s 9 of the Draft Code, which is headed "Accessories before the Fact to Offences"[108]; and s 8(1) of the Code (WA), and s 8 of the Code

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Sungravure Pty Ltd v Middle East Airlines Airliban SAL (1975) 134 CLR 1 at 22 per Mason J; *Boughey* (1986) 161 CLR 10 at 30-31 per Brennan J; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 309 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 220-221 per Dawson, McHugh and Gummow JJ; *R v Barlow* (1997) 188 CLR 1 at 11-12 per Brennan CJ, Dawson and Toohey JJ, 19 per McHugh J, 31-32 per Kirby J; *R v LK* (2010) 241 CLR 177 at 220 [97] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

105 See [109] below.

106 See *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43 at 50-51 [17]-[19], 53-54 [29]-[31] per Gummow and Hayne JJ. See also *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 665 per Wilson, Dawson and Toohey JJ, referring to the virtue of consonance between "the common law" and "the law in the code States"; *R v Jervis* [1993] 1 Qd R 643 at 647 per McPherson A-CJ, referring to use of "decisions given at common law or under comparable statutory provisions" as "practical illustrations of particular problems and of the approach adopted in solving them".

107 Griffith, *Draft of a Code of Criminal Law* (1897) at 4.

108 Griffith, *Draft of a Code of Criminal Law* (1897) at 5.

(Qld), equate to s 10 of the Draft Code, which is headed "Offences committed in prosecution of Common Purpose"[109].

94 Sections 8, 9 and 10 of the Draft Code were designed to achieve what Sir Samuel Griffith correctly understood to be the "common law"[110] of principal and accessorial criminal liability as amended by various nineteenth century statutes. That provenance is common to many provisions in the Draft Code, as Sir Samuel explained in his explanatory letter to the Attorney-General of Queensland which accompanied the Draft Code[111]:

> "I have embodied in the Code a good many provisions ... which I believe to be either correct statements of the Common Law or propositions which will commend themselves as rules that, if they are not, ought to be, recognised as the law. ...
>
> In accordance with the intention expressed in my letter of 1st June, 1896, the pages are arranged in two columns, the proposed provisions of the Code being printed in the right-hand column, and the sources from which they are derived, or other analogous provisions, being stated or referred to in the left-hand column."

And as can be seen from the left-hand column of the Draft Code, the source of ss 8, 9 and 10 of the Draft Code was the "*Common Law*" as amended by identified statutes – mostly in the reign of Queen Victoria – that relevantly deemed accessories to be liable to punishment as principals[112]. In the result, the operation

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109 Griffith, *Draft of a Code of Criminal Law* (1897) at 5.

110 But see *Gammage v The Queen* (1969) 122 CLR 444 at 462 per Windeyer J, noting that "it is misleading to speak glibly of the common law in order to compare and contrast it with a statute", "especially ... when the law of homicide is under discussion".

111 Griffith, *Draft of a Code of Criminal Law* (1897) at vii, xiv. See *Darkan v The Queen* (2006) 227 CLR 373 at 386 [38] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

112 *Punishment for Manslaughter Act 1822* (UK) (3 Geo 4 c 38), s 4; *Piracy Act 1837* (UK) (7 Wm 4 & 1 Vict c 88), s 4, adopted by *Criminal Law Statutes Adoption Act 1838* (NSW) (2 Vict No 10), s 1; *Forgery Act 1865* (Qld) (29 Vict No 3), s 52; *Coinage Offences Act 1865* (Qld) (29 Vict No 4), s 34; *Injuries to Property Act 1865* (Qld) (29 Vict No 5), ss 58, 65; *Larceny Act 1865* (Qld) (29 Vict No 6), ss 103, 104; *Accessories Act 1865* (Qld) (29 Vict No 7), ss 1, 2, 5, 8; *Offences against the Person Act 1865* (Qld) (29 Vict No 11), s 68; *Justices Act 1886* (Qld) (50 Vict No 17), s 41.

of ss 7 and 8 of the Code (WA) is significantly informed by common law doctrines of principal and accessorial criminal liability.

95 Under the common law doctrines of principal and accessorial criminal liability, an aider or abettor to felony who was present at the commission of the crime[113], and each participant in a joint criminal enterprise[114], was a principal to the felony, whereas one who counselled or procured a felony committed in his or her absence was generally an accessory before the fact, and thus only liable to punishment if the principal had been convicted or outlawed[115] (until the Victorian-era statutes referred to above[116]). By way of exception to the latter rule, the common law recognised that, where a person "shall upon malice procure a mad man", or child lacking criminal capacity[117], "to kill another, though the mad man", or child, "shall be excused, yet the incitor or procuror shall be punished as a

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113 eg *Matters of the Crown Happening at Salop* (1554) 1 Plow 97 at 97-98 [75 ER 152 at 154-155], contrasting "the ancient law of the realm ... that they, who were present and abetting others to do the act were accessaries, and not principals" with the later recognition that "they are principals to all intents" because their presence "is a terror to him that is assaulted, so that he dare not defend himself"; *The Coal-Heavers' Case* (1768) 1 Leach 64 at 66 [168 ER 134 at 135]. See Foster, "Discourse III: Of Accomplices in High Treason and Other Capital Offences", in *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases, to Which Are Added Discourses upon a Few Branches of the Crown Law* (1762), 339 ("Discourse on Accomplices"), ch 1, s 2 at 347-348; *Johns (TS) v The Queen* (1980) 143 CLR 108 at 117 per Stephen J; *Giorgianni v The Queen* (1985) 156 CLR 473 at 480 per Gibbs CJ, 493 per Mason J; cf *Osland v The Queen* (1998) 197 CLR 316 at 342 [71] per McHugh J; *IL v The Queen* (2017) 262 CLR 268 at 285 [35] per Kiefel CJ, Keane and Edelman JJ.

114 *R v Plummer* (1701) Kel 109 at 112-113 per Lord Holt CJ [84 ER 1103 at 1105]. See Foster, Discourse on Accomplices, ch 1, s 4 at 350, s 7 at 351-353; *McAuliffe v The Queen* (1995) 183 CLR 108 at 113-114 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ.

115 See Stephen, *A History of the Criminal Law of England* (1883), vol 2 at 232-233, describing this notion that "*accessorius sequitur naturam principalis sui*" as "half scholastic, half derived from the Roman law (a fertile mother of arbitrary rules put forward as self-evident truths)".

116 See Stephen, *A History of the Criminal Law of England* (1883), vol 2 at 235-237.

117 eg *R v Michael* (1840) 9 Car & P 356 at 358 per Alderson B [173 ER 867 at 868]; *R v Manley* (1844) 1 Cox CC 104 per Wightman J.

principall"[118], lest the wrongdoing go unpunished[119]. But that extension of liability – somewhat imprecisely described as "innocent agency"[120] – in no way denied the principal liability of aiders and abettors to, and parties to a joint criminal enterprise with, persons who were not criminally responsible[121].

Chapters XXVI and V

96 Generally speaking, the provisions of Chs XXVI and V of the Code (WA) set out above also derive from provisions of the Code (Qld), and thus the Draft Code, which, in turn, derive from justifications and excuses at common law. As Sir Samuel Griffith explained in the covering letter to the Attorney-General[122]:

> "I have attempted to state specifically all the conditions which can operate at Common Law as justification or excuse for acts *primâ facie* criminal, but have not formally excluded other possible Common Law defences. It is, however, I think, only with reference to assaults and defamation that any possible Common Law defence could be suggested under circumstances not enumerated in the Code. And I venture to think that the provisions of the Code might with safety, and if with safety certainly with advantage, be made exclusive with respect to these offences."

97 The left-hand column and footnotes in the Draft Code acknowledge that some justifications and excuses at common law remained controversial even as at the end of the nineteenth century[123]. Nevertheless, s 29 of the Code (WA), which

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118 Dalton, *The Countrey Justice, Containing the Practice of the Justices of the Peace out of their Sessions*, 6th ed (1643), c 95 at 298. See also Hale, *The History of the Pleas of the Crown* (1736), vol 1 at 615, 617.

119 Foster, Discourse on Accomplices, ch 1, s 3 at 349.

120 See *White v Ridley* (1978) 140 CLR 342 at 353-354 per Stephen J, cf at 346-347 per Gibbs J.

121 Insofar as the latter is innocent of wrongdoing, the former is liable as principal in the first degree: *R v Tyler* (1838) 8 Car & P 616 at 618-619 per Lord Denman CJ [173 ER 643 at 644]; *Osland* (1998) 197 CLR 316 at 348 [85] per McHugh J.

122 Griffith, *Draft of a Code of Criminal Law* (1897) at vii.

123 See especially Griffith, *Draft of a Code of Criminal Law* (1897) at 13 fn 3, commenting that, "perhaps, no branch of the criminal law" had "given rise to more discussion and difference of opinion than the relation of mental infirmity to criminal

(as has been seen) defines the criminal responsibility of children of immature age, is substantially identical to s 31 of the Draft Code (except that the age of complete irresponsibility has been raised and the presumption as to carnal knowledge has been removed[124]), and the source of s 31 of the Draft Code is denoted in the left-hand column, without qualification, as being the "*Common Law*".

The distinction between justifications and excuses at common law

98 Although sometimes contested, the distinction between justifications and excuses has long been significant to the common law of crimes against the person. As Windeyer J explained in *Mamote-Kulang v The Queen*[125], historically, "[k]illing in the execution of public justice" – including pursuant to a lawful sentence of death[126] and, later, to prevent felony[127] – "was justifiable, and a ground for an absolute acquittal". By contrast, killing only in self-defence (*se defendendo*) or by misadventure (*per infortunium*) was merely excused by royal pardon, eventually granted as of right, but with the killer liable to fine and forfeiture[128]. With the influence of Roman and ecclesiastical law, this category of misadventure contributed not only to the definitional concept of *mens rea*, but also to specific excuses such as infancy and madness[129].

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responsibility", the subject of s 29 of the Draft Code and s 27 of the Code (Qld) and the Code (WA).

124 See [84] fn 93 above.

125 (1964) 111 CLR 62 at 78.

126 *Bracton on the Laws and Customs of England*, Woodbine ed, Thorne tr (1968), vol 2 at 340.

127 *R v Compton* (1348) 22 Ass, f 97, pl 55, translated in Kiralfy, *A Source Book of English Law* (1957) at 27. See *Zecevic* (1987) 162 CLR 645 at 657-658 per Wilson, Dawson and Toohey JJ.

128 See Pollock and Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed (1898), vol 2 at 479-484.

129 *Bracton on the Laws and Customs of England*, Woodbine ed, Thorne tr (1968), vol 2 at 384, paraphrasing D 48.8.12 (Modestinus, *Rules*, bk 8), translated in *The Digest of Justinian*, Watson tr ed, rev ed (1998), vol 4 at 335.

99 Over time, judges came to permit, then direct, verdicts of acquittal in cases of excusable homicide[130], and, in the course of the nineteenth century, forfeiture was abolished[131]. Hence, from the point of view of a killer, there has since been no difference in criminal liability at common law between a justification and an excuse: each results in an acquittal. But the distinction remains significant in other respects, inasmuch as justified conduct continues to be regarded as not unlawful, while excused conduct continues to be regarded as unlawful. The point was explained in normative terms by Glanville Williams[132], elaborating on the seminal work of George Fletcher[133] thus:

> "A defence is justificatory (for the purpose of the criminal law) whenever it denies the objective wrongness of the act (that is, wrongness apart from matters of excuse). ... Normally a justification is any defence affirming that the act, state of affairs or consequences are, on balance, to be socially approved, or are matters about which society is neutral. Injuring people is socially deplored, and it remains deplored, or at least regretted, even though the actor has the defence of duress, provocation, infancy, insanity, lack of *mens rea*, or lack of negligence, as the case may be; consequently, these defences are only excuses. In contrast, a lawful arrest by a constable is socially desired, so the defence of lawful arrest is a justification."

100 The consequences of this distinction between various "defences"[134] were in turn the subject of Sir John Smith's 1988 Hamlyn Lecture, which acknowledged[135]

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130 Blackstone, *Commentaries on the Laws of England*, 9th ed (1783), bk 4 at 188.

131 eg *Offences against the Person Act 1828* (Eng) (9 Geo IV c 31), s 10; *Forfeiture Act 1870* (UK) (33 & 34 Vict c 23).

132 Glanville Williams, "The Theory of Excuses" [1982] *Criminal Law Review* 732 at 735.

133 Fletcher, *Rethinking Criminal Law* (1978), ch 10.

134 Of course, to describe justifications and excuses as "defences" is not to deny the "golden thread" of the criminal law stated by Viscount Sankey in *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481-482, that justifications and excuses other than insanity must generally be disproved by the prosecution beyond reasonable doubt.

135 Smith, *Justification and Excuse in the Criminal Law* (1989) at 19, 27-28.

that, at least in clear cases, "merely excusable conduct may be resisted by a person who is threatened by it", whereas "justifiable conduct may not".

101 In Australia, that proposition has been considered by reference to the statement of Gibbs J in *Viro v The Queen*[136] that "a person cannot rely upon the plea of self-defence unless the violence against which he sought to defend himself was unlawful"; as Brennan J observed in *Zecevic v Director of Public Prosecutions (Vict)*[137], "unlawful" in that context does not "connote the criminal responsibility of the victim for an offence", which may be denied by matters of excuse that do not affect the unlawfulness of the victim's conduct.

102 More pertinently for present purposes, however, the distinction also determines the scope of principal and accessorial liability arising from conduct that is prima facie criminal but subject to a defence. Specifically, because justifiable conduct is not unlawful, a person who aids or abets another in its commission, or who participates in a joint criminal enterprise extending to its commission, or who counsels, procures or commands another to commit it, is not liable to punishment. By contrast, because excusable conduct remains unlawful, a person who aids or abets its commission, or who participates in a joint criminal enterprise extending to its commission, or who counsels, procures or commands another to commit it, is liable to punishment, unless he or she is also excused, even if the other person is an innocent agent[138].

103 For example, as self-defence is properly regarded as a justification for this purpose[139], a person who aids another to wound in self-defence, or who is a participant in a joint criminal enterprise in the course of which another participant wounds a third person in self-defence, may be entitled to plead that his or her actions in aiding the other person to wound or participating in the joint criminal enterprise that resulted in the wounding were, to that extent, not unlawful, and hence that he or she is not criminally liable for the wounding[140]. By contrast, as insanity and *doli incapax* are invariably regarded as excuses, a person who aids or procures a person of unsound mind, or a child lacking in criminal capacity, to

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136 (1978) 141 CLR 88 at 116.

137 (1987) 162 CLR 645 at 667; cf *R v Lawson and Forsythe* [1986] VR 515 at 556 per Ormiston J.

138 See [95] above.

139 See and compare *Zecevic* (1987) 162 CLR 645 at 658 per Wilson, Dawson and Toohey JJ, 666 per Brennan J.

140 See *Zecevic* (1987) 162 CLR 645 at 667-668 per Brennan J.

wound a third person is not entitled to plead that his or her actions in aiding or procuring the wounding were not unlawful[141] (although, of course, he or she might be independently entitled to be excused from criminal responsibility – for example, if he or she were also insane or *doli incapax*).

The proper construction of the Code (WA)

104 Although specific justifications and excuses in Chs XXVI and V of the Code (WA) differ in some respects from their common law antecedents, there is no reason to doubt that the statute maintains the fundamental distinction discussed above[142]. As Thomas J observed in *R v Prow*[143], in relation to the Code (Qld):

> "Within the forty sections in [Ch XXVI] there are twenty-eight instances where the formula 'it is lawful for …' is used, (ss 247, 248, 249, 254, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 270, 271 (first limb), 271 (second limb), 273, 274, 275, 276, 277, 278, 279, 280 and 281); and there are six instances in which the formula 'a person … is not criminally responsible for …' is used, (ss 251, 252, 253, 269, 272 and 282). *The former may be taken to afford justification and the latter excuse in favour of a person in respect of acts which would otherwise carry criminal liability*. The distinction no doubt allows certain consequences to ensue in civil law, but for the purposes of the criminal law it is clear enough that both formulae afford protection of an accused person against criminal liability in respect of the specified acts." (emphasis added)

105 Further, although the consequences of the distinction for civil liability are provided expressly[144], it cannot sensibly be supposed that the Criminal Code otherwise assimilates excuses with justifications for all purposes. The point may

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141 See *Bourne* (1952) 36 Cr App R 125 at 128-129 per Goddard LCJ for the Court; *R v Cogan* [1976] QB 217 at 224 per Lawton LJ for the Court; *Matusevich v The Queen* (1977) 137 CLR 633 at 638 per Gibbs J; *R v Hewitt* [1997] 1 VR 301 at 311 per Winneke P; *Osland* (1998) 197 CLR 316 at 325 [16]-[17] per Gaudron and Gummow JJ.

142 See and compare *CTM v The Queen* (2008) 236 CLR 440 at 446 [5] per Gleeson CJ, Gummow, Crennan and Kiefel JJ.

143 [1990] 1 Qd R 64 at 68.

144 See also *R v Kaporonowski* [1972] Qd R 465 at 512 per Lucas J.

be illustrated by reference to an example in Sir James Fitzjames Stephen's *Digest of the Criminal Law*[145], which was a primary influence on the Draft Code:

> "A, a madman, violently attacks B in such a manner as to cause instant danger to B's life. B may kill A, though A is not committing any crime."

And as Brennan J concluded in *Zecevic*[146], the same result must obtain under laws derived from the Draft Code.

Section 268

106 As has been seen, ss 223 and 268 of the Code (WA) provide that an assault or killing is unlawful "unless" it is "authorised or justified or excused by law". Construed in isolation, those provisions might be thought to have the result that, insofar as A's assault is "excused by law", it is lawful, and thus B's conduct would not lawfully be done in self-defence. Such a result, however, would not only be unreasonable, but also give rise to an inconsistency with the express provision in s 248, which was introduced in accordance with recommendations of the Law Reform Commission of Western Australia[147], that "a harmful act is not lawful merely because the person doing it is not criminally responsible for it".

107 One possible way of avoiding that result might be to construe the term "excused by law" as not including circumstances denying criminal responsibility like insanity[148]. But that construction would ill accord with the conventional description of those circumstances as excuses[149], and so ill accord with the history and theory explained above. The preferable solution is to recognise that the concept of unlawfulness in the Code (WA) is not binary[150] and thus to construe "unless" as introducing cases "in which an exception to [the] preceding ... statement will *or*

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145 3rd ed (1883) at 138.

146 (1987) 162 CLR 645 at 667-668.

147 Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Project 97 (2007) at 171-172, citing *Zecevic* (1987) 162 CLR 645 at 663 per Wilson, Dawson and Toohey JJ.

148 See *Zecevic* (1987) 162 CLR 645 at 668 per Brennan J.

149 eg *Pickering v The Queen* (2017) 260 CLR 151 at 159 [21] per Kiefel CJ and Nettle J.

150 See and compare *R v Dabelstein* [1966] Qd R 411 at 415 per Hanger J, 430 per Wanstall J.

may exist"[151] – with the result that conduct is not absolutely lawful for all purposes merely because it is "authorised ... or excused by law". That accommodates the logicality that, just as an authorisation may be limited in its scope, and thus may authorise conduct only to the extent of the authorisation, an excuse may be limited in its scope, and thus may deny the unlawfulness of an act or omission only to the extent that the person doing the act or making the omission is not himself or herself criminally responsible. So, for example, although an assault or killing by a person aged under ten years is not unlawful to the extent that the child doing the act is not criminally responsible, it remains unlawful to the extent that such violence may lawfully be prevented. More significantly for present purposes, it remains unlawful to the extent that a person who aids or procures the violence is criminally responsible unless he or she is independently excused.

Sections 2, 7 and 8

108 Relying on the reasoning of Beech JA in dissent[152], the appellants submitted that, because a person who is not "criminally responsible" is not "liable to punishment as for an offence" under s 1(1) of the Code (WA), an act done or omission made by such a person cannot be "called an offence" under s 2 of the Code (WA).

109 That submission must be rejected. As the plurality in *R v Barlow* observed[153], the word "offence" has various senses in law and ordinary acceptation: it may be used generically "to denote what the law proscribes" or specifically "to denote the facts the existence of which renders an actual offender liable to punishment"; and, when used generically, the term may describe either the entire "concatenation of elements which constitute a particular offence" or "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". Further, as their Honours concluded[154], the text and structure of the Code (WA) make it clear that "offence" is used in the latter generic sense in ss 7 and 8, "to denote the element of conduct ... which, *if* accompanied by prescribed circumstances, or *if* causing a prescribed

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151 *Oxford English Dictionary*, online, "unless", sense B1a (emphasis added).

152 *Birdsall v Western Australia* (2019) 54 WAR 418 at 492-493 [422].

153 (1997) 188 CLR 1 at 9 per Brennan CJ, Dawson and Toohey JJ.

154 *Barlow* (1997) 188 CLR 1 at 9 per Brennan CJ, Dawson and Toohey JJ (emphasis added).

result or *if* engaged in with a prescribed state of mind, renders *a* person engaging in the conduct liable to punishment".

110 It follows that an offence may be committed although the person who actually engaged in the conduct is not liable to punishment because of the absence of prescribed circumstances, a prescribed result or a prescribed state of mind, and thus that an offence may be committed although some person engaging in the conduct would not be liable to punishment because of circumstances denying criminal responsibility irrespective of the person's conduct, such as those in Chs XXVI and V. Hence, where an offence is committed, albeit by a person who is not criminally responsible, ss 7 and 8 of the Code (WA) may operate according to their terms to deem another person liable to punishment except insofar as that other person is not criminally responsible pursuant to Chs XXVI and V[155]. That conclusion accords with the common law doctrines of principal and accessorial liability, and the common law distinction between justifications and excuses, which the Draft Code was designed to embody.

111 In the result, upon its proper construction:

(1) s 7(a) applies, in effect, to a person who actually does the act or makes the omission which comprises the offence, so long as that person is criminally responsible for that act or omission;

(2) s 7(b) applies, in effect, to a person who does any act or makes any omission for the purpose of enabling or aiding another person to do an act or make an omission that constitutes an "offence" (regardless of whether the latter person is criminally responsible for that offence), so long as the former person is criminally responsible for the enabling or aiding act or omission;

(3) s 7(c) applies, in effect, to a person who aids another person to do an act or make an omission that constitutes an "offence" (regardless of whether the latter person is criminally responsible for that offence), so long as the former person is criminally responsible for the aiding;

(4) s 7(d) applies, in effect, to a person who counsels or procures another person to do an act or make an omission that constitutes an "offence" (regardless of whether the latter person is criminally responsible for that offence), so long as the former person is criminally responsible for the act of counselling or procuring; and

(5) s 8(1) applies, in effect, to a person who, with one or more other persons, forms a common intention to prosecute an unlawful purpose

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155 See *Barlow* (1997) 188 CLR 1 at 9-10 per Brennan CJ, Dawson and Toohey JJ.

> with one another, where in the prosecution of such purpose an "offence" is committed of such a nature that its commission was a probable consequence of the prosecution (regardless of whether the other persons are criminally responsible for that offence), so long as the first-mentioned person is criminally responsible for forming the intention.

Conclusion

112 It follows from these reasons that the expression "an offence is committed", where appearing in ss 7 and 8 of the Code (WA), must be taken to include not only an act or omission which renders the actor or omitter liable to criminal punishment – and is, therefore, an "offence" within the meaning of s 2 – but also an act or omission which, but for the actor or omitter being excused of criminal responsibility, would be an "offence" within the meaning of s 2. It follows in turn that, in the circumstances of this matter, it was not incumbent upon the prosecution to negative the possibility that PM was not criminally responsible by reason of s 29 of the Code (WA), and, therefore, that the trial judge did not err in refusing to direct the jury that it was not open to convict any of the appellants or Birdsall unless satisfied beyond reasonable doubt that PM was not the person whose act killed the deceased. The appeals should be dismissed.