HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

THE KING — APPELLANT

AND

CEM BATAK — RESPONDENT

The King v Batak
[2025] HCA 18
Date of Hearing: 8 April 2025
Date of Order: 8 April 2025
Date of Publication of Reasons: 7 May 2025
S148/2024

ORDER

1. *Leave to file the proposed amended notice of appeal is refused.*

2. *Special leave to appeal is revoked.*

On appeal from the Supreme Court of New South Wales

Representation

S C Dowling SC with A L Bonnor and M L Millward for the appellant (instructed by Solicitor for Public Prosecutions (NSW))

G A Bashir SC with C Parkin and J R Murphy for the respondent (instructed by Fahmy Lawyers)

CATCHWORDS

The King v Batak

Criminal practice – Particular offences – Accessory before the fact to constructive murder – Where foundational offence was attempted robbery armed with dangerous weapon – Whether accessory before the fact to constructive murder is an offence known to law.

High Court – Special leave to appeal – Where New South Wales Court of Criminal Appeal ("CCA") ordered new trial – Where Crown sought orders setting aside orders of CCA and dismissing respondent's appeal against conviction – Where Crown argued accessory before the fact to constructive murder is an offence known to law – Where Crown argued different formulation of mental element in CCA and High Court – Where Crown conceded acceptance of its argument required CCA's order for new trial to be affirmed – Whether special leave to appeal should be revoked – Whether interests of justice warranted revocation of special leave to appeal – Whether Crown in substance seeking guidance as to scope of retrial – Whether case ceased to be appropriate vehicle.

Words and phrases – "accessorial liability", "accessory before the fact", "accessory before the fact to constructive murder", "appeal against reasons", "appropriate vehicle", "armed robbery", "constructive murder", "derivative liability", "extended joint criminal enterprise", "foundational offence", "ground of appeal", "guidance", "gun", "high vis shirt", "interests of justice", "joint criminal enterprise", "jury", "jury direction", "knowledge of the act causing death", "mental element", "new trial", "no real dispute", "offence known to law", "primary liability", "revocation of special leave to appeal", "special leave to appeal", "state of mind", "trial judge's direction", "variation of orders".

Crimes Act 1900 (NSW), ss 18, 346.

1 GAGELER CJ, GORDON, STEWARD, GLEESON AND BEECH-JONES JJ. Pursuant to a prior grant of special leave to appeal, the Crown appealed to this Court from part of the judgment of the New South Wales Court of Criminal Appeal in *Batak v The King*.[1] The sole ground of the appeal was that the Court of Criminal Appeal erred in concluding that it was an error of law to permit constructive murder to be left to the jury on the basis of accessorial liability.

2 On 8 April 2025, this Court ordered by a majority that:

(1) Leave to file the proposed Amended Notice of Appeal is refused.

(2) Special leave to appeal is revoked.

3 These are our reasons for making those orders.

Proceedings in the Court of Criminal Appeal

4 The appeal to the Court of Criminal Appeal was from the conviction of the respondent on two counts in a trial by jury in the Supreme Court of New South Wales. Count 2 was attempted robbery whilst armed with a dangerous weapon. Count 2 was argued by the Crown and left to the jury on the basis of the respondent being an accessory before the fact to the offence. Count 1 was murder. Count 1 was argued by the Crown and left to the jury as a charge of constructive murder on the basis of the respondent being an accessory before the fact to the foundational offence charged in Count 2.

5 The appeal to the Court of Criminal Appeal was on four grounds. Ground 1 was that it was an error of law to permit constructive murder to be left to the jury on the basis of accessorial liability. Ground 2 was expressed to be in the alternative to Ground 1 and was in two parts, being that the trial judge misdirected the jury as to either or both of: (a) the elements of accessory before the fact to constructive murder; or (b) the elements of accessory before the fact to aggravated armed robbery. Ground 3 was that the trial judge erred in failing to direct the jury concerning the respondent's lack of prior convictions. Ground 4 was that the verdict was unreasonable.

6 The Court of Criminal Appeal upheld Ground 1 of the appeal, holding that being an accessory before the fact to constructive murder is not an offence known

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1 (2024) 114 NSWLR 313.

to law.[2] The Court of Criminal Appeal also considered the arguments advanced by the respondent on Ground 2 and concluded that Ground 2 was not made out.[3] It considered and rejected Grounds 3 and 4.[4]

7 The Court of Criminal Appeal noted that the consequence of upholding Ground 1 of the appeal was that the respondent's conviction on Count 1 could not stand.[5] However, taking the view that there appeared to be a "strong potential case" against the respondent of murder based on joint criminal enterprise,[6] the Court of Criminal Appeal determined to order a retrial on Count 1. Accordingly, orders 3, 4 and 5 made by the Court of Criminal Appeal were (3) "[u]phold the appeal with respect to count 1 on the indictment", (4) "[q]uash the [respondent's] conviction on count 1" and (5) "[a] retrial ... on count 1 is to be had".[7]

The orders sought by the appellant

8 By its Notice of Appeal to this Court, the Crown originally sought orders that orders 3, 4 and 5 made by the Court of Criminal Appeal be set aside and that, in place of those orders, the appeal against conviction be dismissed.

9 In written submissions in chief on the appeal to this Court, the Crown argued that being an accessory before the fact to constructive murder is an offence known to law. The Crown argued the mental element of that offence to be that "the accessory must know or believe at the time of giving assistance or encouragement ... that the principal *would do* the act causing death, as a means of effecting the venture, should the occasion arise, and with this knowledge the accessory must intentionally assist or encourage the principal" (emphasis added). As explained below, this was a significantly different formulation to that relied on by the Crown before the Court of Criminal Appeal.

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2 (2024) 114 NSWLR 313 at 363 [183], 365 [193], 371 [224], 371 [226].

3 (2024) 114 NSWLR 313 at 316 [6], 355 [156], 367 [206].

4 (2024) 114 NSWLR 313 at 367-369 [207]-[217], 370-371 [218]-[225].

5 (2024) 114 NSWLR 313 at 371 [226].

6 (2024) 114 NSWLR 313 at 371 [229].

7 (2024) 114 NSWLR 313 at 373 [238].

10 In written submissions in response, the respondent raised an issue as to the order appropriate to be made by this Court were this Court to accept the substantive argument of the Crown on the ground of appeal to this Court. The issue was whether the appropriate order would be to set aside orders 3, 4 and 5 made by the Court of Criminal Appeal and in their place dismiss the appeal against conviction, as then sought in the Notice of Appeal, or instead to affirm the order for a new trial made by the Court of Criminal Appeal. The respondent identified the issue as concerning "whether the trial conducted actually incorporated the necessary state of mind direction to the jury" and sought leave to raise by Notice of Contention "whether the trial judge directed the jury in accordance with the requisite state of mind".

11 In its written submissions in reply, the Crown conceded that the trial judge did not direct the jury in accordance with what it sought to argue in the appeal to this Court was the requisite state of mind for the offence of being an accessory before the fact to constructive murder. This concession led the Crown further to concede that, were its argument on its sole ground of appeal to be accepted by this Court, "the order for a new trial should be affirmed" ("the second concession").

12 By letter from the Senior Registrar of this Court, the Crown was invited to clarify the orders it sought in the appeal. In response to that invitation, the Crown filed supplementary submissions in which it resiled from the second concession. The Crown indicated its position then to be that its success on the ground of its appeal to this Court would re-enliven the question raised by Ground 2(a) of the respondent's appeal to the Court of Criminal Appeal, concerning whether the trial judge misdirected the jury as to the elements of accessory before the fact to constructive murder, and that remittal to the Court of Criminal Appeal to determine that question would be appropriate. Presumably, in that event, the Crown would also concede before the Court of Criminal Appeal that the jury had been misdirected. The Crown foreshadowed seeking leave to amend its Notice of Appeal to reflect that position.

13 By a proposed Amended Notice of Appeal accompanying its supplementary submissions, the Crown accordingly proposed to continue to seek orders setting aside orders 3, 4 and 5 made by the Court of Criminal Appeal. Instead of seeking an order that the appeal against conviction be dismissed, the Crown proposed to seek "[i]n place of order 3" an order that the appeal to the Court of Criminal Appeal be dismissed on all grounds other than Ground 2(a) and to seek as well an order that the matter be remitted to the Court of Criminal Appeal "for further consideration and determination of Ground 2(a) ... in accordance with the judgment of this Court".

14 In a subsequent directions hearing, the parties were put on notice that this Court would require the Crown to explain at the time scheduled for the hearing of the appeal why the grant of special leave to appeal should not be revoked.

15 At the hearing of the appeal in this Court, the Crown contended that its appeal was competent and that special leave to appeal should not be revoked. The Crown contended that order 3 made by the Court of Criminal Appeal, which upheld the appeal to that Court with respect to Count 1 on the indictment (ie, murder), and order 5, which provided that "[a] retrial ... on count 1 is to be had", would limit the scope of any retrial of the respondent. The Crown contended that an appeal which seeks to set aside or vary orders made by a court below to make explicit the scope of any remitter or retrial is competent.[8]

16 The Crown then provided a set of orders that were an alternative to those set out in the proposed Amended Notice of Appeal. Those orders did not provide for any remittal to the Court of Criminal Appeal but instead varied order 3 so that it recorded Ground 2(a) being upheld and Ground 1 being dismissed. They also proposed that order 5 made by the Court of Criminal Appeal be set aside and instead this Court order "a new trial to be conducted in accordance with the judgment of this Court".

The interests of justice warranted revocation of special leave

17 It is not necessary to decide whether either of the Crown's reformulations of the orders sought on the appeal affected the competency of the appeal in the sense of ensuring that the Crown was appealing against the orders, and not just the reasons, of the Court of Criminal Appeal. Regardless of its competency, the manner in which the Crown developed its case reveals that it was not in the interests of justice to maintain the grant of special leave to appeal. As will be explained, the attempts to refine the orders sought on the appeal point to a deeper problem arising from the manner in which the Crown has changed its position from that which it argued in the Court of Criminal Appeal.

18 At the trial, the Crown initially sought to rely on three "pathways" to demonstrate the respondent's culpability for murder, namely his participation in a joint criminal enterprise, the doctrine of extended joint criminal enterprise or accessorial liability. The Crown ultimately narrowed its case by solely relying on accessorial liability whereby the respondent intentionally encouraged and assisted

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8 Citing *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 63-65; *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 474-475.

the commission of the foundational offence – armed robbery – by provision of a gun and a high vis shirt, knowing that they were to be used for that offence and where the respondent contemplated the possibility that the gun could be discharged in the commission of the robbery resulting in grievous bodily harm or death. To that end the trial judge directed the jury that, to find the respondent guilty, the Crown had to prove that the "discharge of a gun during the attempted armed robbery with a dangerous weapon was a possibility which the accused was aware of when he provided ... assistance" to the principal offender.

19 In the Court of Criminal Appeal, the Crown contended that, in a case of constructive murder, where the commission of the act causing death is additional to the commission of the acts which comprise the elements of the foundational offence, the "accessory must intentionally assist with the commission of the offence with knowledge of the act causing death as one of the *possible* ways in which the acts constituting the foundational crime may be carried out" (emphasis added). The Court of Criminal Appeal's reasoning to its conclusion that accessorial liability for constructive murder was implicitly excluded by s 18 of the *Crimes Act 1900* (NSW) addressed the possible existence of such liability on the basis that, if accessorial liability existed, the accessory must possess that state of mind.

20 The Crown's submission to the Court of Criminal Appeal as to the state of mind of an accessory in such cases was not just part of the basis on which the Crown resisted Ground 1 of the appeal to that Court. The submission also addressed so much of Ground 2(a) of the appeal which, in the alternative, contended that the trial judge misdirected the jury on the elements of that pathway to murder. An acceptance of the Crown's submission to the Court of Criminal Appeal would arguably have justified the giving of the direction by the trial judge noted above.

21 In applying for special leave to appeal to this Court, the Crown formulated the state of mind of an accessory, in a case where the voluntary act occasioning the death of the deceased is not an act that comprises the elements of the foundational offence, as "requir[ing] a realisation that the act causing death *may* occur in an attempt to commit, or during or immediately after the commission of, the foundational offence" (emphasis added). That formulation was not substantially different from that which was submitted to the Court of Criminal Appeal. It was also arguably capable of supporting the trial judge's direction. The application for special leave to appeal included proposed orders to the effect that, if special leave to appeal were granted and the appeal were allowed, the respondent's conviction for murder would be restored. The Notice of Appeal in this Court sought those orders.

22 As already noted, in its written submissions in this Court, the Crown contended that "[w]here the crime the accessory has assisted is constructive murder under s 18(1)(a) of the *Crimes Act*, one of the essential matters that the accessory must know or believe at the time of giving assistance or encouragement is that the principal *would do* the act causing death, as a means of effecting the venture, should the occasion arise" (emphasis added). This formulation of the state of mind was a critical step in the Crown's argument in this Court that accessorial liability for constructive murder is not excluded by s 18 and that the Court of Criminal Appeal was in error in concluding otherwise. As is apparent, this formulation is significantly different from the formulation of the relevant state of mind that the Crown submitted to the Court of Criminal Appeal, which, as noted, was the basis upon which that Court addressed the possible existence of accessorial liability for constructive murder. Further, unlike the formulation the Crown provided to the Court of Criminal Appeal, if accepted, the Crown's formulation in this Court of the state of mind of an accessory could not support the direction given by the trial judge. Moreover, as was recognised in the Crown's submissions in reply, an acceptance of its argument in this Court would still require the respondent's conviction for murder to be set aside and a new trial ordered.

23 The approach adopted by the Crown meant that there was no real dispute in this Court that the respondent's conviction for murder could not be sustained and that a new trial should be ordered. The utility of the appeal was said by the Crown to be that, unless they are varied, the effect of the orders made by the Court of Criminal Appeal is wrongly to restrict the scope of any retrial so as to exclude accessorial liability for constructive murder as a basis upon which the respondent can be culpable. The problem is that this Court is being asked to address that issue on a significantly different basis to that which was put to the Court of Criminal Appeal, where, as stated, the Crown's formulation of the mental state was part of the Court's reasoning to its conclusion that such liability was excluded.

24 The fact that there is now no real dispute over whether the respondent's conviction should be set aside and a new trial ordered, and the different formulations of the mental element for the alleged offence put forward by the Crown in the Court of Criminal Appeal and then in this Court, meant that it was not in the interests of justice for the appeal to be heard. This Court would be dealing with a question of principle on a different basis to that which was argued in the Court of Criminal Appeal. Instead of this Court addressing whether a conviction for murder could be sustained or a particular jury direction was erroneous, the Crown was in substance only seeking guidance from this Court as to the scope of a retrial on a basis that was disconnected from how the Crown conducted its case at trial and how it conducted the appeal in the Court of Criminal Appeal.

Other matters

25 In resisting the revocation of special leave to appeal, the Crown contended that the effect of the Court of Criminal Appeal's decision is to preclude the future prosecution of the respondent, or any other accused, as an accessory to constructive murder. The Crown submitted that there is no avenue by which the Court of Criminal Appeal's decision can be challenged other than via this appeal. However, at least in circumstances where the respondent, or any future accused, can be tried for murder on the basis of their alleged involvement in a joint criminal enterprise to commit an offence of the kind that constitutes a foundational offence for constructive murder, then there is scope for the Crown to reagitate the existence of accessorial liability. In such a case the Crown can seek a formal ruling as to whether the latter can be put to the jury, which it can be expected will be refused by applying the Court of Criminal Appeal's decision. Depending on whether such a ruling is embodied in "an interlocutory judgment or order", the Crown could then exercise its right of appeal.[9] Alternatively, if the accused is acquitted, the Crown may appeal the verdict if the accused is acquitted by direction as a result of the ruling[10] or, otherwise, the Crown may submit the issue for determination by the Court of Criminal Appeal.[11]

26 Lastly, the various matters relied on by the Court of Criminal Appeal to order a retrial are irrelevant to the present question of whether special leave to appeal should be revoked. Those matters were directed to whether or not the Crown should be held to its position at trial of eschewing reliance on joint criminal enterprise. In this Court, the Crown sought to change its position, by a substantial reformulation of the mental state for an accessory to constructive murder, when the previous formulation of the Crown was an aspect of the reasoning of the Court of Criminal Appeal towards its conclusion that accessorial liability for constructive murder was excluded.

Conclusion

27 For these reasons, it was apparent that the appeal in the present case had ceased to be an appropriate vehicle for the consideration of the important question

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9 *Criminal Appeal Act 1912* (NSW), s 5F(2).

10 *Crimes (Appeal and Review) Act 2001* (NSW), s 107(1)-(2).

11 *Crimes (Appeal and Review) Act*, s 108(1)-(2).

of law raised by the sole ground of appeal on which special leave to appeal was granted. The appropriate course was for the grant of special leave to be revoked.

EDELMAN J.

The preliminary issue: should special leave be revoked?

28 On 21 March 2025, prior to the hearing of a listed appeal in this matter, this Court sent a letter to the parties. The attention of the parties was directed to the concession by the Crown in its reply that, as Mr Batak submitted, if the Court accepted the Crown's submissions on the appeal, "the order for a new trial should be affirmed". The Crown was asked to file supplementary submissions and any proposed amended notice of appeal. Subsequently, on 3 April 2025, a directions hearing was held before Gageler CJ at which his Honour raised with the Crown the preliminary question of whether the proposed orders it sought were, in effect, seeking to appeal from the reasons of the Court of Criminal Appeal of New South Wales rather than from the orders of that Court. The Crown was told that a preliminary issue at the hearing of the appeal would be whether special leave should be revoked.

29 On 8 April 2025, at the hearing of the appeal and after hearing submissions on this preliminary issue, the Court adjourned to consider the course that it would take. That afternoon, the Court announced that, by majority, special leave to appeal was revoked and leave to file the proposed amended notice of appeal was refused. A majority of this Court concluded that the manner in which the appeal would be conducted meant that this case had ceased to be an appropriate vehicle for the question of law it raised. I did not join in the order revoking special leave. I would have allowed the substantive appeal to proceed. For the reasons below, this Court had jurisdiction to make the orders sought by the Crown. And although the appeal presented a different complexion, and was a less suitable vehicle for special leave, than at the time of grant, I consider that special leave should not have been revoked.

Background

30 At 3.45am on 2 April 2019, two men broke into an apartment in order to steal drugs and money. Each of the intruders had a gun. A confrontation occurred with one of the inhabitants of the apartment, who was also armed with a gun. Another inhabitant was shot and killed by one of the intruders.

31 Mr Batak was not present at the robbery. However, the Crown alleged that earlier on the night of the robbery, Mr Batak had supplied one of the intruders with a high visibility shirt and a loaded gun to use in the robbery. Mr Batak was charged on indictment with two offences. Count 1 of the indictment was the offence of murder contrary to s 18(1)(a) of the *Crimes Act 1900* (NSW), relying also on the "accessories before the fact" provision in s 346 of the *Crimes Act*. Count 2 of the indictment against him was attempted robbery whilst armed with a dangerous weapon contrary to s 97(2) of the *Crimes Act*, again relying also on s 346 of the *Crimes Act*. Mr Batak was convicted by a judge and jury of the two counts in the indictment against him.

32 The Crown had initially intended to rely upon three pathways to a conviction for murder. Two pathways were forms of derivative liability (extended joint criminal enterprise and being an accessory before the fact) and the third pathway was primary liability for murder by participation in a joint criminal enterprise. The Crown ultimately chose to pursue only one pathway: Mr Batak was said to be an accessory before the fact, within the meaning of s 346 of the *Crimes Act*, to the offence of constructive murder in s 18(1)(a) of the *Crimes Act*, where the foundational offence was the attempted robbery offence in count 2 of the indictment.

33 Mr Batak appealed to the Court of Criminal Appeal on grounds that included: (1) "It was an error of law to permit constructive murder to be left to the jury on the basis of accessorial liability"; and (2)(a) "In the alternative to (1), the trial judge misdirected the jury as to ... the elements of accessory before the fact to constructive murder". Part of ground 2(a) intersected with ground 1 because it challenged the nature of an aspect of the mental element required for a putative offence of being an accessory before the fact to constructive murder. The trial judge had directed the jury that a necessary element of that offence ("the fifth element") was:

> "The discharge of a gun during the attempted armed robbery with a dangerous weapon was a possibility which the accused was aware of when he provided the assistance ... ([of] providing the shirt and/or gun)."

34 The Crown submitted that accessorial liability for constructive murder was an offence known to the law. As to that aspect of the mental element which was the subject of the direction on the fifth element, the Crown proposed a test in substantially the same terms as the trial judge[12] on the basis that where (as in this case) the commission of the act causing death did not constitute a physical element of the foundational offence, then the accessory must know that the act causing death was "one of the possible ways in which the acts constituting the foundational crime may be carried out". The Crown submitted that it was "known" (or, more accurately, "believed" or "expected") by Mr Batak that one possible way of carrying out the robbery was through the "use of the loaded firearm to effect the robbery, which ... may involve discharging it".

35 The Court of Criminal Appeal upheld the first ground, reasoning that there was no offence known to the law in New South Wales of being an accessory before the fact to the offence in s 18(1)(a) of the *Crimes Act* of constructive murder.[13] In the course of considering the possibility of an offence of being an accessory before the fact to constructive murder, the Court of Criminal Appeal also held that if such

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12 *Batak v The King* (2024) 114 NSWLR 313 at 356-357 [163], 358 [165].

13 *Batak v The King* (2024) 114 NSWLR 313 at 365 [196].

an offence existed it would not contain that aspect of the mental element as formulated in the trial judge's fifth element direction.

36 The Court of Criminal Appeal held that if being an accessory before the fact to the offence of constructive murder were an offence known to the law, the mental element would include a requirement that an accused knew of (or, more accurately, believed in) the existence of an intention by another to do the act or omission that caused death. But that aspect of the mental element was considered by the Court of Criminal Appeal to be incoherent.[14] The Court of Criminal Appeal further considered that the fifth element, as directed by the trial judge, would be unnecessary for accessorial liability for the offence of constructive murder so that the direction by the trial judge could not have caused a miscarriage of justice because the fifth element "made the obtaining of a conviction more difficult for the prosecution, not easier".[15]

37 The Court of Criminal Appeal's orders of 10 May 2024 were relevantly as follows:

> "(3) Uphold the appeal with respect to count 1 on the indictment.
>
> (4) Quash [Mr Batak's] conviction on count 1.
>
> (5) A retrial ... on count 1 is to be had."

38 In the Court of Criminal Appeal's reasons, the Court explained that at a retrial it would be open to the Crown to run a case based on joint criminal enterprise although that pathway to guilt had been abandoned by the Crown in favour of the pathway based on liability as an accessory before the fact to constructive murder.

39 In the Crown's application for special leave to appeal to this Court, the Crown took the same approach that it had taken before the Court of Criminal Appeal: where the act causing death was distinct from the foundational offence's physical elements, "the requisite knowledge and intent of the accessory requires a realisation that the act causing death may occur in an attempt to commit, or during or immediately after the commission of, the foundational offence". It was submitted that knowledge (which apparently meant intention or foresight) of the future act causing death was unnecessary because, so the Crown submitted, in holding that the accessory must have knowledge of the act causing death, the Court of Criminal Appeal "elided the requirement for knowledge of the essential facts

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14 *Batak v The King* (2024) 114 NSWLR 313 at 363 [183], referring to *Giorgianni v The Queen* (1985) 156 CLR 473.

15 *Batak v The King* (2024) 114 NSWLR 313 at 355 [155].

which made what was done a crime with a requirement for knowledge of the elements of the crime".

40 Following the grant of special leave to appeal, the Crown's notice of appeal filed on 21 November 2024 sought orders allowing the appeal, setting aside orders 3, 4 and 5 made by the Court of Criminal Appeal on 10 May 2024 and, in place thereof, ordering that Mr Batak's "appeal against conviction be dismissed".

41 In the Crown's submissions on appeal to this Court, the Crown did not adopt its earlier approach in the Court of Criminal Appeal and on the application for special leave. Nor did it adopt the approach of the Court of Criminal Appeal to the relevant aspect of the mental element of being an accessory before the fact to constructive murder. The Crown refined the terms in which it expressed that part of the mental element as:[16]

> "the accessory must know or believe at the time of giving assistance or encouragement ... that the principal would do the act causing death, as a means of effecting the venture, should the occasion arise ... [I]n the armed robbery of a bank ... a driver ... 'need only have intended that the gunman would shoot to kill or cause grievous bodily harm as a possible means of carrying out the plan – if worst came to worst'".

42 This aspect of the mental element proposed by the Crown involved a departure from the fifth element directed by the trial judge. An expectation of the discharge of a gun as a possible means of carrying out a robbery is different from a conditional intention that this means would be used if worst came to worst. Consequently, in Mr Batak's response in this Court he submitted that even if the offence of being an accessory before the fact to constructive murder were an offence known to the law in New South Wales, the trial judge had, on the refined approach of the Crown itself, misdirected the jury as to this aspect of the mental element of such an offence. Mr Batak thus sought leave to file a notice of contention out of time to this effect.

43 In its reply submissions in this Court, the Crown conceded that if this Court were to accept that an offence of being an accessory before the fact to constructive murder exists with the refined elements that the Crown had asserted, then the trial judge would have misdirected the jury as to this aspect of the mental element of that offence. At that stage, the Crown contended that if its submissions were accepted then Mr Batak would need to be retried as the Court of Criminal Appeal had ordered, albeit that an offence of being an accessory before the fact to constructive murder would be open as a pathway to conviction.

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16 Crown submissions filed 6 February 2025 at 7 [28], quoting *Miller v The Queen* (2016) 259 CLR 380 at 413 [89].

44 Following the letter from this Court, the Crown filed a proposed amended notice of appeal. The Crown no longer sought an order that Mr Batak's appeal against conviction to the Court of Criminal Appeal be dismissed. Instead, the proposed orders were to dismiss Mr Batak's appeal to the Court of Criminal Appeal on all grounds other than ground 2(a) (misdirection as to the elements of accessory before the fact to constructive murder) and to remit the matter to that Court for "further consideration and determination of Ground 2(a) of [Mr Batak's] Notice of Appeal to [the Court of Criminal Appeal] in accordance with the judgment of this Court".

Jurisdiction

45 The central aspect of the preliminary issue to which the parties' attention had been directed was whether this Court had jurisdiction to entertain the appeal in circumstances in which the Crown accepted that the Court of Criminal Appeal was correct, albeit not for the reasons it gave, to order a retrial. It is basic, and fundamental, that appeals are brought from orders and not from reasons.[17] The reference in s 73 of the *Constitution* to "judgments" is to final orders, not reasons.[18] In this appeal, however, the proposed orders sought by the Crown were a substantive variation of the orders of the Court of Criminal Appeal. The proposed orders did not seek to appeal from reasons. The Director of Public Prosecutions was therefore correct in her powerful submission that this Court had jurisdiction to make the orders proposed by the Crown.

46 This conclusion would have been very easy to reach if the orders made by the Court of Criminal Appeal had incorporated a direction or condition that a retrial be conducted according to the reasons that the Court of Criminal Appeal had delivered. In such circumstances, an appeal would obviously lie to alter the terms of that direction or condition. Although the reasons for a decision are rarely incorporated into the orders of a court in this way (because the ratio decidendi of a decision binds lower courts of its own force), orders to this effect can be made. In the criminal context, in *Cook (a pseudonym) v The King*,[19] the majority in the Court of Criminal Appeal made an order that the appeal be allowed "on the basis of ground 1". The inclusion of those words was described by a majority of this

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17 See *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322 at 337-338 [87]-[92]; *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 278 CLR 512 at 527 [34].

18 See *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64. See also *Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465 at 466; *Australian Securities Commission v Macleod* (1994) 54 FCR 309 at 311-312; *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396 at 462 [277].

19 (2024) 98 ALJR 984; 419 ALR 1.

Court as being, in effect, "a declaration"[20] (perhaps, more accurately, an implied condition upon the remittal for retrial requiring compliance with the reasons). In the civil context, in *North Sydney Council v Ligon 302 Pty Ltd*,[21] this Court made orders varying the orders of the Court of Appeal of the Supreme Court of New South Wales to remit the matter for determination "in accordance with the decision of the High Court of Australia", varying the order below that the determination be made "in accordance with the decision of [the Court of Appeal]".[22]

47 The Court of Criminal Appeal in the present case did not incorporate any of its reasons into its orders, which are set out, in part, above. But, in this Court, the Crown nevertheless sought to vary the orders made by the Court of Criminal Appeal. The effect of the variation sought by the Crown's proposed amended notice of appeal in this Court, together with the orders that the Crown foreshadowed seeking on any remitter to the Court of Criminal Appeal, was to include a new express or implied condition upon the ultimate order for retrial to the same effect as the implied condition imposed by this Court in *Cook* by reference to the grounds of appeal. A variation of orders in this way is most unusual but it is within the jurisdiction of this Court.

48 A comparable example is the decision of the Full Court of this Court in *Driclad Pty Ltd v Federal Commissioner of Taxation*,[23] upon which the Crown relied. That case involved appeals from decisions of Taylor J, sitting as a single Justice of this Court. Exercising the original jurisdiction of this Court,[24] his Honour made orders as follows in each matter: "Appeals allowed with costs. Assessments set aside."[25] The orders did not incorporate his Honour's reasons. Despite appearing to "have succeeded completely" on the face of the orders, the taxpayers appealed to the Full Court.[26] During the appeals, members of the Full Court expressed concern about whether this Court had jurisdiction to hear the appeals. Kitto J remarked that the taxpayers had "had 100% success ... in point of formal order. It

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20 *Cook (a pseudonym) v The King* (2024) 98 ALJR 984 at 991 [30]; 419 ALR 1 at 9.

21 (1996) 185 CLR 470 at 481-482.

22 *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435 at 448.

23 (1968) 121 CLR 45.

24 See *AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation* (2015) 255 CLR 439 at 448 [6].

25 *Driclad Pty Ltd v Federal Commissioner of Taxation* (1966) 121 CLR 45 at 60, 62.

26 *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 63.

is that that you appeal against, you do not appeal against reasons."[27] But the Full Court ultimately accepted that it had jurisdiction under s 73 of the *Constitution* because "the orders were nevertheless open to the objection on the part of the taxpayers that the Commissioner was left at liberty, as his Honour intended [the Commissioner] should be, to make fresh assessments" on the basis of the reasons.[28] The orders made by the Full Court were "moulded as to bind the Commissioner".[29] The orders of Taylor J were varied by this Court making declarations and, in some of the matters, remittals to the Commissioner on a condition as to how the assessments were to be treated.[30]

49 This Court had jurisdiction to determine the Crown's appeal.

Appropriate vehicle for special leave

Relevant considerations

50 The considerations for the grant of special leave are set out in s 35A of the *Judiciary Act 1903* (Cth). In addition to any matters that the Court considers relevant, the specifically mentioned considerations are: (i) whether the application for special leave involves a question of law that is of "public importance" or in relation to which this Court's decision is necessary to resolve differences of judicial opinion as to the state of the law; and (ii) whether this Court's consideration of the impugned judgment is required in the "interests of the administration of justice", either in the particular case in which the application is made or generally.

51 Special leave considerations divide broadly into two dimensions. The first dimension relates to the potential extent of the error. The second dimension concerns the legal and practical consequences of the decision. In unusual cases, a potential error will have no consequences beyond those for the parties themselves, but the consequences of such error are so significant for the parties that the Court will "visit" the case on that basis alone. This visitational jurisdiction is largely confined to cases where liberty, bodily integrity, potential financial ruin, or reputation are at stake.[31] On the other hand, the legal and practical consequences

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27 Transcript of Proceedings, Driclad Pty Ltd v Federal Commissioner of Taxation (High Court of Australia, Barwick CJ, McTiernan, Kitto and Menzies JJ, 8 April 1968) at 6.

28 *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 63-64.

29 *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64.

30 *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 69.

31 See *The Commonwealth v Sanofi* (2024) 99 ALJR 213 at 225 [29]; 421 ALR 1 at 11.

of a decision, especially where there are differences of opinion between courts, might be sufficient to warrant a grant of special leave to appeal even if this Court considers it unlikely that the decision from which the appeal is brought is in error.

52 The factors in considering the revocation of special leave on the basis that the case is an inappropriate vehicle are the converse of those for the grant of special leave. Nevertheless, there is a strong gravitational pull against revocation in circumstances in which special leave has already been granted and the appeal is ready to be presented. Revocation will almost always require a very significant change in circumstances that removes one of the foundational reasons for the grant of special leave.

Application of the considerations in this case

53 There is no doubt that the shape of this appeal changed with the shift in the Crown's position concerning the content of the relevant aspect of the mental element required for a putative offence of being an accessory before the fact to constructive murder. In one respect, this change had the potential for significant disruption to the orderly process of appeal. That potential for disruption arose from the submission, and proposed order, by the Crown that this Court remit the matter to the Court of Criminal Appeal.

54 The remitter was thought by the Crown to be necessary to determine whether the relevant aspect of the mental element for being an accessory before the fact to constructive murder, as properly formulated by this Court, would have the effect that the direction of the trial judge gave rise to a miscarriage of justice. The Crown considered that the necessity for that determination would arise if this Court accepted the existence of the offence of accessorial liability for constructive murder but formulated the relevant aspect of the mental element for that liability in terms that were the same as, or similar to, the expression used by the trial judge. In such circumstances there might have been no misdirection or no material misdirection by the trial judge.

55 That approach to remitter has the potential for there to be as many as four appeals and two applications for special leave before Mr Batak could be retried. But this potential for disruption could be avoided if, in circumstances where this Court did conclude that the offence of accessorial liability for constructive murder exists in New South Wales, this Court proceeded to consider whether, on the basis of the relevant aspect of the mental element formulated by this Court, the trial judge had misdirected the jury in a material way.[32] This Court could raise the issue of the materiality of any misdirection based upon a different mental element from that proposed by the Crown at the hearing of the appeal and deal with that issue in this Court's reasons. Even if the parties were not prepared to make submissions as

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32 *Criminal Appeal Act 1912* (NSW), s 6(1).

to the materiality of a misdirection on some different mental element, it would have been open to the Court to invite the parties to provide further written or oral submissions on the question at a time after the hearing.

56 Ultimately, therefore, little weight should be placed on the proposed remitter when considering whether special leave should be revoked due to the change in the Crown case concerning the relevant aspect of the mental element for the putative offence of being an accessory before the fact to constructive murder. Instead, the more relevant factors in favour of revocation are the lack of developed submissions on this issue and the lack of reasons in the Court of Criminal Appeal concerning that aspect of the mental element now put by the Crown.

57 Moreover, there might be doubt about the effect of this appeal on the outcome of any future trial. As explained above, the Court of Criminal Appeal ordered that the matter be remitted for retrial, and left open for the Crown to put its case on the basis of joint criminal enterprise.[33] On the facts of this case, it might be thought that there are very few realistic ways in which a jury could conclude that Mr Batak was an accessory before the fact to constructive murder, at least with the relevant aspect of the mental element as advanced by the Crown, but not conclude that Mr Batak was part of a joint criminal enterprise.

58 On the other hand, there are a number of factors that weigh heavily against revoking special leave to appeal. First, the extent of the difference between the Crown's two formulations of the relevant aspect of the mental element before the Court of Criminal Appeal and before this Court, while not immaterial and potentially capable of leading to different results depending on the circumstances of the case at hand, might have been raised in any event by this Court during an appeal conducted by the Crown even if the Crown had not changed its case.

59 Secondly, there is considerable importance to the underlying issue of whether there is an offence known to the law of New South Wales of being an accessory before the fact to the offence of constructive murder. The same issue arises at common law generally.[34]

60 Thirdly, the revocation of special leave makes it difficult for this issue to be raised again before this Court, at least in the simple appeal process by which the present appeal raised the issue. As the majority point out, there are possible

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33 *Batak v The King* (2024) 114 NSWLR 313 at 371-372 [226]-[234].

34 *Ryan v The Queen* (1967) 121 CLR 205 at 220; *IL v The Queen* (2017) 262 CLR 268 at 274 [7].

avenues for the issue to be brought before this Court again.[35] However, these avenues are not straightforward and could require the pursuit of a contrived process by the Crown which, at least if the issue arose in New South Wales, might involve a potentially futile hearing simply for the prospect of seeking special leave in this Court, solely in order to reagitate an issue which was already the subject of detailed submissions before this Court.

61 In my view, these three factors outweighed the factors in favour of revocation of the grant of special leave to appeal.

Conclusion

62 For these reasons, I would not have revoked special leave to appeal.

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35 See *Criminal Appeal Act 1912* (NSW), s 5F(2); *Crimes (Appeal and Review) Act 2001* (NSW), ss 107(1)-(2), 108(1)-(2).

63 JAGOT J. These reasons for judgment explain why I considered that special leave to appeal in this matter should not have been revoked. I provide these reasons on the basis that the circumstances in which this question arose are identified in the reasons for judgment of the majority.

64 There is no doubt that the appeal was competent. The Crown was correct in its submissions that the effect of orders 3 and 5 made by the New South Wales Court of Criminal Appeal ("[u]phold the appeal with respect to count 1 on the indictment" and "[a] retrial is [sic] on count 1 is to be had") is that the retrial is to be confined to the offence which the Court of Criminal Appeal held to be known to the law and potentially applicable (constructive murder by joint criminal enterprise) and is not to extend to a retrial on the offence which the Court of Criminal Appeal held to be not known to the law (accessory before the fact to constructive murder). The Crown was not attempting to appeal against the mere reasons of the Court of Criminal Appeal or seeking judicial advice on the conduct of the retrial. It was appealing against the substantive effect of orders 3 and 5 of the Court of Criminal Appeal, which the Crown contended would erroneously confine the retrial to one based on constructive murder by joint criminal enterprise. Such an appeal was competent.[36]

65 In my view it remained in the interests of justice for this Court to hear and decide the appeal.

66 First, the substance of the reasons that the Court of Criminal Appeal ordered that there should be a retrial rather than an acquittal of the respondent on count 1 (the murder charge) was relevant to the discretion whether to revoke special leave or not. The Court of Criminal Appeal ordered a retrial on the basis that: (a) "[t]he charge of murder – even for someone not present at the scene – is a very serious one. There is a substantial public interest in a person charged with such an offence being tried before a properly directed jury";[37] (b) "[t]here appears to be a strong potential case against the [respondent] for murder based on [joint criminal enterprise]";[38] (c) "[t]his is not a case where the [respondent] 'would be called upon to meet a quite different case to that presented against him at trial'";[39] and (d) "[i]t is true that the Crown made a deliberate decision to confine its case to accessorial liability, disavowing reliance on [joint criminal enterprise]", but "what 'has

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36 *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 474-475 and the cases cited there in footnote 24.

37 *Batak v The King* (2024) 114 NSWLR 313 at 371 [228].

38 *Batak v The King* (2024) 114 NSWLR 313 at 371 [229].

39 *Batak v The King* (2024) 114 NSWLR 313 at 372 [230], quoting *Parker v The Queen* (1997) 186 CLR 494 at 519.

happened may be regrettable and undesirable, but ... is not sinister'", "the legal issues raised in this case are difficult and fine ones", and this "is not a case where it can be said that the Crown should be fixed with the result of some forensic decision made with full knowledge of the consequences".[40]

67 Those same considerations continued to be relevant in respect of the Crown's appeal to this Court irrespective of the change in the Crown's position concerning the elements of the putative offence of accessory before the fact to constructive murder. They were relevant to "whether the interests of the administration of justice, either generally or in the particular case, require[d] consideration by the High Court of the judgment to which the application relates", as specified in s 35A(b) of the *Judiciary Act 1903* (Cth). They also all weighed against the revocation of the grant of special leave.

68 Second, in the context of a final appeal to this Court, it is not uncommon for arguments to be refined, reframed or, in some cases, first made. While a party may be precluded from doing so on several bases, it is not the case that the inevitable fact of an order for remittal or retrial (as the case may be) involves this Court in giving "judicial advice" about the conduct of the hearing of the remitted matter or the retrial. That proposition overlooks the substantive effect of the Court of Criminal Appeal's orders, which confine the retrial to the basis of constructive murder by joint criminal enterprise. It also appears to apply to the Crown as appellant an unstated principle different from that which would ordinarily apply.

69 Third, the question whether there is an offence known to law of accessory before the fact to constructive murder is important to the administration of justice in New South Wales and, most likely, in other States and Territories. That is, in accordance with s 35A(a)(i) of the *Judiciary Act*, the proceedings continued to involve a question of law "that [was] of public importance, whether because of its general application or otherwise". As the Court of Criminal Appeal recognised, there is a substantial public interest in a serious offence such as that alleged against the respondent going to trial before a properly instructed jury. If, as was the case here, there is going to be a retrial, the retrial should be on all proper bases, with the benefit of this Court having decided if there is an offence known to law of accessory before the fact to constructive murder as the Crown contended.

70 Fourth, the Court of Criminal Appeal having ordered a retrial, there was also no prejudice to the respondent in the retrial being conducted once only on all proper legal bases. The options potentially available to the Crown to bring the same question of law – is there an offence known to law of accessory before the fact to constructive murder and what are its elements – before this Court in this or another matter disclosed that to do so not only may be practically difficult but will expose

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40 *Batak v The King* (2024) 114 NSWLR 313 at 372 [231]-[232], quoting *R v Taufahema* (2007) 228 CLR 232 at 263 [68].

the Crown, the respondent and the public interest to greater prejudice, cost and inconvenience than would have been worked by the hearing and determination of this appeal.

71 Fifth, the Crown's position in this Court that: (a) the elements it accepted to be necessary to constitute that offence did not accord with the directions the trial judge gave to the jury about the elements of that offence; and (b) it did not put those elements to the Court of Criminal Appeal, was unfortunate but in no way sinister. The Crown's reformulation of the elements reflected nothing more than its prosecutorial obligations in action together with the difficulty of the legal concepts involved, as the Court of Criminal Appeal recognised in ordering a retrial.

72 Sixth, the Crown was granted special leave because the question of law was of public importance. The parties had incurred all costs in connection with the hearing of the appeal and were ready to be heard on all issues including the effect of the Crown's reformulation of the elements of the putative offence. To require the Crown to contrive to bring the same important question of law before this Court by one or more of the means by which that course might be possible, when the parties were ready to have the question determined in this appeal, was more than unfortunate.

73 For these reasons, in evaluating the interests of the administration of justice, I considered that the balance weighed firmly in favour of this Court hearing and determining the Crown's appeal, with whatever permutations to which that led in terms of orders to be worked out on a final basis once reasons for judgment were given, as is common in many cases.