

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, GLEESON AND JAGOT JJ

THE KING	APPELLANT
AND	
ROHAN (A PSEUDONYM)	RESPONDENT

The King v Rohan (a pseudonym)
[2024] HCA 3
Date of Hearing: 12 October 2023
Date of Judgment: 14 February 2024
M33/2023

ORDER

- Appeal allowed.*
- Set aside paragraphs 2 to 10 of the orders of the Court of Appeal of the Supreme Court of Victoria of 4 October 2022 and, in their place, order that the appeal against conviction is dismissed.*
- Remit the respondent's appeal against sentence to the Court of Appeal for rehearing.*

On appeal from the Supreme Court of Victoria

Representation

E H Ruddle KC with J B Warren for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

T Kassimatis KC with G F Connelly for the respondent (instructed by Greg Thomas Barrister & Solicitor)

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

CATCHWORDS

The King v Rohan (a pseudonym)

Criminal law – Appeal against conviction – Criminal liability – Statutory complicity – Where s 324(1) of *Crimes Act 1958* (Vic) provided, "if an offence ... is committed, a person who is involved in the commission of the offence is taken to have committed the offence" – Where s 323(1)(c) of *Crimes Act* provided person is "involved in the commission of an offence" if person "enters into an agreement, arrangement or understanding with another person to commit the offence" – Where respondent convicted of offences of supplying drug of dependence to a child and sexual penetration of a child under 12 on basis of ss 323(1)(c) and 324(1) – Where prosecution relevantly alleged respondent and two co-accused entered into agreement, arrangement or understanding to supply cannabis to two complainants (aged 11 and 12), and then sexually penetrate complainant (aged 11) – Where element of supply offence that child in fact be under 18 years of age – Where element of sexual penetration offence that child in fact be under 12 years of age – Where knowledge of age not an element of either offence – Whether prosecution required to prove that accused knew, at time of entering agreement, ages of complainants or that complainants were under specified age – Whether substantial miscarriage of justice resulted from failure to direct jury to be satisfied beyond reasonable doubt that parties to agreement knew ages of complainants – Whether fault element in *Giorgianni v The Queen* (1985) 156 CLR 473 applicable to s 323(1)(c) – Whether prosecution required to prove that accused knew or believed, at time of entering into agreement, essential facts that made conduct an offence, where knowledge or belief not an element of the offence itself.

Words and phrases – "accessorial liability", "agreement", "agreement, arrangement or understanding", "agreement to commit an offence", "complicity", "derivative liability", "essential facts", "group activity", "involved in the commission of an offence", "joint criminal enterprise", "primary liability", "statutory complicity".

Crimes Act 1958 (Vic), s 49A, Subdiv 1 of Div 1 of Pt II.

Drugs, Poisons and Controlled Substances Act 1981 (Vic), s 71B.

1 GAGELER CJ, GORDON AND EDELMAN JJ. This appeal concerns what is necessary to prove that a person is "involved in the commission of an offence" under s 323(1)(c) of the *Crimes Act 1958* (Vic), being where the person "enters into an agreement, arrangement or understanding with another person to commit the offence". Specifically, the issue is whether the prosecution must prove that an accused knew or believed, at the time of entering into the agreement, the essential facts that made the proposed conduct an offence, where that knowledge or belief is not an element of the offence itself. The answer is no.

Background to the appeal

2 The respondent, Mr Rohan (a pseudonym), was jointly charged with two other men, MK and WF, on indictment in relation to events one evening in December 2018 when the co-accused picked up two girls, Daisy (aged 11) and Katie (aged 12) (pseudonyms), supplied them with drugs and alcohol, and then sexually penetrated and sexually assaulted Daisy.

3 Mr Rohan, MK and WF were all charged with the same offences, on the basis that each co-accused had either committed the offence or was a person "involved in the commission of the offence" under s 324(1) of the *Crimes Act* because they had, within the meaning of s 323(1)(c), "enter[ed] into an agreement, arrangement or understanding ... to commit the offence". The prosecution case was that the three co-accused had reached an agreement, arrangement or understanding to supply alcohol and cannabis to Daisy and Katie, and then engage in sexual activity – including sexual penetration – with both Daisy and Katie ("the agreement"). On that basis, the prosecution case was that all three co-accused were guilty of all charges, irrespective of who carried out the actual acts of supply, sexual penetration or sexual assault.

4 A jury in the County Court of Victoria found each co-accused guilty of two charges of supplying a drug of dependence to a child¹ ("the supply offences") (in relation to Daisy and Katie); seven charges of sexual penetration of a child under 12² ("the sexual penetration offences") (in relation to Daisy); and two charges of sexual assault of a child under 16³ ("the sexual assault offences")

1 *Drugs, Poisons and Controlled Substances Act 1981* (Vic), s 71B(1).

2 *Crimes Act*, s 49A(1).

3 *Crimes Act*, s 49D(1).

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(in relation to Daisy). Each co-accused was acquitted of charges of sexual penetration of a child under 16⁴ (in relation to Katie).

5 None of the offences for which Mr Rohan and his co-accused were convicted included, as an element, proof of knowledge of the victim's age or that the victim was under a certain age.⁵ The trial judge did not direct the jury that, for the "agreement ... to commit the offence" to be established beyond reasonable doubt, the prosecution was required to prove that the agreement was to have sex with, or supply drugs to, *underage* girls or that the co-accused knew the ages of Daisy and Katie (or that they were under a certain age). That is, the trial judge did not direct the jury that the prosecution was required to prove: in respect of the supply offences, that any of the accused knew that Daisy and Katie were under 18; in respect of the sexual assault offences, that any of the accused knew that Daisy was under 16; or in respect of the sexual penetration offences, that any of the accused knew that Daisy was under 12.

6 Mr Rohan appealed to the Court of Appeal of the Supreme Court of Victoria against his convictions for the two supply offences and four of the seven sexual penetration offences, all being where he was convicted on the basis of the agreement to commit the offences. Mr Rohan did not appeal his convictions for the two sexual assault offences or the three sexual penetration offences where he was the person who did the acts of sexual assault and sexual penetration.

7 Mr Rohan raised a single ground of appeal: that "[a] substantial miscarriage of justice arose ... as a result of the erroneous failure to direct the jury that they had to be satisfied beyond reasonable doubt that the parties to the agreement knew the age of the complainants".

8 The Court of Appeal allowed the appeal. The Court framed the issue for determination as being whether the "agreement ... to commit the offence" under s 323(1)(c) is an agreement to carry out the offending acts or an agreement to commit the offending acts complete with knowledge of, or belief in, the facts that make the proposed conduct an offence. The Court considered that the hinging of "involvement" in s 323(1)(c) on the deliberate act of agreement, arrangement or understanding required proof of intention to commit an offence and, therefore, proof of knowledge of, or belief in, the facts that constitute the offence. The Court of Appeal acknowledged that this meant that, in order to be convicted, it may be necessary to prove that the person "involved" knew more about the facts

4 *Crimes Act*, s 49B(1).

5 A defence of reasonable belief as to age applied to the supply offences: *Drugs, Poisons and Controlled Substances Act*, s 71B(4).

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constituting the offence than the "principal offender", but this was said to reflect the "purely derivative nature" of the offending by the "complicit offender".

9 On that basis, the Court of Appeal upheld Mr Rohan's submission that, for the purposes of s 324(1) read with s 323(1)(c) of the *Crimes Act*, the prosecution had to prove to the criminal standard that at the time that Mr Rohan entered into the agreement, arrangement or understanding, he *knew* that Daisy was under 12 for the sexual penetration offences and he *knew* that the complainants were both under 18 for the drug supply offences. As the trial judge did not direct the jury in those terms, the Court of Appeal set aside Mr Rohan's convictions where he had been convicted on the basis of s 324(1) read with s 323(1)(c), and ordered that there be a new trial of those charges. Mr Rohan was resentenced on the convictions that remained.

10 The Crown was granted special leave to appeal to this Court. For the reasons that follow, the appeal must be allowed. The trial judge did not misdirect the jury.

Subdivision 1 of Div 1 of Pt II of the *Crimes Act*

11 Subdivision 1 of Div 1 of Pt II of the *Crimes Act*, which includes ss 324(1) and 323(1)(c), is headed "Complicity in commission of offences". The Subdivision was inserted into the *Crimes Act* in 2014 to introduce a statutory scheme for criminal liability to attach to "a person who is involved in the commission of an offence".⁶ The scheme was designed to replace a number of common law doctrines, including the law of complicity in relation to aiding and abetting, and the doctrine of joint criminal enterprise.⁷ The Explanatory Memorandum explained that the aim was to "improve the substantive law of complicity by introducing simpler, internally consistent laws and abolishing problematic common law rules" and to "facilitate simpler, more understandable jury directions on complicity".⁸ The Explanatory Memorandum also stated that the provisions drew extensively

6 *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), Pt 2, Div 2. See Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 12-16.

7 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13.

8 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 12.

from recommendations in the "Simplification of Jury Directions Project" Report.⁹ Parliament did not, however, adopt all of the Report's recommendations.¹⁰

12 Section 324(1) is the key operative provision in the Subdivision. It provides:

"Subject to subsection (3), *if an offence* (whether indictable or summary) *is committed, a person who is involved in the commission of the offence is taken to have committed the offence* and is liable to the maximum penalty for that offence." (emphasis added)

13 Section 323(1) provides four different bases on which "a person is involved in the commission of an offence":

"For the purposes of this Subdivision, *a person is involved in the commission of an offence* if the person –

- (a) intentionally assists, encourages or directs the commission of the offence; or
- (b) intentionally assists, encourages or directs the commission of another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence; or
- (c) *enters into an agreement, arrangement or understanding with another person to commit the offence*; or
- (d) enters into an agreement, arrangement or understanding with another person to commit another offence where the person was aware that it

9 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 12, referring to Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012).

10 cf Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 93-98; Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13; Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 June 2014 at 2129-2130; *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), Pt 2, Div 2.

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was probable that the offence charged would be committed in the course of carrying out the other offence." (emphasis added)

14 Section 323 further provides:

- "(2) In determining whether a person has encouraged the commission of an offence, it is irrelevant whether or not the person who committed the offence in fact was encouraged to commit the offence.

Note

A person who committed an offence may include 2 or more persons who entered into an agreement, arrangement or understanding to commit the offence.

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

15 Sections 324(1), 323(1)(c) and 323(3)(b) combine to provide that if an offence is committed, a person who entered into an agreement, arrangement or understanding with another person to commit that offence is taken to have committed that offence and is liable to the maximum penalty for that offence, whether or not the person realised that the facts constituted an offence.

16 Three further provisions in Subdiv 1 of Div 1 should be noted. As has been foreshadowed, s 324C abolishes some common law doctrines, described in the Explanatory Memorandum as "the common law concerning the ways in which a person may be held to have been *complicit* in the commission of an offence".¹¹ It provides that:

- "(1) The law of complicity at common law in relation to aiding, abetting, counselling or procuring the commission of an offence is abolished.

11 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 15 (emphasis added).

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- (2) The doctrines at common law of acting in concert, joint criminal enterprise and common purpose (including extended common purpose) are abolished.

Note

The common law concerning the circumstances in which a person may withdraw from an offence in which the person would otherwise be complicit is not abolished by this section."

17 Section 324A provides that "[a] person who is involved in the commission of an offence may be found guilty of the offence whether or not any other person is prosecuted for or found guilty of the offence". As s 324(1) makes clear, however, the prosecution must still prove that an offence was in fact committed.¹²

18 Section 324B provides that "[a] person may be found guilty of an offence by virtue of section 324 if the trier of fact is satisfied that the person is guilty either as the person who committed the offence or as a person involved in the commission of the offence but is unable to determine which applies".

The directions to the jury

19 The convictions that are the subject of this appeal – those that were dependent on Mr Rohan having been involved in the commission of the offences under s 324(1) – were against two offence provisions: s 71B(1) of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (the supply offences) and s 49A(1) of the *Crimes Act* (the sexual penetration offences).

20 Section 71B(1) of the *Drugs, Poisons and Controlled Substances Act* relevantly provides that a person who, without authority or licence, supplies a drug of dependence to a child for use by that child is guilty of an indictable offence. "Child" is defined as a person under 18 years of age.¹³ In her charge to the jury, the trial judge explained that this offence had four elements: "[t]his offence would be committed by any person who one, gave cannabis, two, to [Daisy], that's Charge 1, or to [Katie], Charge 2, and element three is intending it to be for her use, and element four is when that person was not authorised or licensed to do so". Knowledge that the person is a child is not an element of the offence; however, as the trial judge explained to the jury, it is a defence to a charge for a

12 See also Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 15.

13 *Drugs, Poisons and Controlled Substances Act*, s 70(1) (definition of "child").

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person to prove that he or she believed on reasonable grounds that the person to whom the drug of dependence was supplied was 18 years of age or older.¹⁴

21 Section 49A(1) of the *Crimes Act* relevantly provides that a person (A) commits an offence if two elements are met: "A intentionally ... sexually penetrates another person (B)" and "B is a child under the age of 12 years". The trial judge described these two elements to the jury, explaining that the offence "would be committed by any person who one, intentionally sexually penetrated [Daisy] and two, that [Daisy] was under the age of 12 at the time". As reflected in those directions, the second element of s 49A(1) has no mental element; knowledge or belief as to the age of B is not an element of the offence. Further, it is not a defence to a charge that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that B was 12 years of age or more.¹⁵

22 The trial judge then went on to explain what the jury needed to be satisfied of before it could find a person, who did not do the physical acts, guilty of the offences charged. Relevantly, the trial judge explained that:

"[Y]ou must be satisfied the accused agreed with at least one other person to commit the offence. ...

The agreement must have been to commit the particular offence charged. This element will not be satisfied if the accused agreed to pursue some other form of activity that is not criminal or a different offence. However, it is not necessary that they knew they were agreeing to commit a crime, as long as they agreed to do something which was, in fact, criminal. ...

You do not even have to find that they all agreed on the precise terms of the agreement. For this element to be satisfied you only need to find that they agreed to commit the particular criminal offence together.

If you are satisfied beyond reasonable doubt that the three accused had an agreement to supply [Daisy] and [Katie] with cannabis, that would be sufficient to satisfy this part of the element in relation to Charges 1 and 2.

If you are satisfied beyond reasonable doubt that the three accused had an agreement to engage in sexual activity, including penetration, with [Daisy]

14 *Drugs, Poisons and Controlled Substances Act*, s 71B(4).

15 *Crimes Act*, s 49ZC(a).

and [Katie], that would be sufficient to satisfy this part of the first element in relation to the sexual offence charges."

23 The trial judge described the necessary mental state for entering into the agreement as follows:

"The prosecution must prove that when the accused agreed to commit the offence he had the necessary state of mind to do so.

In other words, for the supply of cannabis charge, that he intended it to be for the use of [Daisy] and [Katie], and in relation to the sexual penetration of a child charges, that he intended the child be sexually penetrated ... [F]urther, where relevant, that he had no defence of reasonable belief in age. Remember, the onus would fall on the accused to prove that."

24 In sum, the trial judge did not instruct the jury that the prosecution needed to prove that Mr Rohan knew the ages of Daisy or Katie (or that they were under a certain age) when agreeing to commit the offences. Rather, it was enough for the prosecution to prove that Mr Rohan had agreed with another person or persons to supply Daisy and Katie with cannabis, and engage in sexual activity, including penetration, with Daisy and Katie, while having the necessary state of mind for each offence – intending that Daisy and Katie use the cannabis, and intending that Daisy and Katie be sexually penetrated. For the supply offences, it was up to Mr Rohan to establish that he had a defence of reasonable belief in age.¹⁶ There was no such defence for the sexual penetration offences against Daisy.¹⁷

Construing ss 324(1) and 323(1)(c)

25 The starting point for the ascertainment of the meaning of a statutory provision – here, ss 324(1) and 323(1)(c) of the *Crimes Act* – is the text of the statute, whilst at the same time regard is had to context in its widest sense – including its historical context – and purpose.¹⁸ Ordinarily, the same meaning is

16 *Drugs, Poisons and Controlled Substances Act*, s 71B(4).

17 As referred to above at [4], each co-accused was acquitted of charges of sexual penetration of a child under 16 in relation to Katie (aged 12). A defence of reasonable belief in age applied to this offence: *Crimes Act*, ss 49B(1) and 49W(1).

18 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] and the authorities there cited; *R v Jacobs Group (Australia) Pty Ltd* (2023) 97 ALJR 595 at 602 [23]; 411 ALR 202 at 208-209.

given to the same words appearing in different parts of a statute. Put in different terms, there needs to be a reason not to give the same words in the same statute the same meaning.¹⁹

26 Section 323(1)(c) provides that "a person is involved in the commission of *an offence*" if the person "enters into an agreement ... to commit *the offence*" and s 324(1) provides that "if *an offence* ... is committed, a person who is involved in the commission of *the offence* is taken to have committed *the offence*" (emphasis added). The person is liable under s 324(1) to the maximum penalty for *that offence*.

27 The term "offence" appears throughout the Subdivision. It is not defined. There was significant attention given in argument to the meaning of the word "offence". The Crown contended that "offence" in s 323(1)(c) means only the acts or omissions constituting the conduct element of an offence, while at the same time maintaining that "offence" used elsewhere in ss 323 and 324 means the concatenation of elements (physical and mental) which constitute a particular offence. It was on that basis that the Crown contended that proof of an "agreement ... to commit the offence" required only proof that the accused entered into an agreement with another person to commit the acts or omissions which constitute the offence.

28 Given the logic of the provisions and how they interact, the word "offence" cannot have different meanings within those provisions. The same offence is being referred to throughout the Subdivision – the offence that is committed and for which a person may be liable to the maximum penalty under s 324(1). And the term "offence" means the criminal offence – that is, the concatenation of factual elements (physical, mental and circumstantial) which give rise to criminal liability, rather than solely the physical acts.²⁰ The Crown's contention is rejected.

29 But that is not the end of the inquiry. It does not necessarily follow that, because "offence" refers to all the elements of the offence, it must be proved that a person who "enters into an agreement ... to commit the offence" intends, knows, or believes in the existence of, all those elements. Section 323(1)(c) should not be construed simply by focusing on the meaning of a single word used

19 *Jacobs* (2023) 97 ALJR 595 at 602 [25]; 411 ALR 202 at 209, and the authorities there cited. See also Pearce, *Statutory Interpretation in Australia*, 9th ed (2019) at 141-142 [4.6]-[4.7]; Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 117 [5.170].

20 See *Kingswell v The Queen* (1985) 159 CLR 264 at 292; *R v Barlow* (1997) 188 CLR 1 at 9.

throughout the Subdivision. What does s 323(1)(c) mean when it says "enter[] into an agreement, arrangement or understanding with another person *to commit the offence*"? The liability is based on agreement (extending to an arrangement or understanding) with another person or persons. The requisite agreement may be expressed in words. But there is no reason why the agreement may not be inferred from the parties' conduct.²¹ The jury must be satisfied beyond reasonable doubt that the person and another person or persons agreed something would be done or omitted to be done – to commit an offence.

30 It is therefore essential to identify what acts and omissions the parties agreed upon and what the person's state of mind was when they entered into the agreement with the other person or persons. It is not necessary that the person *knew* that they were agreeing to commit an offence,²² as long as they agreed to do something which was, in the circumstances, a criminal offence. That construction of ss 324(1) and 323(1)(c) does not extend liability to persons involved in an offence by requiring only that they agreed to do the physical acts constituting the conduct element of the offence. To the contrary – a person who enters into an agreement must do so with the state of mind necessary such that it meets the description of entering an agreement "to commit the offence". That is because objective conduct that demonstrates entry into an agreement might not be accompanied by the requisite state of mind.

31 At its most basic level, it is therefore necessary to ask three questions for the purposes of ss 324(1) and 323(1)(c): (1) Did the accused and one or more people enter into an agreement? (2) In accordance with that agreement, did one or more of them act (or fail to act) in a way which together would meet all the acts or omissions necessary to commit an offence, in the circumstances necessary for the commission of that offence? (3) Did the accused have the state of mind required for the commission of that offence at the time of entering into the agreement? If so, the accused is guilty of the offence.

32 In the present appeal, Mr Rohan, MK and WF agreed to supply cannabis *to Daisy and Katie*, and then engage in sexual activity – including sexual penetration – *with Daisy*. Those acts, which they agreed to do, and which occurred, were criminal. And the accused had the necessary state of mind to agree to commit the offences. The prosecution did not need to prove that any of the accused had any further knowledge or intention beyond that the accused agreed, in relation to

21 See, in respect of the common law, *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; *Miller v The Queen* (2016) 259 CLR 380 at 388 [4]; *Mitchell v The King* (2023) 97 ALJR 172 at 183 [54]; 407 ALR 587 at 599.

22 *Crimes Act*, s 323(3)(b).

the supply charges, to supply the cannabis *intending* that Daisy and Katie use it (no matter which of the accused did the act of supply) and, in relation to the sexual penetration charges, to sexually penetrate Daisy *intending* that Daisy be sexually penetrated (again no matter which of the accused did the act of sexual penetration).

33 Put in other words, the critical matter that, in this case, made the agreement one "to commit the offence" of sexual penetration of a child under 12 was that the agreement was to intentionally sexually penetrate Daisy. The agreement was not simply to intentionally sexually penetrate any person (that being not, in itself, an offence), but to intentionally sexually penetrate a particular person – Daisy. And intentionally sexually penetrating Daisy was an offence under s 49A(1) of the *Crimes Act*. It was an offence because she was under 12, not because any of the accused knew or believed that she was under 12. And, at the time of entering into the agreement, Mr Rohan had the necessary mental state for that offence as prescribed by s 49A(1) – he intended that Daisy be sexually penetrated.

34 It can therefore be seen that a person will be liable under ss 324(1) and 323(1)(c) if: *first*, they enter into an agreement with another person or persons to do certain acts or omissions necessary to commit an offence; *second*, in accordance with (and within the scope of) that agreement²³, one or more parties to the agreement performs all of the acts or omissions necessary to commit the offence, in the circumstances necessary for the commission of that offence; and *third*, at the time of entering into the agreement, the person had the state of mind required for the commission of the offence. The person is then liable under s 324(1), subject to any excuses or defences that may be available to them.²⁴

35 That construction is consistent with and reinforced by s 324B of the *Crimes Act*, which provides that a person may be found guilty of an offence if the trier of fact is satisfied that the person is guilty either as the person who committed the offence or as a person involved in the commission of the offence but the trier of fact is unable to determine which applies. That is, where two or more persons entered into an agreement to commit an offence within the meaning of s 323(1)(c) and an offence was committed in accordance with that agreement, the jury need not be satisfied of what role each person played in the commission of the offence, provided that the acts committed were within the scope of the continuing agreement and the person had the state of mind required for the offence at the time of the agreement.

23 The person not having withdrawn from the offence: see *Crimes Act*, s 324(2).

24 See, eg, *Drugs, Poisons and Controlled Substances Act*, s 71B(4).

36 That construction is also consistent with the Explanatory Memorandum, which said that s 323(1)(c) "covers group activity that would be covered by the common law doctrines of acting in concert, joint criminal enterprise and common purpose".²⁵ That is, Parliament intended s 323(1)(c) to cover the same activity that would be covered by those common law doctrines. The fact that liability under s 324(1) was loosely described as "derivative" in the Explanatory Memorandum²⁶ means no more than that a person cannot be party to a crime without it being established that a crime has been committed, including by persons acting in combination. That does not detract from the fact that s 323(1)(c), like the doctrine of joint criminal enterprise, is a form of primary liability arising from a type of agency – an agreement between two or more persons to commit a crime together.²⁷ The things done, in accordance with the continuing agreement, which are necessary to constitute the crime are attributed to all parties to the agreement and they are all equally guilty of the crime regardless of the part played by each in its commission.²⁸ Where the crime is committed, s 323(1)(c) should not be understood as permitting or requiring the parties to an agreement to commit the crime to be treated differently according to who did what.

37 The Court of Appeal's²⁹ reference to and reliance on *R v LK*³⁰ was misplaced. *LK* considered the offence of conspiracy to commit an offence under s 11.5(1) of the *Criminal Code* (Cth), where the default fault element was intention. The Court held in that context that proof of intention to enter into an agreement to commit an offence required proof of the accused's knowledge of, or belief in, the facts that made the proposed conduct an offence.³¹ It is true that

25 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13.

26 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 14.

27 See, in respect of the common law, *Osland v The Queen* (1998) 197 CLR 316 at 343-344 [75], 383 [174], 402 [217]; *IL v The Queen* (2017) 262 CLR 268 at 282 [29], 311 [103], 323-324 [146]-[149]; *O'Dea v Western Australia* (2022) 273 CLR 315 at 335 [55]; *Mitchell* (2023) 97 ALJR 172 at 184 [55]; 407 ALR 587 at 599-600.

28 *Mitchell* (2023) 97 ALJR 172 at 184 [55]; 407 ALR 587 at 599-600.

29 *Rohan v The King* [2022] VSCA 215 at [77]-[79].

30 (2010) 241 CLR 177.

31 *LK* (2010) 241 CLR 177 at 228 [117].

the "Simplification of Jury Directions Project" Report described its recommended provision for group activity as a "completed conspiracy offence", by reference to the fault element in *LK*.³² However, the terms of the provision enacted by Parliament, and the Explanatory Memorandum, do not indicate an intention for s 323(1)(c) to model a conspiracy offence.

38 Extensive reference was made in the reasons of the Court of Appeal,³³ and in argument in this Court, to s 323(1)(a) of the *Crimes Act* and to this Court's decision in *Giorgianni v The Queen*.³⁴ In particular, reference was made to the statements by Gibbs CJ that to prove aiding, abetting, counselling or procuring at common law it is necessary to prove that the accused, "*knowing all the essential facts which made what was done a crime, ... intentionally aided, abetted, counselled or procured the acts of the principal offender*".³⁵ His Honour explained that knowledge is required "even when the offence is one of strict liability, so that the actual perpetrator may be convicted in the absence of knowledge".³⁶ The other members of the Court made similar statements of principle.³⁷

39 In this Court, Mr Rohan submitted that one of the essential facts which made the conduct of the supply of cannabis and the acts of sexual penetration a crime was that the girl concerned was under a specified age. Therefore, the argument proceeded, to meet the common law test of aiding and abetting, the prosecution would have had to show that the alleged aider and abettor knew that the girl concerned was under the specified age. Both parties agreed in this Court that this requirement would also apply to s 323(1)(a) of the *Crimes Act*, following from the use in that provision of the word "intentionally". Nothing that is said here should be understood as detracting from or casting doubt on what was held in *Giorgianni* about the common law principles of aiding and abetting or as expressing any contrary conclusion about the construction of s 323(1)(a) accepted by the parties in this appeal. As the Explanatory Memorandum explained, s 323(1)(a) "covers the behaviour that would be covered by aiding, abetting,

32 Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 97-98 [2.279]-[2.280].

33 *Rohan v The King* [2022] VSCA 215 at [71]-[76].

34 (1985) 156 CLR 473.

35 *Giorgianni* (1985) 156 CLR 473 at 487-488 (emphasis added); see also 479.

36 *Giorgianni* (1985) 156 CLR 473 at 483.

37 *Giorgianni* (1985) 156 CLR 473 at 493-495, 506-507.

counselling and procuring at common law".³⁸ Indeed, the Explanatory Memorandum expressly stated that the reference to "intentionally" in s 323(1)(a) is consistent with the fault element required by *Giorgianni*.³⁹

40 It does not follow, however, that s 323(1)(c) should be construed as requiring the prosecution to prove that any of the parties to the agreement, arrangement or understanding knew either the age of the victim or that the victim was under a specified age. Section 323(1)(a) and (c) are expressed differently. They have different work to do. That difference is evident from the different language used in each provision and is emphasised by including in s 323(1)(a) the word "intentionally". The conduct caught by s 323(1)(a) is potentially wide and varied – it deals with assisting, encouraging or directing the commission of an offence. "Intentionally" prevents s 323(1)(a) having too broad a reach. As Mason J observed in *Giorgianni* in relation to aiding and abetting at common law, "there need not exist any agreement or consensus between the ... secondary participant and the principal offender".⁴⁰ In that context, as Mason J explained, "[t]he 'link in purpose' between the secondary party and the principal offender is *not* established where a person does something to bring about, or render more likely, the commission of an offence by another in circumstances in which, through ignorance of the facts, it appears to [them] to be an innocent act".⁴¹ Rather, the "link in purpose" is established by the requirement for intention informed by knowledge of the essential facts.

41 By contrast, the "link in purpose" between offenders required by s 323(1)(c) is provided by the "agreement, arrangement or understanding" between them "to commit the offence". That is, they are agreeing to embark on a course of conduct together – to commit a crime together. The plain language of s 323(1)(c) should be given effect according to its terms. There is no need to read in an additional fault element, beyond the fault elements that make up the offence that is the subject of the agreement. The additional fault element in *Giorgianni* – that the accused knew all of the essential facts which made what was done a

38 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13.

39 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13. See also Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 97 [2.277].

40 (1985) 156 CLR 473 at 493.

41 (1985) 156 CLR 473 at 494 (emphasis added).

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crime – is apposite to s 323(1)(a), which, like aiding and abetting, is a form of derivative liability (requiring the commission of a crime by another), but is inapposite to s 323(1)(c), which, like the doctrine of joint criminal enterprise, is a form of primary liability.

42 Nothing in s 323(1)(b) or (d) points to any contrary construction of s 323(1)(c). Paragraphs (b) and (d) extend paragraphs (a) and (c). In relation to those paragraphs, the Explanatory Memorandum stated that "[a]n accused may be liable where the offence committed differs from the offence that the accused originally encouraged etc., if the accused foresaw the probability that the offence would be committed in the course of carrying out the original offence".⁴² The manner in which each paragraph departs from the common law is different. Section 323(1)(b) (in conjunction with s 324C(1)) extends liability in relation to aiding, abetting, counselling and procuring from that which existed at common law. Section 323(1)(d) (in conjunction with s 324C(2)) narrows what was the position at common law for extended joint criminal enterprise⁴³ – it extends liability for group activity only where the accused foresees the probability (not the possibility) that another offence will be committed.

Conclusion and orders

43 For those reasons, the appeal should be allowed. Paragraphs 2 to 10 of the orders of the Court of Appeal of the Supreme Court of Victoria of 4 October 2022 are set aside and, in their place, order that the appeal against conviction is dismissed. Mr Rohan's appeal against sentence is remitted to the Court of Appeal for rehearing.

42 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13.

43 See *Miller* (2016) 259 CLR 380 at 401-402 [43].

44 GLEESON AND JAGOT JJ. The question in this appeal is whether, under provisions (ss 323 to 324C) in Div 1 of Pt II of the *Crimes Act 1958* (Vic) ("the Crimes Act"), the Crown had to prove beyond reasonable doubt that an accused, as a person alleged to have entered into an agreement, arrangement or understanding with another person to commit offences, knew the age of the child against whom the offences were perpetrated in order to be taken to have committed the offences, in circumstances where knowledge of the age of the child was not itself an element of the offences.

45 The respondent was convicted of multiple charges, six of which depended on the application of ss 323 to 324C of the Crimes Act. Those provisions concern a person's guilt of an offence by reason of their "involvement in" the offence. By s 323(1)(c) of the Crimes Act, a person is involved in the commission of an offence if the person "enters into an agreement, arrangement or understanding with another person to commit the offence". Two of the six charges (charges 1 and 2) alleged that the respondent, with two others, supplied a drug of dependence to a child (meaning a person under 18 years of age) contrary to s 71B of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The other four of the six charges (charges 3, 7, 8, and 9) alleged that the respondent, with two others, sexually penetrated a child under the age of 12 years contrary to s 49A(1) of the Crimes Act.

46 Neither s 71B nor s 49A(1) required knowledge of the age of the child as an element of the offence. The provisions required only that the child in fact be under 18 years of age for the drug supply offences, and under 12 years of age for the sexual penetration offences. The trial judge did not direct the jury that, to establish that the respondent was involved in the commission of the offences by operation of s 323(1)(c), the Crown had to prove beyond reasonable doubt that the respondent knew that the child victims were, relevantly, under 18 years of age for the drug supply offences, and under 12 years of age for the sexual penetration offences.

47 Having been convicted based on his "involvement in" the six offences in accordance with s 323(1)(c) of the Crimes Act, the respondent sought leave to appeal against his conviction and sentence to the Court of Appeal of the Supreme Court of Victoria. The Court of Appeal held that, for the drug supply offences, the Crown had to prove beyond reasonable doubt that the agreement, arrangement or understanding between the respondent and his co-accused involved the supply of a drug of dependence to a child, being a person under 18 years of age (and known to be such). For the sexual penetration offences, the Court of Appeal held that the Crown had to prove beyond reasonable doubt that the agreement, arrangement or understanding between the respondent and his co-accused involved one or more of them intentionally sexually penetrating a child under 12 years of age (and known to be such). The Court of Appeal therefore granted leave to appeal and set aside

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the convictions of the respondent on the six charges and ordered that they be subject to a new trial.⁴⁴

48 This Court granted the Crown special leave to appeal on the ground that the Court of Appeal had misconstrued s 323(1)(c) of the Crimes Act. The Crown contends that s 323(1)(c) did not require it to prove beyond reasonable doubt that the respondent knew that the children against whom the alleged offences were perpetrated were under 18 or 12 years of age as relevant to each offence.

49 As knowledge of the age of the children was not an element of the offences, such knowledge also was not a matter that the Crown had to prove beyond reasonable doubt to establish that the respondent entered into an agreement, arrangement or understanding to commit the offences. The Court of Appeal therefore erred in quashing the convictions of the respondent in respect of the six charges. The respondent's appeal against conviction ought to have been dismissed.

Statutory provisions

50 Section 324C of the Crimes Act abolishes the "law of complicity at common law in relation to aiding, abetting, counselling or procuring the commission of an offence" and the "doctrines at common law of acting in concert, joint criminal enterprise and common purpose (including extended common purpose)".

51 Section 324(1) of the Crimes Act provides that "if an offence (whether indictable or summary) is committed, a person who is involved in the commission of the offence is taken to have committed the offence and is liable to the maximum penalty for that offence".

52 Section 323(1) of the Crimes Act provides that, for the purpose of (relevantly) s 324(1):

"... a person is involved in the commission of an offence if the person –

- (a) intentionally assists, encourages or directs the commission of the offence; or
- (b) intentionally assists, encourages or directs the commission of another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence; or

44 *Rohan v The King* [2022] VSCA 215.

- (c) enters into an agreement, arrangement or understanding with another person to commit the offence; or
- (d) enters into an agreement, arrangement or understanding with another person to commit another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence."

53 Section 323(3) of the Crimes Act provides that a "person may be involved in the commission of an offence, by act or omission": (a) "even if the person is not physically present when the offence, or an element of the offence, is committed"; and (b) "whether or not the person realises that the facts constitute an offence".

54 By s 324A of the Crimes Act, a "person who is involved in the commission of an offence may be found guilty of the offence whether or not any other person is prosecuted for or found guilty of the offence".

55 By s 324B of the Crimes Act, a "person may be found guilty of an offence by virtue of section 324 if the trier of fact is satisfied that the person is guilty either as the person who committed the offence or as a person involved in the commission of the offence but is unable to determine which applies".

56 To the extent relevant, s 49A(1) of the Crimes Act provides that a "person (A) commits an offence if ... A intentionally ... sexually penetrates another person (B)" and "B is a child under the age of 12 years". By s 49ZC, it is not a defence to a charge under s 49A(1) that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that B was 12 years of age or more.

57 To the extent relevant, s 71B(1)(b) of the *Drugs, Poisons and Controlled Substances Act* provides that a person who (without authority or licence under the Act or regulations to do so) "supplies a drug of dependence to a child for the use of that drug of dependence by that child" is guilty of an indictable offence. Section 70(1) of that Act defines "child" to mean a person under 18 years of age. By s 71B(4), it is a defence to a charge under (relevantly) s 71B(1)(b) for a person charged to prove that they "believed on reasonable grounds that the person to whom the drug of dependence was supplied was 18 years of age or older".

Construing s 323(1)(c)

58 The Second Reading Speech for the *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014* (Vic), which introduced the relevant provisions, refers to a recommendation of the *"Simplification of Jury Directions Project*

report"⁴⁵ to simplify the highly complex directions on complicity required at common law.⁴⁶ The Second Reading Speech says that the provisions "have a similar scope to the common law doctrines", other than the common law doctrine of extended common purpose (which was to be abolished).⁴⁷

59 The Explanatory Memorandum for the Bill says that the provisions would "improve the substantive law of complicity by introducing simpler, internally consistent laws and abolishing problematic common law rules" and had drawn "extensively" from the recommendations in the "Simplification of Jury Directions Project" report.⁴⁸ The Explanatory Memorandum includes this statement:⁴⁹

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

New section 323(1)(c) covers group activity that would be covered by the common law doctrines of acting in concert, joint criminal enterprise and common purpose.

New section 323(1)(b) and (d) extend paragraphs (a) and (c) by a form of recklessness. An accused may be liable where the offence committed differs from the offence that the accused originally encouraged etc, if the accused foresaw the probability that the offence would be committed in the course of carrying out the original offence.

...

45 Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012).

46 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 June 2014 at 2129.

47 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 June 2014 at 2129-2130.

48 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 12.

49 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13-14.

It is clear that liability is derivative, as an offence has to have been committed for a person to be complicit in that offence. However, this does not require any other person to be prosecuted for, or found guilty of, the offence – see new section 324A."

60 The "Simplification of Jury Directions Project" report proposed provisions reflecting the terms of s 323(1)(a) and (b) on the basis that the "word intentionally in proposed subsection (1)(a) ensures, in keeping with *Giorgianni*, that a purposive state of mind is required for complicity", being "not just an intention to assist or encourage, but an intention to assist or encourage another to commit a particular offence";⁵⁰ and proposed sub-s (1)(b) would be a "completed conspiracy offence" in which the fault element required would "be in line with that specified for traditional forms of accessory liability in *Giorgianni*", as it "seems implicit in the terms 'agreement, arrangement or understanding' that there must be a specific degree of knowledge, and intent, in order to fall within the notion of a conspiracy".⁵¹ The report cited *R v LK*⁵² in support of this last statement.

61 The high point of the respondent's argument is that s 323(1)(a) and (c) of the Crimes Act reflect the recommendations of the "Simplification of Jury Directions Project" report. That report describes what became s 323(1)(c) as a conspiracy offence which requires proof of the accused's knowledge of all elements of the offence, not just proof of the physical acts or omissions constituting the offence.⁵³ In *R v LK*, for example, the relevant offence was dealing with money, and the money was the proceeds of crime, and the person was reckless as to the fact that the money was the proceeds of crime. The charge was conspiracy to commit the offence. For the alleged conspiracy, proof of mere recklessness as to whether the money the subject of the offence was the proceeds of crime could not prove the required intention, which was specified by the relevant statute to be an intention "that an offence would be committed pursuant to the agreement".⁵⁴ This

50 Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 97 [2.277].

51 Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 97-98 [2.279]-[2.280].

52 (2010) 241 CLR 177.

53 Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 97-98 [2.279]-[2.280].

54 *Criminal Code* (Cth), s 11.5(2)(b).

carried the requirement to prove knowledge that the money was the proceeds of crime.⁵⁵

62 In construing the relevant provisions, it is not to be assumed that the Victorian Parliament knew or necessarily shared the view of the authors of the "Simplification of Jury Directions Project" report and, on that basis, that s 323(1)(c) (like s 323(1)(a), given the word "intentionally" in that provision) is to be construed as requiring an accused to know facts that the person who committed the offence need not know in order to commit the offence. Assumptions to that effect are not legitimate aids to statutory construction. In this case, they are displaced by the Explanatory Memorandum and by the text, context, and purpose of s 323(1)(c).

63 The Explanatory Memorandum says that s 323(1)(a) covers the behaviour that would be covered by aiding, abetting, counselling, and procuring at common law and therefore reflects the fault element required by *Giorgianni v The Queen*⁵⁶ by use of the word "intentionally".⁵⁷ In *Giorgianni*, this Court held that aiding, abetting, counselling, and procuring an offence requires proof that the accused knew every fact essential to the offence. This follows from the fact that the very words "aiding, abetting, counselling, and procuring" indicate that "a particular state of mind is essential"⁵⁸ for such an offence to be committed, being actual knowledge of each element of the offence.⁵⁹

64 The Explanatory Memorandum says that s 323(1)(c) covers group activity that would be covered by the common law doctrines of acting in concert, joint criminal enterprise, and common purpose.⁶⁰ It does not refer to s 323(1)(c) reflecting the common law of conspiracy or the fault element in *Giorgianni*, despite these opinions having been expressed in the "Simplification of Jury Directions Project" report. Further, the common law doctrines that the Explanatory Memorandum says that s 323(1)(c) covers are not aiding or abetting or conspiracy offences. Offences by reason of acting in concert, joint criminal enterprise, and

55 *R v LK* (2010) 241 CLR 177 at 224 [108], 228-229 [117]-[119].

56 (1985) 156 CLR 473.

57 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13.

58 *Giorgianni v The Queen* (1985) 156 CLR 473 at 479.

59 *Giorgianni v The Queen* (1985) 156 CLR 473 at 487-488, 493-495, 506-509.

60 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13.

common purpose involve a "mutual embarkation on a crime".⁶¹ The requirement of mutuality requires an agreement, arrangement or understanding that the parties will commit acts or omissions constituting a crime, in which event, if one person commits all acts or omissions necessary to constitute the crime, the others have also committed that crime.⁶² As McHugh J explained in *Osland v The Queen*, the correct principle in such a case is that the parties to the agreement, arrangement or understanding "are all equally liable for the acts that constitute the actus reus of the crime".⁶³ That is, "it is the acts, and not the crime, of the actual perpetrator which are attributed to the person acting in concert".⁶⁴ This means, for example, that the actual perpetrator of the acts may be acquitted of the crime and the other party or parties to the agreement, arrangement or understanding convicted of the crime.⁶⁵

65 In other words, the common law doctrines distinguished between cases of: (a) an accused who aided, abetted, counselled or procured the commission of a crime by another – which required the accused to have knowledge of every essential fact constituting the offence, lest a person be criminally liable merely by doing "something to bring about, or render more likely, the commission of an offence by another in circumstances in which, through ignorance of the facts, it appears to [the person] to be an innocent act";⁶⁶ (b) an accused who conspired with another person to commit a crime – which required the accused to "have intended to put the common design, the commission of the offence, into effect",⁶⁷ so that "the intention to do the unlawful act [is] the mens rea of the offence and the fact of the agreement [is] the actus reus";⁶⁸ and (c) an accused who entered into an agreement, arrangement or understanding to commit acts or omissions constituting a crime – in which event, if one party to the agreement, arrangement or

61 *Miller v The Queen* (2016) 259 CLR 380 at 398 [34], citing *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [20]; 231 ALR 500 at 505.

62 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

63 *Osland v The Queen* (1998) 197 CLR 316 at 343 [73].

64 *Osland v The Queen* (1998) 197 CLR 316 at 344 [75].

65 *Osland v The Queen* (1998) 197 CLR 316 at 345 [79].

66 *Giorgianni v The Queen* (1985) 156 CLR 473 at 494.

67 *R v LK* (2010) 241 CLR 177 at 208 [63].

68 *R v LK* (2010) 241 CLR 177 at 208 [64].

understanding commits all acts or omissions in the circumstances necessary to constitute the crime, the accused has also committed that crime.

66 For s 323(1)(c) to cover the group activity that would be covered by the common law doctrines of acting in concert, joint criminal enterprise, and common purpose, as the Explanatory Memorandum states, the provision cannot require the Crown to prove not only the fact of entry into the agreement, arrangement or understanding to commit the offence and the commission of the offence, but also that the accused knew a fact where knowledge (as opposed to the existence) of that fact was not itself an element of the offence. If construed in that way, s 323(1)(c) does not cover the group activity that would be covered by the specified common law doctrines. It covers only a lesser range of conduct than those common law doctrines.

67 In circumstances where: (a) the Second Reading Speech identifies the intention of the Victorian Parliament to abolish the common law doctrine of joint criminal enterprise and identifies that the provisions are otherwise intended to "have a similar scope to the common law doctrines";⁶⁹ (b) the Explanatory Memorandum says that s 323(1)(c) covers group activity that would be covered by the common law doctrines of acting in concert, joint criminal enterprise, and common purpose;⁷⁰ and (c) the Explanatory Memorandum identifies the *Giorgianni* requirement of knowledge as applying to s 323(1)(a),⁷¹ but not to s 323(1)(c) (contrary to the "Simplification of Jury Directions Project" report, which identifies the *Giorgianni* requirement of knowledge as applying to both proposed provisions),⁷² the respondent's argument that the legislative provision reflects the reasoning in the "Simplification of Jury Directions Project" report is unpersuasive. If anything, the extrinsic material points firmly against the respondent's construction of s 323(1)(c).

68 Further, by s 324(1) of the Crimes Act, an offence must have been committed before a person may be involved in the commission of that offence, but, as s 324A makes clear, no person needs to have been prosecuted for or convicted

69 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 June 2014 at 2129.

70 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13.

71 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 13.

72 Weinberg et al, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012) at 97 [2.277], 97-98 [2.279]-[2.280].

of the commission of the offence before a person may be involved in the commission of that offence. If the offence has been committed, then a person may be involved in the commission of the offence in any one or more of the ways specified in s 323(1). The obvious distinction between para (a) of s 323(1) (concerning a person who "assists, encourages or directs the commission of the offence") and para (c) of s 323(1) (concerning a person who "enters into an agreement, arrangement or understanding with another person to commit the offence") is that para (a) is qualified by the word "intentionally" whereas para (c) is not so qualified. The presence of "intentionally" in s 323(1)(a) is a strong textual indicator that for s 323(1)(a) to be engaged, the intention to assist, encourage or direct the commission of the offence requires the person alleged to have been involved in the offence to know all essential elements of the offence. The absence of "intentionally" in s 323(1)(c) is a strong textual indicator that for s 323(1)(c) to be engaged, the entry into the agreement, arrangement or understanding with another person is no more and no less than for one or more of the parties to the agreement, arrangement or understanding to commit the offence.

69 There is also a strong contextual indicator weighing against the respondent's construction. It is that s 324B of the Crimes Act provides that a "person may be found guilty of an offence by virtue of section 324 if the trier of fact is satisfied that the person is guilty either as the person who committed the offence or as a person involved in the commission of the offence but is unable to determine which applies". The words "by virtue of section 324" ensure that s 324B cannot operate unless an offence is committed (as s 324(1) is conditioned on the commission of an offence). Section 324B means that if the trier of fact is satisfied beyond reasonable doubt that an offence has been committed and that the accused is either the person who committed the offence or a person who was involved in the commission of the offence, the trier of fact can find the accused guilty without deciding which (that is, commission of or involvement in the commission of the offence) applies. Insofar as the application of s 323(1)(c) is concerned, the apparent equivalence of criminal culpability inherent in s 324B weighs against any construction which involves s 323(1)(c) requiring proof of the accused's knowledge when such proof is not required as an element of the commission of the offence.

70 Other arguments advanced by the respondent, discussed below, are unpersuasive.

71 First, the reference in the Explanatory Memorandum to all liability under the provisions being "derivative" is to be understood in the terms there used, that is, that such liability is "derivative" because "an offence has to have been

committed for a person to be complicit in that offence".⁷³ The Explanatory Memorandum is not referring to "derivative" criminal liability in any technical sense. It is not therefore suggesting that the common law distinctions between derivative and primary liability (which had common law consequences⁷⁴) operate as a gloss on the statutory provisions.

72 Second, s 323(3)(b), which provides that a person may be involved in the commission of an offence by act or omission whether or not the person realises that the facts constitute an offence, does not support the respondent's construction. Section 323(3)(b) is merely the statutory equivalent of the common law principle that ignorance of the law is no excuse.

73 Third, any tension between the use of the word "offence" in s 323(1)(a) and (c) and s 324(1) is to be resolved contextually. "Offence" is not a defined term but must mean (wherever it appears in the provisions) all elements (physical, mental, and circumstantial) which together comprise the offence.⁷⁵ In s 324(1), accordingly, the condition "if an offence ... is committed" requires the Crown to prove beyond reasonable doubt that an offence has been committed by a person (irrespective of whether that person has been or even could be prosecuted or convicted for the offence). The phrase "a person who is involved in the commission of the offence" in s 324(1) operates by reference to s 323(1). A person is such a person if any of paras (a) to (d) apply. Focusing on s 323(1)(a) and (c), the former involves intentionally assisting, encouraging or directing the commission of the offence by another person (meaning, by reason of the word "intentionally", doing so knowing all elements – physical, mental, and circumstantial – which together comprise the offence). The latter involves entering into an agreement, arrangement or understanding with another person for either or both to commit the offence. In this latter case, the equivalence of criminal culpability between the parties to the agreement, arrangement or understanding is created by their mutual entry into the agreement, arrangement or understanding to commit the offence. This equivalence means that whatever mental and circumstantial state is sufficient for one party to commit the offence is also sufficient to mean the other party is taken to have committed that offence.

74 Further, the respondent's extreme example – of a parent agreeing with an adult child that the adult child could use the family home to have sex with a person

73 Victoria, Legislative Council, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Explanatory Memorandum at 14.

74 *Osland v The Queen* (1998) 197 CLR 316 at 341-351 [70]-[95], 400-402 [207]-[217].

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

with the parent not knowing the person was a child under the age of 12 years – does not help. The example overlooks the requirement for the accused to have entered into an agreement, arrangement or understanding to commit the offence – which, in the case of the offence created by s 49A(1)(a)(i), is that person A (a specific person) intentionally sexually penetrates person B (a specific person) and not merely any hypothetical person. In any event, the proper construction of s 323(1)(c) is not to be determined by extreme examples.

Conclusion

75 Accordingly, in the case of the drug supply charges (charges 1 and 2), the Crown did not have to prove that the respondent knew that the person to whom the drug of dependence was supplied was a person under 18 years of age in order to satisfy the requirements of s 323(1)(c) of the Crimes Act. The Crown had to prove, relevantly, only that the offence under s 71B(1) was committed by a person with whom the respondent had entered into an agreement, arrangement or understanding to commit the offence under s 71B(1). To prove such an agreement, arrangement or understanding relevantly required only proof beyond reasonable doubt of an agreement, arrangement or understanding to supply a drug of dependence to the child where that child, in fact, was under 18 years of age. The defence of honest and reasonable mistake, however, would be available to both the person who committed the offence and the person taken to have committed the offence by operation of s 323(1)(c), as provided for in s 71B(4).

76 In the case of the sexual penetration charges (charges 3, 7, 8, and 9), the Crown did not have to prove that the respondent knew that the person being intentionally sexually penetrated was under the age of 12 years. The Crown had to prove, relevantly, only that the offence under s 49A(1)(a)(i) was committed by a person with whom the respondent had entered into an agreement, arrangement or understanding to commit the offence under s 49A(1)(a)(i). To prove such an agreement, arrangement or understanding relevantly required only proof beyond reasonable doubt of an agreement, arrangement or understanding to intentionally sexually penetrate the child where that child, in fact, was under the age of 12 years.

77 If offences require, as an element of the offence, that the person committing the offence have a particular state of mind (eg, knowledge of the age of the person against whom the offence is being perpetrated) then that element of the offence would apply to the required agreement, arrangement or understanding. That is, for example, for a person to enter into an agreement, arrangement or understanding to supply a drug to a child known to be under 18 years of age, that person would need to know the child was under 18 years of age. Where the offences do not require such knowledge, as in this case, no such element of the offence also applies to the agreement, arrangement or understanding.

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For these reasons, the orders should be:

- (1) The appeal be allowed.
- (2) Set aside orders 2 to 10 made by the Court of Appeal of the Supreme Court of Victoria on 4 October 2022 and, in lieu thereof, order that the appeal against conviction is dismissed.
- (3) The respondent's application for leave to appeal against sentence be remitted to the Court of Appeal of the Supreme Court of Victoria for rehearing.