

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN AND STEWARD JJ

BRETT CHRISTOPHER O'DEA

APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA

RESPONDENT

O'Dea v Western Australia
[2022] HCA 24
Date of Hearing: 4 May 2022
Date of Judgment: 10 August 2022
P53/2021

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 13 April 2021 and, in their place, order that:*
 - (a) *there be an extension of time within which to apply for leave to appeal;*
 - (b) *leave to appeal be granted;*
 - (c) *the appeal be allowed;*
 - (d) *the appellant's conviction be set aside; and*
 - (e) *there be a new trial.*

On appeal from the Supreme Court of Western Australia

Representation

S Vandongen SC with A O Karstaedt for the appellant (instructed by NR Barber Legal)

A L Forrester SC with S D Packham for the respondent (instructed by Office of the Director of Public Prosecutions (WA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

O'Dea v Western Australia

Criminal law – Parties to offence – Principal offenders – Where appellant and another charged jointly with offence of unlawfully doing grievous bodily harm with intent under s 294(1)(a) of *Criminal Code* (WA) – Where prosecution relied on s 7(a) of *Criminal Code*, which deems "[e]very person who actually does the act ... which constitutes the offence" to be guilty of offence – Where uncertainty as to which act or acts of appellant or co-accused, or combination of their acts, caused grievous bodily harm – Where trial judge relevantly directed jury they could convict appellant under s 7(a) if satisfied beyond reasonable doubt that appellant and co-accused were "acting in concert, each of them doing one or more of the acts which caused" grievous bodily harm and that "[t]he relevant accused's acts were unlawful" – Whether s 7(a) permits acts of person to be attributed to another – Whether jury direction occasioned miscarriage of justice.

Words and phrases – "acting in concert", "actually does the act", "attribution", "criminal responsibility", "deemed to have taken part in committing the offence", "parties to offence", "principal in the first degree", "principal offender", "unlawful common purpose".

Criminal Code (WA), s 7(a).

1 KIEFEL CJ AND GAGELER J. The appellant and his co-accused Jacob Jefferson Webb were tried in the District Court of Western Australia before a jury on a count that each of them, with intent to maim, disfigure, disable or do some grievous bodily harm to one Alimamy Koroma, unlawfully did grievous bodily harm to Mr Koroma, contrary to s 294(1) of the *Criminal Code* (WA) ("the Code"). The facts relevant to that charge are set out in the reasons of Gordon, Edelman and Steward JJ. The jury returned a verdict of guilty in respect of the appellant but was unable to agree upon a verdict in respect of Mr Webb.

2 At the trial, the prosecution sought to rely upon s 7(a) of the Code. Section 7 is entitled "Principal Offenders". In relevant part it 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."

3 Section 8, which complements s 7¹, deals with an offence committed in the prosecution of a common purpose.

4 The term "offence" is defined by s 2:

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

5 The trial judge, Lemonis DCJ, directed the jury in connection with s 7(a). His Honour directed, with reference to a jury handout, that they must be satisfied to the requisite standard that "an offence can consist of numerous acts, which have been done by more than one person. Where two people are acting in concert, each of them doing one or more of the acts which together constitute the offence, then they are all guilty of that offence. Persons who are guilty in this way are sometimes referred to as joint principals". His Honour said that "[f]or an accused to be liable

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

as a joint principal, he must do an act that forms part of the offence, which act is part of a series of acts committed with another person, while they are acting together".

6 The summary of this pathway of reasoning ("the first pathway") in the handout to the jury contained the statement that the jury must be satisfied that the appellant and Mr Webb "were acting in concert, each of them doing one or more of the acts which caused the traumatic brain injury to be done to Mr Koroma" and that "[t]he relevant accused's acts were unlawful". The "relevant accused" was said to refer to "the accused whose case [the jury was] considering". In further directions, given when the jury sought clarification of the words "in concert", the trial judge reiterated his earlier direction and said: "[w]hat you do is you look at the totality of the acts and if it can be said that the relevant accused was acting together or in concert with the other accused".

7 The trial judge also directed the jury in relation to the prosecution case which relied on s 7(c) ("the second pathway") but no issue regarding it arises on this appeal. It was accepted by both parties on this appeal that, as the Court of Appeal concluded, the jury must have convicted on the first pathway, which related to s 7(a). No submissions were made concerning the relevance of the second pathway to questions concerning s 7(a).

8 In the Court of Appeal, the appellant relevantly argued that the trial judge failed to direct the jury in two respects, either of which constituted a miscarriage of justice. It was argued that the trial judge ought to have directed the jury that, for the appellant to be found liable pursuant to s 7(a), not only must his acts have been unlawful, so too must the acts of his co-accused, Mr Webb. This was necessary because there were issues at trial as to whether the prosecution had proved that each of them had not acted in defence of another², or that they had not acted reasonably to overcome force used by Mr Koroma in resisting arrest³, or that they had not acted reasonably to prevent offences and violence⁴. The jury was directed to consider these issues. The trial judge was also said to have failed to direct the jury as to the meaning of the phrase "acting in concert".

2 See s 248 of the Code.

3 See s 231 of the Code.

4 See s 24(1) of the *Criminal Investigation Act 2006* (WA).

3.

9 The Court of Appeal (Buss P, Mazza and Vaughan JJA) unanimously rejected these arguments and dismissed the appeal⁵. Their Honours held⁶ that the jury was entitled to convict the appellant of the charged offence in accordance with the first pathway, even if the jury was not satisfied beyond reasonable doubt that Mr Webb's acts were unlawful. In so holding, their Honours reasoned by analogy with this Court's decision in *Pickett v Western Australia*⁷ that any statutory excuse from criminal liability that Mr Webb may have had was not an obstacle to the application of s 7(a) of the Code to the appellant. Applying *Pickett*, which in turn referred to the earlier decision of *R v Barlow*⁸, their Honours explained that s 7 is not concerned with the criminal responsibility of any person who is a party to the offence. It is the doing of the act by the actor which s 7 attributes to another person or persons, not the criminal responsibility of the actor⁹. Their Honours were also satisfied that the trial judge adequately explained what was meant by "acting in concert" in the context of s 7(a)¹⁰.

10 The appellant's second ground of appeal to this Court, which concerns the directions given as to when persons could be said to be "acting in concert", may be disposed of shortly. Where persons do acts which together would amount to the commission of a criminal offence, but the evidence does not reveal which one of them actually did the offending act, it is not uncommon for each of them to be charged with committing the offence¹¹. A jury can apply s 7(a) with respect to a charge of grievous bodily harm if they find two or more persons were acting together in delivering a series of blows which resulted in the grievous bodily harm¹². The effect of s 7(a) is to deem each person to have committed those actions constituting the offence.

5 *O'Dea v Western Australia* (2021) 57 WAR 229.

6 *O'Dea v Western Australia* (2021) 57 WAR 229 at 256 [148].

7 (2020) 270 CLR 323.

8 (1997) 188 CLR 1.

9 *O'Dea v Western Australia* (2021) 57 WAR 229 at 256 [147], citing *Pickett v Western Australia* (2020) 270 CLR 323 at 351 [66].

10 *O'Dea v Western Australia* (2021) 57 WAR 229 at 254 [135].

11 See, eg, *R v Webb; Ex parte Attorney-General* [1990] 2 Qd R 275 at 283.

12 *Warren v The Queen* [1987] WAR 314 at 328 per Franklyn J.

11 In *R v Wyles; Ex parte Attorney-General*¹³, it was explained that at the time the *Criminal Code* (Qld) was enacted the criminal law had developed in a way so as to sheet home criminal responsibility by a jury being able to look at the totality of the acts where it could be inferred that persons acted in concert, "one doing the one thing and others other things, all leading to the completion of the ... offence". In cases such as this, each of the perpetrators was held to be liable as a principal and was treated as if they had actually committed the offence.

12 It may be accepted, as McPherson JA pointed out in *R v Sherrington*¹⁴, that it may be preferable not to import words which have a special meaning in the common law into the Code. His Honour was speaking of the *Criminal Code* (Qld) but the same may be said of the Code of Western Australia. "Acting in concert" may be misunderstood to refer to a pre-arranged plan, which is an aspect of the common purpose to which s 8 refers. But in the present case, the jury could not have been confused about the meaning of that phrase in the context of s 7. They were directed that s 7(a) refers to persons "acting together". This conveyed that they should determine whether the appellant and Mr Webb were acting in combination. No question of intention or common purpose was said to arise in connection with their actions.

13 Attention may then be directed to the first ground of appeal, which repeats the submission made to the Court of Appeal that the jury should have been directed that they must be satisfied that the acts of Mr Webb were also unlawful. The essential question is whether the characterisation of Mr Webb's actions as lawful or unlawful, which turns on the application of the relevant defences, is relevant to the enquiry under s 7(a). The question turns on the construction of that provision and its operation.

14 It is important to bear in mind that the Code was intended to replace the common law¹⁵. Whilst it may be proper to resort to the common law as an aid to the construction of the Code, which was the course taken in *Wyles*¹⁶, the first duty of a court is to look to the text of the Code for an answer to a question which arises as to the meaning of its terms and its operation¹⁷. In *Barlow*, the majority focused

13 [1977] Qd R 169 at 179-180 per Hoare J (Matthews J agreeing), cited in *Warren v The Queen* [1987] WAR 314 at 328 per Franklyn J.

14 [2001] QCA 105 at [11].

15 *Brennan v The King* (1936) 55 CLR 253 at 263.

16 [1977] Qd R 169 at 178; see *Warren v The Queen* [1987] WAR 314 at 328 per Franklyn J.

17 *Stuart v The Queen* (1974) 134 CLR 426 at 437.

5.

on the provisions of ss 7 and 8 in their context in the *Criminal Code* (Qld) and upon the guidance offered by the structure of it¹⁸.

15 In the latter respect, it may be observed that ss 7 and 8 appear in Ch II of the Code, which concerns parties to offences, whereas ss 231 and 248 appear in Ch XXVI, which is concerned with offences involving violence to the person, justification, excuse and circumstances of aggravation. Sections 7 and 8 are concerned with the attribution of acts to a person. Sections 231 and 248 are concerned with whether a person is liable to punishment for an offence.

16 The error in reasoning which was corrected by *Barlow* was the notion that ss 7 and 8 were concerned with imputing to other participants in an offence the criminal responsibility of the person who did the act or made the omission constituting the offence ("the actor")¹⁹. *Barlow* and *Pickett* held that criminal responsibility is not the concern of those provisions; rather they fasten upon the conduct of the actor.

17 The key to the operation of ss 7 and 8, identified in *Barlow*, was whether the term "offence" refers to an offence as proscribed by the Code or to what an actor (there referred to as "a principal offender") has actually done or omitted to do that renders that person liable to punishment²⁰. The majority held²¹ that it was the latter. In their Honours' view, s 2 of the *Criminal Code* (Qld), which is in relevantly the same terms as s 2 of the Code, makes it clear that "offence" is used to denote the element of conduct which, if accompanied by the prescribed circumstances, renders a person engaging in the conduct liable to punishment.

18 In *Barlow*, the majority confirmed that, by the ordinary rules of construction, the term "offence", as denoting the element of conduct in an offence for which a person may be punished, must bear the same meaning in paras (b), (c) and (d) of s 7 as it does in para (a) and that there is nothing to suggest that it has any other meaning in s 8²². In *Pickett*, the majority observed²³ that s 7(a) expressly refers to "the act or ... omission which constitutes the offence" and said that "[i]t is

18 *Pickett v Western Australia* (2020) 270 CLR 323 at 338 [24], 347 [54] per Kiefel CJ, Bell, Keane and Gordon JJ.

19 *Pickett v Western Australia* (2020) 270 CLR 323 at 344 [47].

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

21 *R v Barlow* (1997) 188 CLR 1 at 9 per Brennan CJ, Dawson and Toohey JJ.

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

23 *Pickett v Western Australia* (2020) 270 CLR 323 at 342 [41].

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)".

19 In *Pickett*, the case for the prosecution was that one member of the group who assaulted the deceased, which included Mr Pickett, inflicted the fatal stab wound. The prosecution could not establish that Mr Pickett had done so. There was a real possibility that the fatal stabbing had been done by a child under the age of 14 ("PM") who, by virtue of s 29 of the Code (which appears in Ch V of the Code, "Criminal Responsibility"), could not have been held criminally responsible unless certain matters were proved by the prosecution. It was common ground that the prosecution did not adduce evidence to establish PM's capacity beyond reasonable doubt. Nevertheless, in argument, PM was treated as the hypothetical killer. Because the person who "actually caused the death" of the deceased was a person other than Mr Pickett, s 7(a) clearly could not be relied upon. The prosecution case was that each of the other seven, including Mr Pickett, was deemed to have taken part in committing the offence by reason of s 7(b), s 7(c) or s 8²⁴.

20 The argument that because PM might not be criminally responsible meant no offence had been committed, was held to be erroneous by the majority in *Pickett*²⁵. The reasoning of the Court of Appeal in that case – 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" for the purposes of s 2 – was also rejected.

21 The Court of Appeal in *Pickett* had read "offence" as if it referred to an act which of itself renders the person liable to punishment. As the majority of this Court explained²⁶, *Barlow* had made clear 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". The "act" that constituted the offence for the purposes of ss 7 and 8 was the physical act of stabbing the deceased. The stabbing constituted the conduct element of the offence of murder. It followed that an offence within the meaning of ss 7 and 8 may be committed even though the person who did the act that

24 *Pickett v Western Australia* (2020) 270 CLR 323 at 334-335 [14].

25 *Pickett v Western Australia* (2020) 270 CLR 323 at 340-341 [37]-[38].

26 *Pickett v Western Australia* (2020) 270 CLR 323 at 340-341 [37].

7.

constitutes the offence is not criminally responsible because of the provisions of Ch V.

22 It is clear from the reasoning of the majority in *Pickett* that the opening words of s 7, "When an offence is committed", refer to the factual circumstances – there of death by stabbing – rather than to a conclusion that a particular person – a "principal offender" – can be said to be liable to punishment for it²⁷. Their Honours regarded a suggestion that ss 7 and 8 can have no operation unless liability to punishment of a "principal offender" is first established as a departure from the terms of the Code. Those provisions make each person within its scope a principal offender and "[s]ection 7 is explicit in this regard"²⁸. The majority added that whilst it may be convenient to refer to a person who "actually does an act or makes an omission" as "the principal offender", the use of "that short-hand" should not obscure the point that s 7 expressly attributes to the persons mentioned in s 7 the acts or omissions that constitute the offence.

23 In holding that "an offence" may be committed for the purposes of ss 7 and 8, even though the person who did the act was not criminally responsible, the majority in *Pickett* explained²⁹ that "[t]he personal circumstances referred to in the provisions of Ch V ... are immaterial to whether an act has been done, and so to whether an offence has been 'committed' for the purposes of ss 7 and 8". In their Honours' view, "[i]t would be inconsistent with [the majority in *Barlow*] 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"³⁰. The intended operation of ss 7 and 8 was made clear in the conclusions stated by their Honours in *Pickett*. They said that ss 7 and 8 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. The circumstance that one person may have an immunity from criminal responsibility by reason of the personal circumstances referred to in Ch V does not prevent ss 7 and 8 from operating against others³¹.

24 Applying the reasoning in *Pickett* to this case, the "offence" for the purposes of s 7(a) was each act of striking a blow to Mr Koroma by the appellant and by Mr Webb. The acts of each are attributed to the other and they both become

27 *Pickett v Western Australia* (2020) 270 CLR 323 at 341 [38].

28 *Pickett v Western Australia* (2020) 270 CLR 323 at 342 [40].

29 *Pickett v Western Australia* (2020) 270 CLR 323 at 348-349 [59].

30 *Pickett v Western Australia* (2020) 270 CLR 323 at 349 [59].

31 *Pickett v Western Australia* (2020) 270 CLR 323 at 351 [66].

principal offenders and liable to criminal punishment under s 294(1), subject to any defences which may arise from their personal circumstances. The fact that they may each have a defence does not prevent s 7(a) from applying. It follows that the lawfulness or otherwise of Mr Webb's actions for the purposes of Ch XXVI is not material to the application of s 7.

25 The appellant seeks to distinguish the holding in *Pickett*. He contends that whereas *Pickett* was concerned with excuses from criminal responsibility, which arise under Ch V, this case raises questions about justifications provided for under Ch XXVI, by which an act may be regarded as lawful. The appellant relies in particular on a passage in the reasons of the majority in *Pickett*³² where it was said that:

"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 on 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)."

26 The majority went on to say³³:

"But there was no suggestion that PM acted in self-defence and so no issue arises in that regard."

27 The observation does not form part of the reasoning of the majority on the issues which arose in *Pickett*. It was made in passing to make clear that no question of PM acting in self-defence arose. On further analysis, it is not consistent with the majority's reasoning as a whole, as may be seen from the application of that reasoning to the circumstances of this case. If the personal circumstances of PM in *Pickett* were irrelevant to the attribution of the act in question, so too must be any defence which may be raised by a particular participant.

28 The appeal should be dismissed.

32 *Pickett v Western Australia* (2020) 270 CLR 323 at 343 [43].

33 *Pickett v Western Australia* (2020) 270 CLR 323 at 343 [43].

GORDON, EDELMAN AND STEWARD JJ.

Introduction

29 Section 7 of the *Criminal Code* (WA) provides that, when an offence is committed, four classes of persons will be "deemed to have taken part in committing the offence and to be guilty of the offence". Each of the four classes of persons can be charged with "actually committing" the offence. The first class, in s 7(a), is "[e]very person who actually does the act ... which constitutes the offence". The question in this appeal is whether an accused person who does not actually do the act which constitutes the offence, or who the Crown cannot prove beyond reasonable doubt actually did the act which constitutes the offence, can be "deemed ... to be guilty of the offence" under s 7(a).

30 Over the last three decades, different intermediate appellate courts have taken different approaches to the interpretation of s 7(a) and an equivalent section in the Queensland *Criminal Code*. The first and narrowest approach, taken by some intermediate appellate courts, is to give the words "actually does the act" their ordinary meaning in every case. An accused person will be criminally responsible under s 7(a) only for their own acts. Sections 7(b), 7(c) and 7(d) then expand that criminal responsibility to deem the accused person to be criminally responsible for the acts of others in certain circumstances, so that the accused person may be charged with "actually committing" the acts that constitute the offence. This approach is consistent with the text of s 7(a). It is consistent with fundamental principles of criminal law that underpinned the drafting of s 7. And it respects the correctness of the unchallenged reasoning in *Pickett v Western Australia*³⁴, a decision of this Court delivered only two years ago.

31 The second approach, taken by some intermediate appellate courts, is to give the words "actually does the act" in s 7(a) their opposite meaning by attributing to the accused person the acts of another provided that the other person's acts were committed pursuant to a common intention (purpose or design) with the accused person. This approach requires the recognition of a large implication in s 7(a) that cannot be justified. That implication: contradicts the meaning of the plain text of s 7(a); is inconsistent with the drafting history of s 7 and the well-established approach at common law to which regard could be had in resolving any ambiguity in s 7(a); and is unnecessary due to the existence of a wider, express provision in s 8 concerning extended liability based on a common intention (purpose or design) with the accused person.

32 On the third and broadest approach, reflected in the directions given by the trial judge to the jury in this case, the words "actually does the act" in s 7(a) are given their opposite meaning by attributing to the accused person the acts of another provided that the accused person and the other person were "acting in concert" (albeit not in the sense of that expression at common law) and the acts were part of "the same series of events", but without any requirement for an unlawful common purpose. This approach rewrites s 7(a) with dramatic consequences. Suppose that an accused person unexpectedly became involved in a brawl in which the accused person "actually committed" a minor act of assault upon a victim. On this broad approach, the accused person could be treated as having "actually committed" a stabbing act of murder if another person stabbed the victim during the brawl. In a circumstance where there was a much closer relationship between the accused person and the perpetrator, this Court in *Pickett* assumed that s 7(a) would not apply.

33 Mr O'Dea was convicted after the trial judge erroneously directed the jury based on the third and broadest approach. The Court of Appeal of the Supreme Court of Western Australia dismissed Mr O'Dea's appeal against conviction. The appeal must be allowed, Mr O'Dea's conviction quashed, and an order made for a retrial.

Sections 7 and 8 of the *Criminal Code*

34 Sections 7 and 8 are contained in Ch II of the *Criminal Code*, entitled "Parties to offence", and provide as follows:

"7. Principal offenders

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.

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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.

8. Offence committed in prosecution of common purpose

- (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 circumstances of this case

The State's case against the accused men and the verdicts

35 Mr O'Dea was charged on indictment with the offence under s 294(1)(a) of the *Criminal Code* of unlawfully doing grievous bodily harm to Mr Koroma with intent to maim, disfigure, disable, or to do some grievous bodily harm. Mr O'Dea was charged jointly with Mr Webb. He was tried in the District Court of Western Australia before a judge and jury. The State's case against Mr O'Dea and Mr Webb

relied upon ss 7(a) and 7(c) of the *Criminal Code*. In establishing the facts of the case, the State relied upon closed-circuit television footage from the house outside which Mr Koroma was attacked as well as from an adjacent house.

36 The State's case was as follows. In January 2018, between 2.30 am and 2.50 am, Ms Dimer entered the Manning Bowling Club. She attempted to open a box labelled "footy tips" when she was disturbed by Mr Koroma, who worked as a cleaner at the bowling club. She fled from the premises and was pursued by Mr Koroma. After confronting Mr Koroma with a house brick, Ms Dimer continued to run along the street, with Mr Koroma in pursuit, towards a residential house that was occupied by Mr O'Dea, Mr O'Dea's partner and Mr Webb. Mr O'Dea awoke to the sound of screaming. Mr O'Dea then woke Mr Webb, who was asleep on a couch in the house, and they went outside. Mr O'Dea had armed himself with a weapon similar to a hockey stick.

37 Ms Dimer and Mr Koroma were in the driveway of the house when Mr O'Dea came outside with Mr Webb. Mr O'Dea and Mr Webb tackled Mr Koroma and struck him, causing him to fall to the ground. When he was on the ground, Mr O'Dea and Mr Webb kicked him to the body and head. Mr Koroma sat up. Mr O'Dea kicked him to the face, causing him to fall down again. While Mr Koroma was lying on the ground, Mr O'Dea struck Mr Koroma to the head with the weapon and then hit him at least ten times in the head with his clenched fist. Mr Webb kicked Mr Koroma to the head twice.

38 Mr O'Dea then dragged Mr Koroma onto the grass verge where he punched Mr Koroma twice more while Mr Koroma was lying on his back. Ms Dimer began to walk away but Mr O'Dea told her to return, which she did. Ms Dimer grabbed a lanyard that was around Mr Koroma's neck and started to drag his body by it. Mr Koroma recovered into a sitting position, but Mr Webb grabbed him from behind and dragged him onto a neighbour's driveway where Mr Koroma's head struck the ground. Mr O'Dea and Mr Webb circled Mr Koroma. When Mr Koroma attempted to stand, Mr O'Dea struck him on the right ankle with the weapon. Mr Koroma again fell to the ground before getting up, taking several steps, and then falling again. Mr Koroma eventually got up and walked away.

39 The weapon used by Mr O'Dea was never found. Mr Koroma suffered a traumatic brain injury as a result of the attack. He also suffered skull and facial bone fractures, and a fractured right ankle. The traumatic brain injury amounted to grievous bodily harm. A neurosurgical registrar, Dr Rasouli, who was called by the State, gave evidence at trial that Mr Koroma's brain injury involved brain haemorrhages on the left-hand side of his head and a smaller brain haemorrhage on the right-hand side of his head. The injuries were most likely caused by blunt force trauma which could have been caused by, amongst other things, a punch to the head, slamming the head on the ground, falling hard on a surface, or being hit

with an object. It was possible that the injuries to the left-hand side of the brain and the injury to the right-hand side of the brain had been caused by a single punch or a fall to the ground with force.

40 Mr O'Dea did not give evidence at trial nor did he adduce any evidence. His defence at trial, based on submissions by his counsel and an electronic record of interview with police, was that he had an honest and reasonable belief that Mr Koroma was attacking Ms Dimer. The jury returned a verdict of guilty in relation to Mr O'Dea for the offence under s 294(1)(a) of the *Criminal Code* of unlawfully doing grievous bodily harm with intent to disable or do grievous bodily harm. The jury were unable to agree upon a verdict in relation to Mr Webb. Mr Webb was subsequently retried and convicted of the alternative offence of unlawfully doing grievous bodily harm contrary to s 297(1) of the *Criminal Code*.

The two pathways to conviction of Mr O'Dea

41 In his closing address, the prosecutor submitted that although it was not possible to be certain that Mr O'Dea alone had done the act or acts that caused Mr Koroma's traumatic brain injury, the injury was more likely to have been caused by Mr O'Dea than by Mr Webb. The prosecutor argued that it was possible that the traumatic brain injury had been caused by a combination of the acts of Mr O'Dea and Mr Webb.

42 The trial judge directed the jury, including by reference to a jury handout, that there were two pathways by which the jury might be satisfied beyond reasonable doubt that Mr O'Dea was guilty of the offence of causing grievous bodily harm with intent under s 294(1)(a) of the *Criminal Code*.

43 The first pathway to conviction concerned s 7(a) of the *Criminal Code*. The trial judge directed the jury that they could convict Mr O'Dea if they were satisfied beyond reasonable doubt of four matters³⁵: (i) "Mr Koroma suffered a bodily injury that amount[ed] to grievous bodily harm"; (ii) "Mr O'Dea and Mr Webb were acting in concert, each of them doing one or more of the acts which caused the traumatic brain injury to be done to Mr Koroma"; (iii) "[t]he relevant accused's acts were unlawful"; and (iv) "[i]n doing the relevant acts, the relevant accused intended to disable, or to cause grievous bodily harm to Mr Koroma".

44 During their deliberations, the jury asked a question about the meaning of "acting in concert" in the directions of the trial judge. The trial judge answered that

35 See *O'Dea v Western Australia* (2021) 57 WAR 229 at 237 [41] per Buss P, Mazza and Vaughan JJA.

Gordon J
Edelman J
Steward J

14.

question as follows, notably omitting any requirement for Mr O'Dea and Mr Webb to have a common unlawful purpose:

"For an accused to be liable as a joint principal he must do an act that forms part of the offence which act is part of a series of acts committed with another person while they are acting together. What you do is you look at the totality of the acts and if it can be said that the relevant accused was acting together or in concert with the other accused."

45 The second pathway to conviction concerned s 7(c) of the *Criminal Code*. The trial judge directed the jury that they were required to be satisfied beyond reasonable doubt of seven matters before convicting Mr O'Dea³⁶: (i) at least one of Mr O'Dea and Mr Webb did the act or acts that caused Mr Koroma's traumatic brain injury; (ii) the acts of both Mr O'Dea and Mr Webb were unlawful; (iii) both Mr O'Dea and Mr Webb intended to disable or do grievous bodily harm to Mr Koroma; (iv) Mr O'Dea knew that Mr Webb's intention was to disable or do grievous bodily harm to Mr Koroma; (v) Mr O'Dea knew that Mr Webb was assaulting Mr Koroma in such a manner as to be endangering or be likely to endanger life or to cause or be likely to cause permanent injury to health; (vi) Mr O'Dea did something with the intention of aiding or assisting in the doing of the acts done by Mr Webb; and (vii) Mr O'Dea's acts actually aided or assisted Mr Webb to commit the offence.

The decision of the Court of Appeal

46 The Court of Appeal held that a verdict of guilty based on the second pathway was not open to the jury³⁷. The jury could not have convicted Mr O'Dea on the basis of the aiding provision in s 7(c) of the *Criminal Code* because the jury's failure to reach a verdict in relation to Mr Webb meant that the jury had not concluded that Mr Webb was criminally responsible for the charged offence. If Mr Webb was not criminally responsible then he had not committed an offence and Mr O'Dea could not be convicted of aiding in the commission of an offence that had not been committed.

47 In relation to the first pathway concerning s 7(a), the Court of Appeal held that the trial judge had not erred in his directions to the jury. It was open to the jury to convict Mr O'Dea under s 7(a) by amalgamating the acts of Mr O'Dea and

36 See *O'Dea v Western Australia* (2021) 57 WAR 229 at 237-238 [42] per Buss P, Mazza and Vaughan JJA.

37 *O'Dea v Western Australia* (2021) 57 WAR 229 at 261 [184]-[186] per Buss P, Mazza and Vaughan JJA.

Mr Webb without having concluded that Mr Webb's acts were unlawful and without having concluded that their acts were the result of an unlawful common purpose³⁸. It sufficed that the acts of Mr O'Dea and Mr Webb formed part of a "series of acts committed" while they were "acting in combination"³⁹.

The issue in this Court

48 A necessary and correct consequence of the reasoning of this Court in *Pickett* was that the Court of Appeal properly excluded the second pathway as a possible means of conviction of Mr O'Dea. If Mr Webb was not criminally responsible because his acts – done in self-defence or defence of another – were lawful, then he had not committed an offence and Mr O'Dea could not be convicted of aiding in the commission of an offence that had not been committed. For the reasons below, the State of Western Australia was correct to accept in this Court that, to convict Mr O'Dea under s 7(c), the conduct of Mr Webb had to be unlawful. The unchallenged reasoning of the Court of Appeal on this point was impeccable.

49 The issue in this Court concerned the reasoning of the Court of Appeal in relation to the first pathway. Mr O'Dea's first ground of appeal asserted that the Court of Appeal should have concluded that the trial judge erred by giving a direction to the jury that the criminal responsibility of Mr O'Dea could be based upon him acting in concert with Mr Webb where Mr Webb's acts were not found to be unlawful. This ground was the central focus of Mr O'Dea's appeal.

50 Mr O'Dea's second ground of appeal concerned the conclusion of the Court of Appeal that it was sufficient for the trial judge to direct the jury that "acting in concert" meant that Mr O'Dea and Mr Webb "were acting together". This ground of appeal was premised upon the correctness of the trial judge's direction that it was necessary for the jury to conclude beyond reasonable doubt that Mr O'Dea and Mr Webb were acting in concert, in the sense of that expression at common law. For the reasons below, the Court of Appeal was correct that this premise was misconceived.

38 *O'Dea v Western Australia* (2021) 57 WAR 229 at 256 [147]-[149] per Buss P, Mazza and Vaughan JJA.

39 *O'Dea v Western Australia* (2021) 57 WAR 229 at 254 [136]-[137] per Buss P, Mazza and Vaughan JJA.

The background to the drafting of s 7 of the *Criminal Code*

51 The *Criminal Code* "should be construed ... without any presumption that it was intended to do no more than restate the existing law"⁴⁰. There is no such presumption because the *Criminal Code* was intended to replace the common law.

52 Nevertheless, in its goal of providing a comprehensive statement of criminal liability, the *Criminal Code* inevitably borrowed from some common law concepts. Hence, it has been held that it is permissible to resort to the common law prior to the *Criminal Code* in circumstances "where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning"⁴¹. In each instance, the common law is considered as part of the contemporary context of the drafting of the relevant provision of the *Criminal Code*. In relation to ss 7 and 8, the common law prior to the *Criminal Code* formed an important part of the context in which the provisions were drafted: "[o]bviously s 7 ... employs words which previously had acquired a technical meaning"⁴².

53 The common law, prior to the introduction of s 7, drew a distinction between principals in the first degree, whose criminal responsibility was primary, and principals in the second and third degrees, who were accessories and whose liability was derivative of, or dependent upon, a finding of criminal responsibility of another: "[o]bviously ... accessorial liability is dependent upon the commission by someone of an offence"⁴³.

54 As to principals in the first degree, the core instance of such criminal responsibility, as expressed in Russell's *Treatise on Crimes and Misdemeanors*⁴⁴ three years prior to the enactment of the Queensland *Criminal Code*, concerned "those who have *actually and with their own hands committed the [act]*". Sir James Fitzjames Stephen described principals in the first degree as "those who actually

40 *Brennan v The King* (1936) 55 CLR 253 at 263 per Dixon and Evatt JJ, quoted in *Pickett v Western Australia* (2020) 270 CLR 323 at 337 [22] per Kiefel CJ, Bell, Keane and Gordon JJ.

41 *Stuart v The Queen* (1974) 134 CLR 426 at 437 per Gibbs J, quoted in *Pickett v Western Australia* (2020) 270 CLR 323 at 337 [23] per Kiefel CJ, Bell, Keane and Gordon JJ.

42 Gillies, *The Law of Criminal Complicity* (1980) at 28.

43 Gillies, *The Law of Criminal Complicity* (1980) at 5.

44 Russell, *A Treatise on Crimes and Misdemeanors*, 6th ed (1896), vol 1 at 161 (emphasis in original).

committed the offence"⁴⁵. As Sir Courtney Kenny said, a principal in the first degree is "[a]lmost always ... the [person] by whom this act itself was done"⁴⁶.

55 There was one exceptional circumstance where a person could be a principal in the first degree without actually performing the act that constituted the actus reus of the offence. That circumstance was where the person acted through an agent⁴⁷. Where a principal acted through an agent, the acts of the agent were attributed to the principal and the liability of the principal was primary, not derivative⁴⁸. An example of where the common law treated a person as a principal in the first degree by agency was where the acts of another were part of a joint enterprise⁴⁹.

56 Sometimes it was said that a person could be a principal in the first degree based on a fiction of "innocent agency". For instance, a person who prepared a poisoned drink to be given by an innocent person to the victim was sometimes said to be a principal who acted through an innocent agent⁵⁰. But the better view is that no agency and no attribution are involved. The person who prepared the poisoned drink is criminally responsible for their own act which caused the death, even if the drink was served by a different person⁵¹: it is "natural to say that the defendant had caused the death"⁵².

45 Stephen, *A General View of the Criminal Law of England*, 2nd ed (1890) at 82.

46 Kenny, *Outlines of Criminal Law*, 5th ed (1913) at 84.

47 See, eg, *IL v The Queen* (2017) 262 CLR 268 at 284 [32] per Kiefel CJ, Keane and Edelman JJ, quoting *White v Ridley* (1978) 140 CLR 342 at 346 per Gibbs J.

48 *Northern Land Council v Quall* (2020) 94 ALJR 904 at 920-921 [82] per Nettle and Edelman JJ; 383 ALR 378 at 398-399.

49 See *McAuliffe v The Queen* (1995) 183 CLR 108 at 114 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ; *Osland v The Queen* (1998) 197 CLR 316 at 342-343 [72] per McHugh J; *Pickett v Western Australia* (2020) 270 CLR 323 at 363-364 [95] per Nettle J.

50 *R v Michael* (1840) 9 Car & P 356 [173 ER 867]; cf *R v Lowe* (1850) 3 Car & K 123 [175 ER 489].

51 Jenks (ed), *Mr Serjeant Stephen's New Commentaries on the Laws of England*, 14th ed (1903), vol 4 at 30-31.

52 Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991) at 105.

57 There was a fine distinction drawn between principals in the second degree and principals in the third degree. A principal in the second degree was a person who was present at the scene of a crime and encouraged the perpetrator but did not physically participate. The liability of a principal in the second degree was derivative of, or dependent upon, the criminal responsibility of the person who had been encouraged⁵³. A principal in the third degree, or "accessory before the fact", was a person who aided and abetted in the commission of the crime, but who was not present at the scene of the crime. Again, the liability of the accessory before the fact was derivative of, or dependent upon, the criminal responsibility of the person who was aided and abetted⁵⁴.

58 In 1877, Sir James Fitzjames Stephen was authorised by the Lord Chancellor and the Attorney-General to prepare a draft Penal Code⁵⁵. The draft Penal Code which he prepared was based upon his earlier Digest⁵⁶. Although introduced to the House of Commons, it was never enacted into law: it was the "closest England came to achieving a codified criminal law" and served as a model for numerous jurisdictions, including Queensland and Western Australia⁵⁷. Section 71 of his draft Penal Code⁵⁸ provided as follows:

53 *Osland v The Queen* (1998) 197 CLR 316 at 341-342 [71] per McHugh J, citing *R v Kupferberg* (1918) 13 Cr App R 166 and *R v Clarkson* [1971] 1 WLR 1402; [1971] 3 All ER 344.

54 *Osland v The Queen* (1998) 197 CLR 316 at 341-342 [71] per McHugh J, citing *R v Higgins* (1801) 2 East 5 at 19 [102 ER 269 at 274-275], *R v See Lun* (1932) 32 SR (NSW) 363 at 364, *Howell v Doyle* [1952] VLR 128 at 133 and *Jackson v Horne* (1965) 114 CLR 82 at 94.

55 *Darkan v The Queen* (2006) 227 CLR 373 at 385 [33] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

56 Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877).

57 Kadish, "The model penal code's historical antecedents" (1988) 19 *Rutgers Law Journal* 521 at 531, 533-534.

58 That became s 72 of the *Criminal Code Bill 1880*, which was not enacted following criticism by Cockburn CJ and a change in government: *Darkan v The Queen* (2006) 227 CLR 373 at 386 [36] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

"Parties to Offences

Every one is a party to and guilty of an indictable offence who

- (a) Actually commits the offence or does or omits any act the doing or omission of which forms part of the offence; or
- (b) Aids or abets any person in the actual commission of the offence, or in any such act or omission as aforesaid; or
- (c) Directly or indirectly counsels or procures any person to commit the offence, or to do or omit any such act as aforesaid.

If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose."

59 Section 7(a) of the *Criminal Code*, and its equivalent in the Queensland *Criminal Code*, were closely modelled upon the opening words of s 71(a) of the draft Penal Code and use nearly identical wording to the common description of the core instance of a principal in the first degree. However, and significantly, s 7(a) does not include the balance of s 71(a) with its reference to a person who does or omits "any act the doing or omission of which *forms part of* the offence" (emphasis added). In addition, the expanded instance of agency by common intention or common purpose was treated separately in the final paragraph. As this Court observed in *Darkan v The Queen*⁵⁹, and as Sir Samuel Griffith remarked in a marginal note to his Draft Code, the final paragraph of s 71 was adapted by Sir Samuel Griffith in his redrafting of s 8 of the Queensland *Criminal Code*, from which s 8(1) of the *Criminal Code* was copied.

60 Sections 7(b), 7(c) and 7(d) of the *Criminal Code* were adapted from ss 71(b) and 71(c). In his marginal note to s 71, Sir James Fitzjames Stephen observed that the section was "framed as to put an end to the nice distinctions between accessories before the fact [principals in the third degree], and principals, in the second degree"⁶⁰. The plain words of ss 71(b) and 71(c), like those of ss 7(b),

59 (2006) 227 CLR 373 at 386-387 [36]-[39] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

60 United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) [C 2345] at 76.

7(c) and 7(d) of the *Criminal Code*, erased the fine distinctions between principals in the second degree and principals in the third degree.

Sections 7(b), 7(c) and 7(d) of the *Criminal Code*

The textual requirement for commission of an offence

61 Although it has sometimes been said in Western Australia that ss 7(b), 7(c) and 7(d) of the *Criminal Code* followed the common law in being concerned with derivative liability⁶¹, the common law concepts of derivative liability were not precisely transplanted. As Kennedy J said in *Warren v The Queen*⁶², it is not "helpful to proceed on any a priori basis that the liability of the aider or accessory is merely derivative from that of the primary offender". As the decision in *Pickett* shows, one reason that it is not helpful is that the blunt application of a concept of derivative liability does not distinguish between the acts of another which make that person liable to punishment subject to excuses, and the acts of another which make that person criminally responsible.

62 Nevertheless, there remained in s 7 the important requirement of the commission of an offence either by the principal offender (s 7(a)) or by other persons (ss 7(b), 7(c) and 7(d)). The opening words of s 7 are: "When an offence is committed". Section 2 defines an "offence" as "[a]n act or omission which renders the person doing the act or making the omission liable to punishment". By their terms, ss 7(b), 7(c) and 7(d) therefore all require that another person has done an act that renders that person liable to punishment, subject to excuses. Section 7(a) requires that the accused person "actually does the act" which constitutes the offence.

The decision in Pickett

63 In *Pickett*, Mr Slater died as a result of a stab wound to his chest which was inflicted during an attack by a group of eight male persons that included the five appellants. The person who "actually" inflicted the stab wound that caused Mr Slater's death was either Mr Pickett or a juvenile, PM. PM was not proved by the prosecution to have had the capacity to know that he ought not to do the act. Hence, PM was excused from criminal responsibility under s 29 of the *Criminal Code*. The question before this Court was whether the appellants, including

61 See, eg, *Campbell v Western Australia* (2016) 50 WAR 331 at 341 [21] per McLure P; *Birdsall v Western Australia* (2019) 54 WAR 418 at 434 [62], 437 [84]-[85], 452-453 [179] per Buss P and Mazza JA.

62 [1987] WAR 314 at 324.

Mr Pickett, could be criminally responsible under s 7(b), s 7(c) or s 8 of the *Criminal Code*, even though the person who may have actually inflicted the stab wound was not criminally responsible.

64 This Court unanimously held that, despite PM's lack of criminal responsibility, the appellants were capable of being criminally responsible under s 7(b), s 7(c) or s 8 of the *Criminal Code*. In respect of s 7, there were several important steps to the reasoning of Kiefel CJ, Bell, Keane and Gordon JJ:

- (1) The reference to an "offence" in s 7 is to "the conduct element of an offence (being an act or omission)"⁶³.
- (2) Sections 7(b), 7(c) and 7(d) are not concerned with attributing the criminal responsibility of one participant to other participants⁶⁴.
- (3) In other words, a participant can be criminally responsible under s 7(b), s 7(c) or s 7(d) even if the provisions in Ch V in Pt I of the *Criminal Code* excuse from criminal responsibility "the person who did the act or made the omission that constituted the offence"⁶⁵.
- (4) Sections 7(b), 7(c), 7(d) and 8 still require that the act or omission of another constitute the conduct element of an offence that is committed. It is one thing to say that "PM was not criminally responsible" under Ch V "[b]ut it is another thing to say that it follows that no offence was committed by him"⁶⁶. For instance, if "PM, as the hypothetical killer ... had struck the lethal blow in self-defence ... his assault ... 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"⁶⁷.

⁶³ (2020) 270 CLR 323 at 341 [37]. See also at 342 [40], 343 [44], 345-348 [51]-[56]. See further *R v Barlow* (1997) 188 CLR 1 at 9 per Brennan CJ, Dawson and Toohey JJ.

⁶⁴ (2020) 270 CLR 323 at 342 [41], 344 [47], 352 [67].

⁶⁵ (2020) 270 CLR 323 at 348 [58].

⁶⁶ (2020) 270 CLR 323 at 341 [38]. See also at 348-349 [59]-[60].

⁶⁷ (2020) 270 CLR 323 at 343 [43].

- (5) The only exception in s 7 where the relevant act does not need to be the constituent element of an offence is the final paragraph of s 7⁶⁸.
- (6) The relevant act that was the "conduct element of the offence of murder" was the act of stabbing⁶⁹. The lack of proof beyond reasonable doubt that PM had capacity did not mean "that no offence had been committed" but meant only "that PM was not liable to punishment for the act that constituted the offence"⁷⁰.

65 This summary demonstrates the centrality to the reasons of Kiefel CJ, Bell, Keane and Gordon JJ of the requirement for liability of a participant under s 7(b), s 7(c) or s 7(d) that there be an offence committed by the other person. This was why their Honours focused upon the difference between an excuse under Ch V of the *Criminal Code* (which renders a person not criminally responsible for an offence) and a justification (which has the effect that a person's acts were lawful such that no offence was committed)⁷¹. As Nettle J explained in his Honour's separate reasons, the "distinction between justifications and excuses has long been significant to the common law of crimes against the person"⁷². After setting out that long-established significance in detail⁷³, his Honour explained that, since self-defence is a justification which makes the act lawful⁷⁴:

"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".

68 (2020) 270 CLR 323 at 351 [65].

69 (2020) 270 CLR 323 at 348 [57].

70 (2020) 270 CLR 323 at 350 [62].

71 (2020) 270 CLR 323 at 343 [43].

72 (2020) 270 CLR 323 at 364 [98].

73 (2020) 270 CLR 323 at 364-367 [98]-[103].

74 (2020) 270 CLR 323 at 366-367 [103].

66 This principle in *Pickett* was not novel. As Nettle J observed in *Pickett*⁷⁵, the plurality of Brennan CJ, Dawson and Toohey JJ in *R v Barlow* had said that in ss 7 and 8 the reference to an "offence" was used "to denote the element of conduct ... 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". And in *Jackson v Horne*⁷⁶, this Court held that criminal responsibility of a person who procures the commission of an offence by another person, under the provision of the Queensland *Criminal Code* equivalent to s 7(d) of the *Criminal Code*, required the other person to have committed an offence. Indeed, it would have been astonishing to extend criminal liability to a person who aided another in the commission of a lawful act, thus creating "a kind of ghost crime committed by the actor which is sufficient to inculcate the [accused person]"⁷⁷.

The operation of s 7(a) of the *Criminal Code*

The proper approach to s 7(a)

67 In *R v Melling*⁷⁸, Holmes JA (with whom McMurdo P and Applegarth J agreed) correctly reasoned, in an appeal concerning the criminal responsibility of two accused persons for grievous bodily harm, that "for the Crown to succeed in establishing criminal responsibility on the part of both appellants under s 7(1)(a), it was necessary that against each there be proved an act causing injuries amounting to grievous bodily harm, as well as the necessary intent". In other words, the act "causing" the grievous bodily harm must be the "actual" and not the attributed act of the accused person. In the words of s 7(a), the act that constitutes the offence of grievous bodily harm must be one that the person "actually does".

68 This approach is consistent with the text and drafting history of s 7(a), including the incorporation of a requirement in s 7 for the commission of an offence, either by the actual acts of the accused person (s 7(a)) or by the acts of others (ss 7(b), 7(c) and 7(d)). It does not require the recognition of any contrived

75 (2020) 270 CLR 323 at 369 [109], quoting *R v Barlow* (1997) 188 CLR 1 at 9 per Brennan CJ, Dawson and Toohey JJ (emphasis of Nettle J).

76 (1965) 114 CLR 82 at 88 per Barwick CJ, 94 per Taylor J, 95 per Menzies J.

77 Glanville Williams, "Secondary Parties to Non-Existent Crime" (1953) 16 *Modern Law Review* 384 at 385.

78 [2010] QCA 307 at [25] (concerning the equivalent provision to s 7(a) in the *Criminal Code* (Qld)).

or fictitious implication in s 7(a). And it respects the correctness of the unchallenged reasoning in *Pickett*.

69 The clearest instance in which s 7(a) will apply, using the example of a fatal stabbing, is where the accused person's actual act is proved to have been the only act that caused the victim's death. It will also apply, in the same manner, where the death is the result of the acts of two or more people acting independently, and where the acts of each person were sufficient to cause the death. Thus, if the accused person and another person both fatally stab a victim without any underlying common purpose or joint criminal enterprise and the victim dies, it is not open to either the accused person or the other person to deny criminal responsibility for their acts on the basis that, but for their acts, the death would have resulted from the acts of the other individual.

The second approach – attribution of acts in a series on the basis of joint criminal enterprise

70 As noted above, some intermediate appellate courts have held that s 7(a) contains an implication that the acts of another person can be attributed to a person, and treated as "actually" having been committed by the person, where the person acts "in concert" with the other person in the sense of that expression at common law⁷⁹ (or, to use expressions that amount to the same thing, with a "common purpose" or with a "common design"⁸⁰).

71 The premise of Mr O'Dea's second ground of appeal was that this approach was correct. On this approach, Mr O'Dea argued, the trial judge erred because he did not properly direct the jury as to the requirement of an unlawful common purpose between Mr O'Dea and Mr Webb. This premise should not, however, be accepted.

72 The implication that must be recognised on this approach is contrary to the text and context of s 7(a). In *Campbell v Western Australia*⁸¹, McLure P redrafted s 7(a) so as to include such a fictitious implication that extended the operation of

79 See, eg, *R v Wyles; Ex parte Attorney-General* [1977] Qd R 169 at 174 per Lucas J; *R v Webb; Ex parte Attorney-General* [1990] 2 Qd R 275 at 283 per Macrossan CJ.

80 See *McAuliffe v The Queen* (1995) 183 CLR 108 at 114 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ; *Gillard v The Queen* (2003) 219 CLR 1 at 35 [109] per Hayne J; *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 273 [19] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

81 (2016) 50 WAR 331 at 341 [22].

the paragraph to include acts that were *not* actually done by the person but were done by another person for whom the person was "liable at common law". In *R v Sherrington*⁸², in a passage quoted by the Court of Appeal in this case⁸³, McPherson JA (with whom Wilson J agreed) correctly characterised such reasoning as "a form of heresy".

73 The implication based on common law would so overwhelm the meaning of s 7(a) that it would be possible for a person to be criminally responsible under s 7(a) even if the person had not done any actual acts at all. As the Court of Appeal of the Supreme Court of Western Australia correctly observed in *L v Western Australia*⁸⁴, in the course of rejecting any implication of a common law principle of common purpose in s 7 of the *Criminal Code*, the common law principle permitted the attribution of acts of another person to an accused person acting in concert for an unlawful purpose, even if the accused person had not "actually" done any act at all.

74 The recognition of an implication of a common law requirement of "acting in concert" in s 7(a) is also precluded by the history and context of s 7(a), which includes the express requirement of a common purpose in s 8. As explained above, s 8 was a modified version of Sir James Fitzjames Stephen's provision for criminal responsibility based upon agency where persons satisfy requirements including having formed a common intention to prosecute an unlawful purpose in conjunction with one another. Section 8 thus operates in the circumstance, incorrectly contemplated by Lucas J as falling within s 7(a) in *R v Wyles; Ex parte Attorney-General*⁸⁵, where "A B and C form a plan to burgle a house, in pursuance of which A breaks into the house but does not enter, B takes no part in the breaking but enters and steals, and C keeps watch in the street outside".

82 [2001] QCA 105 at [11].

83 *O'Dea v Western Australia* (2021) 57 WAR 229 at 248 [100] per Buss P, Mazza and Vaughan JJA.

84 (2016) 49 WAR 545 at 548 [5], 553 [33], 554 [41] per Martin CJ, Mazza JA and Mitchell J. See also *Whitby v Western Australia* [2019] WASCA 11 at [191] per Hall J.

85 [1977] Qd R 169 at 174. See also *Osland v The Queen* (1998) 197 CLR 316 at 342-351 [72]-[95] per McHugh J.

The broadest approach to s 7(a)

75 The broadest approach to s 7(a), adopted by the trial judge in this case, is to eschew the requirement for the commission of any offence by either the accused person or another person. Instead, the acts of the other person are attributed to the accused person by a novel principle unknown to the civil or criminal law of agency. That novel principle would permit attribution to an accused person (here, Mr O'Dea) of the acts of another (here, Mr Webb) if the acts form part of a series of acts committed "in combination" with the other person. No attempt was made to justify the attribution of acts to Mr O'Dea on such a novel basis.

76 Apart from the unjustified novel approach to attribution, a further problem with this approach is that it is contrary to the textual meaning of "actually does the act" in s 7(a) and the plain meaning of those words in light of the drafting history of s 7(a). As explained above, the language of s 7(a) preserved, in almost identical terms, the core instance of a principal in the first degree as expressed by Sir James Fitzjames Stephen in the opening words of s 71(a) of his draft Penal Code⁸⁶. That meaning imposed criminal responsibility upon the accused person only for their actual acts, not acts that were attributed to them. Moreover, and as already pointed out, s 7(a) does not contain the additional language of s 71(a) of the draft Penal Code, with its reference to the doing of an act or omission which "forms part of the offence".

77 A further problem with this approach is the inconsistency with the remainder of s 7 in imposing criminal responsibility based in part upon the lawful acts of others. As explained above, one premise of the decision in *Pickett* was that an accused person could not be criminally responsible for the lawful acts of others under s 7(b), s 7(c) or s 7(d). An offence must be committed by the other person. The opening words of s 7, "When an offence is committed", do not merely govern ss 7(b), 7(c) and 7(d). They also govern s 7(a).

78 If this broad approach were correct, then Mr Pickett could have been made criminally responsible under s 7(a). It would not have mattered whether the person who "actually" inflicted the stab wound that caused Mr Slater's death was PM rather than Mr Pickett. In other words, if the stab wound had been inflicted by PM, it would have been possible on this approach for Mr Pickett to be criminally responsible under s 7(a) by the attribution to him of PM's acts that were committed as part of a series with the acts of Mr Pickett, and while PM and Mr Pickett were acting in combination. Such an approach was emphatically rejected by this Court. As Kiefel CJ, Bell, Keane and Gordon JJ said, the person who actually inflicted

86 United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) [C 2345] at 76.

the stab wound, "and only that person, actually caused the death of the Deceased for the purposes of s 7(a) of the Code"⁸⁷.

Application of s 7(a) to this case and conclusion

79 In *Whitby v Western Australia*⁸⁸, Buss P and Mazza JA observed that a "remarkable feature of the State's case at the trial was the prosecutor's reliance solely upon s 7(a) of the [*Criminal Code*]". Equally, in this case, a remarkable feature of the State's case against Mr O'Dea and Mr Webb was that the State made no attempt to allege that, at any point during the assaults on Mr Koroma, Mr O'Dea and Mr Webb tacitly formed an unlawful common purpose of doing grievous bodily harm to Mr Koroma, which extended beyond a reasonable response to the circumstances that they believed to exist⁸⁹. Instead, the State sought to attribute the acts of Mr O'Dea or Mr Webb to each other by a novel doctrine of agency that cannot be justified by the text or context of s 7(a) and has never been justified as a matter of principle.

80 The acceptance by the Court of Appeal of the broadest approach to s 7(a), which was the basis of the trial judge's direction to the jury as to the first pathway, was an error. Rather, and in light of the acceptance by the prosecutor in closing that it was possible that the grievous bodily harm had been caused by a combination of the acts of Mr O'Dea and Mr Webb, the proper legal meaning of s 7(a) in its application to Mr O'Dea required a direction to the jury as follows. The jury could convict Mr O'Dea if they were satisfied beyond reasonable doubt that: (i) Mr Koroma's traumatic brain injury was grievous bodily harm; (ii) Mr O'Dea's acts, by themselves, were sufficient to have caused Mr Koroma's traumatic brain injury; and (iii) Mr O'Dea's acts that were sufficient to cause Mr Koroma's traumatic brain injury were not undertaken in self-defence or as a result of an honest and reasonable mistake.

81 The Court of Appeal should have found that the trial judge erred in his direction to the jury that Mr O'Dea could be convicted under the first pathway based upon a combination of the acts of Mr O'Dea and Mr Webb acting "in concert". That direction was an error of law amounting to a miscarriage of justice. The appeal should be allowed on the first ground of appeal. It is, therefore, strictly unnecessary to address Mr O'Dea's second ground of appeal, although it should be

87 *Pickett v Western Australia* (2020) 270 CLR 323 at 334-335 [14], referring to *Birdsall v Western Australia* (2019) 54 WAR 418 at 430 [31].

88 [2019] WASCA 11 at [119].

89 *Criminal Code*, s 248(4)(b).

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28.

apparent from these reasons that the second ground was based upon a misconceived premise. There was no requirement for the trial judge to explain to the jury the meaning of "acting in concert" in relation to s 7(a). The concept of "acting in concert" is not contained in s 7(a) and it should not form part of any direction concerning that section.

82 Orders should be made as follows:

- (1) Appeal allowed.
- (2) Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 13 April 2021 and, in their place, order that:
 - (a) there be an extension of time within which to apply for leave to appeal;
 - (b) leave to appeal be granted;
 - (c) the appeal be allowed;
 - (d) the appellant's conviction be set aside; and
 - (e) there be a new trial.

