



Sentencing in complicity cases — Part 1: Joint criminal enterprise

Andrew Dyer, *Research Officer* and Hugh Donnelly, *Director, Research and Sentencing*

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Introduction

This is the first of two *Sentencing Trends and Issues* papers which discuss sentencing in complicity cases. Part 1 will discuss the sentencing principles that are applicable when an offender has been found to be criminally liable either on the basis of his or her participation in a joint criminal enterprise or by the application of the doctrine of extended common purpose. Part 2 will discuss the sentencing of aiders, abettors, and accessories before and after the fact.

This paper focuses on the leading sentencing authorities in five offence categories:

- homicide
- assault and wounding
- robbery
- kidnapping, and
- break and enter.

Joint criminal enterprise

A joint criminal enterprise exists when two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime and then, while that understanding or arrangement is still on foot, one or the other of them does, or they do between them, in accordance with their

understanding or arrangement, all of the things that are necessary to constitute the crime.¹ The understanding need not be express.² Its existence may be inferred from all of the circumstances.³

Extended common purpose

The High Court declared in *Clayton v The Queen*⁴ that “intermediate and trial courts must continue to apply the principles established by” the decisions of *McAuliffe v The Queen*⁵ and *Gillard v The Queen*.⁶ It was held in *McAuliffe* that the doctrine of extended common purpose applies when, in carrying out a joint criminal enterprise, one of the participants in the enterprise commits a *further* crime that is nonetheless within the scope of the joint enterprise.⁷ What is within the scope of a joint enterprise is established subjectively; that is, by determining whether the party who did not actually commit the further crime nevertheless foresaw it as a possible incident of the enterprise.⁸ The Crown must prove that the secondary offender foresaw that the principal might form the requisite intent for the further crime, for example, the intent to kill or inflict really serious bodily injury in the case of murder.⁹ If the secondary offender did possess such foresight and, despite this, continued to participate in the enterprise, then he or she will be liable for the further offence.¹⁰

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

2 *ibid* at 114.

3 *ibid* at 114.

4 *Clayton v The Queen* (2006) 81 ALJR 439 at [3].

5 (1995) 183 CLR 108.

6 (2003) 219 CLR 1.

7 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114, quoted with approval in *Clayton v The Queen* (2006) 81 ALJR 439 at [17].

8 *Clayton v The Queen* (2006) 81 ALJR 439 at [17]; *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

9 *Taufahema v R* [2007] NSWCCA 33 at [30].

10 *Clayton v The Queen* (2006) 81 ALJR 439 at [17]; *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

The doctrine is to be distinguished from other forms of complicity. As Hayne J emphasised in *Gillard v The Queen*¹¹ it is:

“a doctrine which is separate from the liability of an accessory before the fact, who counsels or procures the commission of the crime; it is separate from the liability of a principal in the second degree, who aids or abets in the commission of the crime”.¹²

The common law doctrine of joint criminal enterprise does not apply to offences prosecuted under the *Criminal Code Act 1995* (Commonwealth).¹³

Liability of participants

All of the participants in a joint enterprise are equally guilty of the crime, and subject to the same maximum penalty, regardless of the role played by each in the crime’s commission.¹⁴ A person convicted of a crime due to the application of the doctrine of extended common purpose can be subject to the same maximum penalty if he or she foresaw the crime committed by the principal, or subject to the same maximum penalty for the crime that they foresaw. The secondary party may not know of, or foresee, the principal offender’s intention but may foresee the possibility of a crime as an incident to the common design.¹⁵

Despite each participant to a particular joint enterprise or a particular extended common purpose being equally liable for the same crime and subject to the same maximum penalty, it will often not be appropriate to give each participant the same sentence. As Gibbs CJ stated in *Lowe v The Queen*:¹⁶

“it is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive

the same sentence, but other things are not always equal, and such matters as ... the part which he or she played in the commission of the offence, have to be taken into account”.¹⁷

Fact finding at sentence

Sentencing an offender on the basis of his or her participation in a joint criminal enterprise can present significant practical difficulties for a court. The facts can be complex. It is common that as a result of charge bargaining, participants are convicted of different charges.¹⁸ It is imperative that the Crown define with precision the joint criminal enterprise between the parties or, where it relies upon the extended form of the doctrine, what the Crown asserts the secondary offender foresaw. This is so whether the offender is convicted following a trial or pleads guilty. What the secondary offender foresaw in an extended liability case will constitute the ingredients of the offence for the purposes of applying the *De Simoni* principle.¹⁹ Findings of fact about the degree of an offender’s involvement have a significant effect on the assessment of an offender’s moral culpability.

The task of assessing culpability of an offender after a trial can be more difficult than that of determining guilt itself.²⁰ If an offender is convicted following a trial in a joint enterprise case, the view of the facts adopted by the judge for the purpose of sentencing must be consistent with the verdict of the jury.²¹ This is complicated by the fact that the Crown may rely at trial on alternative forms of liability for an offence. For example, in the case of murder (if the facts permit), the Crown may rely upon the various permutations of the forms of murder such as intent to kill or inflict really serious harm, felony-murder, joint criminal

11 (2003) 219 CLR 1.

12 *Gillard v The Queen* (2003) 219 CLR 1 at [109] per Hayne J. Gleeson CJ and Callinan J said at [10] “Hayne J ... has summarised the principles as to criminal complicity based upon participation in a common enterprise, as stated in *McAuliffe v The Queen*.” Gummow J at [31] also agreed with Hayne J’s summary. *Gillard v The Queen* was quoted with approval by the Full Court in *Clayton v The Queen* (2006) 81 ALJR 439 at [3].

13 *R v Salcedo* [2004] NSWCCA 430 at [26]–[27].

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

15 *Gillard v The Queen* (2003) 219 CLR 1 at [25].

16 (1984) 154 CLR 606.

17 *Lowe v The Queen* (1984) 154 CLR 606 at 609.

18 *R v Howard* (1992) 29 NSWLR 242 and *R v Diab* [2005] NSWCCA 64 are good examples.

19 *The Queen v De Simoni* (1981) 147 CLR 583.

20 *Cheung v The Queen* (2001) 209 CLR 1 at [8]. The task confronting Hidden J in *R v Puta* [2001] NSWSC 225 is a good illustration.

21 *R v Isaacs* (1997) 41 NSWLR 374 at 378.

enterprise and the extended form of the doctrine.²² In a case of that kind it is the obligation of the judge at sentence to base “the findings of fact both on what was necessarily implicit in the jury verdict and on [his/her] own impressions” and this includes “a judgment of the credibility of numerous witnesses”.²³

Where the offender pleads guilty, any facts beyond the ingredients of the offence must be proved by evidence or admitted formally in an agreed statement of facts.²⁴ The statement of facts following a plea should, where possible, be specific about the offender’s participation, or in the words of Simpson J in *Della-Vedova v R*, at least “attempt to identify ... the facts upon which the offender is to be sentenced”.²⁵ Of course, disputed issues of fact need not always be resolved for or against the offender at sentence.²⁶ The discussion below however, illustrates the importance of defining, where possible, both the offender’s foresight and role in the agreed statement of facts tendered at sentence.

Homicide

Many of the principles applicable to the sentencing of offenders convicted on the basis of joint enterprise were formulated in the context of murder or manslaughter cases. It has been consistently held that the role each offender plays in an offence

of murder or manslaughter is crucial to assessing their respective culpability.²⁷ Where the court cannot determine what role each offender played, each offender will be held to have the same level of culpability.²⁸ In *R v Puta*, for instance, Hidden J found that while it was common ground that one of the offender’s roles was subsidiary, “it is difficult to arrive at any conclusion beyond reasonable doubt about the participation of the other men”.²⁹ Accordingly, given that his Honour was unable to find facts to differentiate the respective roles of the co-offenders, they were assessed as being equally culpable.

Instigator/dominant figure

The fact that an offender is the instigator of, or dominant figure in, the enterprise will increase his or her culpability.³⁰ In *R v Mamae* for example, the instigator of the assault upon the deceased was held, on this basis, to be more culpable than one of his co-offenders, who had merely “joined in” once the attack had started.³¹ Similarly, the Court of Criminal Appeal in *R v Spathis*³² could not find any reason to doubt the trial judge’s findings that the co-offender, Patsalis, was more culpable because he was the dominant party in the enterprise, had planned the crime, bought knives and gloves, lured the victim and “persuaded Mr Spathis to assist him. Mr Spathis, weakly, agreed to do so”.³³

22 For example see *R v Spathis* [No 22] [1999] NSWSC 1320 at [15], where in a 55 day trial the Crown relied the following permutations: (a) a joint attack or (b) a joint criminal enterprise to either rob and/or murder the victim. If the agreement was to rob, it was the Crown case that the accused who did not do the stabbing was aware of the possibility that, in the course of the robbery, his co-accused may intentionally kill, or cause grievous bodily harm or (c) felony murder whereby either accused were responsible for the stabbing in the course of a robbery with wounding or alternatively responsible as co-accused aware that the other co-accused was armed with a knife and might immediately before, during, or immediately after the commission of the robbery, stab the victim seriously injuring him or killing him.

23 *R v Spathis* [2001] NSWCCA 476 at [196].

24 *GAS v The Queen* (2004) 217 CLR 198 at [30].

25 [2009] NSWCCA 107 at [12].

26 *Weininger v The Queen* (2003) 212 CLR 629 at [19].

27 *Lowe v The Queen* (1984) 154 CLR 606 at 609 per Gibbs CJ; *R v Howard* (1992) 29 NSWLR 242; *Carruthers v R* [2007] NSWCCA 276.

28 *GAS v The Queen* (2004) 217 CLR 198 at [23]; *R v Puta* [2001] NSWSC 225; *R v Hart* (unrep, 21/6/1996, NSWCCA).

29 *R v Puta* [2001] NSWSC 225 at [13].

30 *R v Spathis* [2001] NSWCCA 476; *R v Mamae* [2001] NSWSC 936 at [17]–[18]; *R v Tan* [2007] NSWSC 684 at [26]; see also *R v Ngo* (No 3) (2001) 125 A Crim R 495 where the offender “instigated and organised” (at [1]) the murder of a member of Parliament, and, despite not participating in the physical acts causing death, was sentenced to life imprisonment.

31 *R v Mamae* [2001] NSWSC 936 at [18].

32 [2001] NSWCCA 476 at [196].

33 [No 22] [1999] NSWSC 1320 at [43].

Planning

The degree of planning by a participant is a relevant consideration.³⁴ In *R v Suteski*³⁵ the offender's already significant moral culpability was compounded by the circumstance that she actively participated in the plan by personally attending a Leagues Club, in order to identify the victim to the principal who stabbed the deceased. Her criminality was found to be at least equivalent to that of the person who stabbed the deceased.³⁶ In *R v Carruthers*, one offender was held to be less culpable than his co-offender partly on the basis that, unlike in the case of his co-offender, it could not be established beyond reasonable doubt that he had planned the murder.³⁷ Likewise, in *R v Tan*, one offender, E, was held to have been substantially less culpable than his co-offenders on the basis that he merely drove the assailants to the victim's house and, unlike them, had not played a part in the plan to cause the victim grievous bodily harm.³⁸ In *R v Howard*, the fact that one offender's involvement in the physical attack on the victim was more "impulsive and less pre-meditated than that of some of the others" was seen as a factor reducing his culpability.³⁹ On the other hand, the fact that some of his co-offenders had planned the attack was a factor that increased their culpability.⁴⁰

Participation in physical acts causing death

The extent to which each offender participated in the physical acts that caused death will be a factor that will often bear heavily on any assessment of

their culpability.⁴¹ In *R v Tan*, the fact that some co-offenders took no part in the attack leading to the deceased's death was a factor leading to a reduction in their culpability.⁴² In *R v Howard* on the other hand, the substantial role played by some of the offenders in the physical assault on the victim was a factor that increased their culpability.⁴³ Conversely, the less substantial role in the attack played by other offenders was a factor that lessened their culpability.⁴⁴ The judge found in *R v Spathis* that the joint enterprise was a premeditated murder and that both offenders were seated either side of the victim in a truck armed with knives.⁴⁵ But "the assassin, or assassins, [could not] be identified beyond reasonable doubt".⁴⁶ Although the judge found differences in culpability of each (cited above) there was not a marked difference in the sentences imposed.⁴⁷

Nevertheless, the importance of this factor will depend on the circumstances of the case. In *R v Nguyen*, three co-offenders were held to be equally as culpable as the offender who actually shot the victim dead.⁴⁸ This assessment was made in circumstances where each of the offenders had planned the offence with the shooter and walked with him into a crowded billiard hall where the offence was committed. They were found to have "each actively, knowingly and with premeditation participat[ed] ... in the offences he committed ... [E]ach was there to ... provide support and encouragement to the gunman and deter, if not deal with, any resistance".⁴⁹

34 *R v Howard* (1992) 29 NSWLR 242; *R v Tan* [2007] NSWSC 684; *Carruthers v R* [2007] NSWCCA 276; *R v Lucre* (unrep, 6/11/1996, NSWCCA).

35 [2002] NSWCCA 509 at [175], [181] (reported on other issues at (2002) 56 NSWLR 182).

36 *ibid* [175].

37 [2007] NSWCCA 276 at [13], [36].

38 [2007] NSWSC 684 at [4], [24].

39 (1992) 29 NSWLR 242 at 254.

40 *ibid* at 257.

41 *R v Mamae* [2001] NSWSC 936; *Howard v R* (1992) 29 NSWLR 242; *R v Tan* [2007] NSWSC 684; *Carruthers v R* [2007] NSWCCA 276; *R v Lucre* (unrep, 6/11/1996, NSWCCA).

42 [2007] NSWSC 684 at [24]–[25].

43 (1992) 29 NSWLR 242 at 253–257.

44 *ibid*.

45 [No 22] [1999] NSWSC 1320 at [43].

46 *ibid* at [23].

47 Patsalis: 21 years 6 months with a minimum term of 16 years and an additional term of 5 years and 6 months. Spathis 19 years with a minimum term of 14 years and an additional term of 5 years.

48 [2006] NSWSC 850 at [94].

49 *ibid* at [12].

A similar assessment was made in *R v Tan*,⁵⁰ where the accused had entered into a joint enterprise with other men to cause grievous bodily harm to the victim by throwing acid in his face and, as a result of this attack, the victim had died. The accused had not physically carried out the attack, but it had been “contracted at his behest for which he was prepared to pay \$10,000”.⁵¹ Price J cited *GAS v The Queen*⁵² as authority for the proposition that “[t]here is no general principle that the culpability of a procurer is less than the assailant” and concluded that, in this case “the culpability of the prisoner is at least equal to, if not higher than ... the two assailants who carried out the attack in accordance with their instructions”.⁵³

Direct benefit from crime

If one of the parties to the joint enterprise stands to gain financially or otherwise from the commission of the attack, that fact will significantly compound the offender’s culpability.⁵⁴ In *R v Carruthers*, the fact that one offender directly benefitted from the deceased’s death (as the deceased was a witness against him in an upcoming criminal trial), whereas there was no direct benefit to his co-offender, was a major consideration in determining their respective levels of culpability for the offence.⁵⁵

Extended common purpose

Foresight and participation in acts causing death

An offender convicted of murder on the basis of the doctrine of extended common purpose has generally been regarded as being less culpable than the offender who is physically responsible

for the death.⁵⁶ As a secondary offender who is convicted of murder on the basis of the doctrine of extended common purpose (a) lacks the specific intent to cause grievous bodily harm or death and (b) has not participated at all in the physical acts causing death, they are generally considered less culpable than the person responsible for the act causing death.

In *R v Penisini*,⁵⁷ one of the secondary parties was initially convicted of murder on the basis of the doctrine of extended common purpose. Wood CJ at CL said that the absence in such an offender of a specific intention that anyone be killed or occasioned grievous bodily harm means that they will often be less culpable than the principal, who clearly did have this intention.⁵⁸ Sully J applied similar reasoning when sentencing another secondary offender in the same enterprise with which Wood CJ at CL dealt.⁵⁹ This offender had also been convicted of murder on the basis of the doctrine of extended common purpose. His Honour regarded it as “a matter of commonsense” that the culpability of the person who actually fired the shot causing death was greater than that of his co-offenders.⁶⁰ Similarly, in *R v Brown*, Newman J’s finding that the principal was more culpable than a co-offender convicted under the doctrine of extended common purpose, partly on the basis that the principal at all times controlled the revolver that was used to fire the fatal shot and actually fired the shot, was not disturbed.⁶¹

Likewise, where the principal is convicted of murder and his or her co-offender(s) convicted of extended common purpose manslaughter, the joint offender’s culpability will, by virtue of the ingredients of the crime, be assessed as being lower than that of the principal. Examples of this include *R v Penisini*,⁶² *R v*

50 [2007] NSWSC 684.

51 *ibid* at [26].

52 [2004] 217 CLR 198 at [23].

53 *R v Tan* [2007] NSWSC 684 at [31]. See also *R v Ngo* (No 3) (2001) 125 A Crim R 495, where the instigator of the murder of a member of Parliament, who did not fire the fatal shots, was sentenced to life imprisonment.

54 *R v Suteski* [2002] NSWCCA 509 at [175], [181] (reported on other issues at (2002) 56 NSWLR 182); *Carruthers v R* [2007] NSWCCA 276.

55 [2007] NSWCCA 276 at [38]–[39].

56 See, for example, *R v Penisini* [2003] NSWSC 892 at [124].

57 [2003] NSWSC 892.

58 *ibid* at [124].

59 *R v Taufahema* [2004] NSWSC 833.

60 *ibid* at [49].

61 [2006] NSWCCA 395 at [8].

62 [2003] NSWSC 892.

Taufahema,⁶³ *R v Taufahema*,⁶⁴ *R v Hung Duc Dang*,⁶⁵ and *R v Diab*.⁶⁶ This is because the co-offender not only lacked a specific intent to kill the victim or cause him or her grievous bodily harm, but did not even foresee the possibility that the principal offender might have a murderous intent.

Diab's co-offender, MA, pleaded guilty to murder in circumstances where he had shot the deceased following an altercation.⁶⁷ The joint criminal enterprise between MA and Diab was an agreement that MA would use a loaded pistol to threaten and frighten the deceased and his friend. The unlawful and dangerous act was confronting the deceased with a loaded pistol.⁶⁸ The Crown accepted a plea to manslaughter not on the basis that Diab foresaw as a possible incident to the enterprise that MA might shoot the deceased with murderous intent. Rather it was accepted on the basis that, in carrying out the agreement to use the pistol, Diab foresaw as a possible incident of the confrontation that MA might shoot the deceased with the loaded pistol. The sentencing judge found that Diab's criminality was "less than his co-offender" as he had "a lesser degree of forethought about the possibility of [the pistol's] use".⁶⁹

Counsel for Diab on appeal argued that his client did not know MA had the pistol and sought to restrict Diab's culpability to "the mere seconds between when he was aware of the presence of the pistol in MA's hand when it was presented to the victim and its discharge almost immediately thereafter".⁷⁰ Although in making the submission, counsel "disavowed any intention to traverse the plea of guilty",⁷¹ the court held that this submission should be rejected because it involved considering the offence "on a new and different basis".⁷²

However, where the principal offender is convicted of manslaughter and the secondary offender is also convicted of manslaughter on the basis of the doctrine of extended common purpose, it is possible that the secondary offender will be assessed as being as or more culpable than the principal, notwithstanding that the principal has committed the act causing death. In *Kaiser v R*,⁷³ for example, the appellant entered an agreement with another man to assault his ex-partner, foreseeing that in the course of the enterprise she might be killed in circumstances amounting to manslaughter. When this in fact happened, the secondary offender, who was convicted under the doctrine of extended common purpose, was assessed as being more culpable than the principal, even though he had apparently not agreed to the principal using a gun in the assault and was not present when the shooting took place.⁷⁴ This was because, in circumstances where both men lacked a specific intention to kill the victim or do her grievous bodily harm, it was the secondary offender who was the instigator, planner and intended beneficiary of the offence.⁷⁵ The Court of Criminal Appeal upheld the trial judge's findings as to the offenders' relative culpability for the offence.⁷⁶

Planning

If a principal offender has pre-planned the murder for which the secondary offender stands convicted on the basis of extended common purpose, this pre-planning will be a factor that increases his or her culpability in comparison with that of his or her co-offender(s).⁷⁷ As an offender who is convicted on the basis of extended common purpose has merely foreseen the possibility of death occurring, he or she cannot be said to have actually planned the murder for which he or she is convicted.

63 [2007] NSWSC 959.

64 [2007] NSWSC 1460.

65 [2001] NSWCCA 321.

66 [2005] NSWCCA 64.

67 *R v MA* (2004) 145 A Crim R 434.

68 See also *Gillard v The Queen* (2003) 219 CLR 1 at [12] per Gleeson CJ and Callinan J "The presentation of a loaded weapon in the course of such a robbery involves an assault in circumstances which clearly expose the victim to an appreciable risk of serious injury."

69 *R v Diab* [2005] NSWCCA 64 quoting the remarks of the sentencing judge at [8].

70 *ibid* at [9].

71 *ibid* at [9].

72 *ibid* at [11] per Grove J.

73 [2009] NSWCCA 130.

74 *ibid*.

75 *ibid* at [24].

76 *ibid* at [24].

Assault and wounding offences

Similar principles apply when parties are sentenced for their participation in a joint enterprise to assault or wound. As James J (McClellan CJ at CL and Adams J agreeing) said in *R v Wright*:⁷⁸

“In each case it depends on the circumstances whether a person who is criminally liable for an act as a principal in the second degree or an accessory should be regarded as equally culpable, less culpable or even more culpable than the person who actually performed the criminal act.”⁷⁹

Most of the leading cases in this area relate to joint enterprises, but many of the principles that have been developed for homicide are relevant when sentencing persons convicted of assault or wounding due to the application of the doctrine of extended common purpose.

Extent of participation in the assault

It has been accepted that, as with other offences, a party to a joint enterprise to wound or assault will be sentenced for the full range of the criminal acts done by any of the parties to the joint enterprise in carrying out the joint enterprise.⁸⁰ This follows from the fact that, in the case of a joint enterprise, all parties are considered to be equally guilty of the offence which is the subject of the joint enterprise and, in the case of extended common purpose, all parties are considered to be equally guilty of the further crime that is committed.⁸¹

However, an offender will not receive the same punishment as would have been appropriate had he or she personally performed all of those acts.⁸² That is, the degree to which an offender has participated in the actual assault will be a relevant

consideration on sentence.⁸³ For example, in *R v Wright* it was accepted that “some regard, even if limited, could properly be had to the facts that a number of the acts of violence perpetrated on the victim had been done by persons other than the respondent”.⁸⁴ In *R v Bae*, the court found that the fact that the applicant “exhibited more physical abuse to his victim than that utilised by [his co-offender]”⁸⁵ partially justified the trial judge’s assessment that he was more culpable.

Further, in *R v Mitchell*, the criminality of Mitchell’s co-offender, Gallagher, was found to be “somewhat less than Mitchell, but not to a very substantial degree”, primarily on the basis that he had a greater involvement in the physical assault on the victim.⁸⁶ Moreover, Gallagher’s culpability was increased as a result of the fact that he was “a party to the infliction of the injury upon the victim in a real sense and not merely by way of derivative culpability as might be the case had he simply aided and abetted his co-offender”.⁸⁷

Similar principles apply where, unlike in *R v Wright*,⁸⁸ *R v Bae*⁸⁹ and *R v Mitchell*,⁹⁰ an offender has been convicted of an assault or wounding offence not on the basis of his or her involvement in a joint enterprise but rather on the basis of the doctrine of extended common purpose. In *R v Swan*, Barr and Howie JJ held that “[t]he question of culpability is not simply determined by the charge to which the principal in the second degree pleaded guilty, but what he actually did in assisting or encouraging the principal offender”.⁹¹ In that case, the secondary offender was not involved in the wounding of the victim with a knife and remained outside the premises while the wounding took place. This was one reason why he was held to be less culpable than the principal.

77 *Brown v R* [2006] NSWCCA 395 at [8].

78 [2009] NSWCCA 3.

79 *ibid* at [29].

80 *ibid* at [28].

81 *R v Cotter* [2003] NSWCCA 273 at [89].

82 *R v Wright* [2009] NSWCCA 3 at [29].

83 *R v Wright* [2009] NSWCCA 3; *R v Bae* [1999] NSWCCA 290; *R v Steele* (unrep, 17/4/1997, NSWCCA); *R v Mitchell* (2007) 177 A Crim R 94; *R v Fields* (unrep, 17/2/1992, NSWCCA).

84 [2009] NSWCCA 3 at [31].

85 [1999] NSWCCA 290 at [29].

86 (2007) 177 A Crim R 94 at [41].

87 *ibid* at [41].

88 [2009] NSWCCA 3.

89 [1999] NSWCCA 290.

90 (2007) 177 A Crim R 94.

91 [2006] NSWCCA 47 at [72].

Foresight

In an extended common purpose case, the foresight of the secondary offender will be relevant to the assessment of his or her culpability. So, in *R v Swan*, the fact that the secondary offender merely foresaw the possibility of wounding, and not that the victim may be wounded with a knife, had the effect that he was less culpable than he would have been had he foreseen the actual way in which the victim would be wounded.⁹² In other words, as with homicide, the mental state of the secondary offender bears on any assessment of his or her culpability. It may also be, taking this a stage further, that the secondary offender who is liable for an assault or wounding offence due to application of the doctrine of extended common purpose will often be less culpable than the principal offender merely because, unlike such a principal, he or she lacked any specific intent to assault or wound.

Instigator/dominant figure

The offender who instigated the offence will have his or her culpability increased on this account.⁹³ In *R v Bae*, for instance, Bae's criminality was found to be of a higher order than that of his co-offender partly on the basis that he had "initiated the concept of the attack".⁹⁴ In *R v Steele*, the fact that one offender had "led his brother into the commission of the crime" was one factor that led to his culpability being assessed as being higher than that of his brother, although the fact that his brother had enthusiastically participated in the offence meant that there was "not a great deal of ... room for distinction between [them]".⁹⁵ Finally, in *R v Duncan*, the applicant initiated the attack.⁹⁶ Even if he had not participated in the violence there would have been no significant lessening in his objective criminality.⁹⁷

Presence or absence of personal animosity towards the victim

The culpability of one of the parties in a case of assault or wounding will be increased if, unlike his or her co-offender(s), he or she had no reason for personal animosity towards the victim. So while in *R v Mitchell*, Mitchell had a belief that the victim had sexually abused him, the fact that his co-offender, Gallagher, did not, led to the conclusion that "[o]n one view, [Gallagher's] culpability was greater than [that of] Mitchell because he had no personal reason to be vindictive toward the victim."⁹⁸

Planning/premeditation

Any planning or premeditation will lead to an increase in the culpability of any party to the joint enterprise who engaged in such planning.⁹⁹ In *Bajouri v R*, the fact that the applicant did not become involved in the offence "until the last minute" and had no part in its planning was one circumstance reducing his culpability when compared to that of his co-offenders.¹⁰⁰

Offender who "calls off" the assault

The fact that one offender "calls off" the assault will often not be a relevant consideration in determining his or her culpability in comparison with that of his or her co-offender(s). By the time that very serious injuries have been inflicted on the victim, it will be too late for an offender to "reduce his [or her] culpability by being the first to decide that enough punishment has been meted out".¹⁰¹

92 [2006] NSWCCA 47 at [74].

93 *R v Bae* [1999] NSWCCA 290; *R v Steele* (unrep, 17/4/1997, NSWCCA); *R v Duncan* [2004] NSWCCA 431.

94 *R v Bae* [1999] NSWCCA 290 at [28].

95 *R v Steele* (unrep, 17/4/1997, NSWCCA).

96 [2004] NSWCCA 431.

97 *ibid* at [326].

98 (2007) 177 A Crim R 94 at [41].

99 *R v Mitchell* (2007) 177 A Crim R 94; *Bajouri v R* [2009] NSWCCA 125.

100 [2009] NSWCCA 125 at [50].

101 *R v Mitchell* (2007) 177 A Crim R 94.

Robbery

It is common for the Crown to rely on joint enterprise in robbery cases. For example, in a sample of sentencing remarks for offences under s 97 of the *Crimes Act* 1900 between 1999 and 2002 the doctrine “was raised by judges in 35 [of 352] cases (9.9%)”.¹⁰²

Need culpability be assessed in robbery cases?

In *R v Hoschke*,¹⁰³ Carruthers AJ said:

“If two persons agree to perform a joint criminal enterprise, such as in the instant case of robbery of an unarmed, innocent bystander, then it is inappropriate to attempt to assess with any degree of precision the role which each played in the consummation of the criminal enterprise.”¹⁰⁴

Similarly, in the later case of *R v Cotter*, his Honour held that there was a “certain attraction” in the argument that each of the offenders “had the same degree of criminal responsibility”.¹⁰⁵ One of the offenders was held not to be able to “avoid full culpability” for the robbery which he had been involved in, notwithstanding that he had not entered the farmhouse where it had taken place and, instead, had remained in a car outside.¹⁰⁶

The rationale for the view expressed by Carruthers AJ appears to be as follows. Under the doctrines of joint criminal enterprise and extended common purpose, each offender is equally liable for the crime that has been committed. As each is equally liable, each should also be assessed as being equally culpable for the offence, regardless of each offender’s role in the offence.¹⁰⁷

However, this view, as framed, would appear to be inconsistent with the approach that has generally been taken by NSW courts when sentencing offenders who have participated in joint enterprises

and particularly other robbery cases. As noted above, when offenders are convicted of an offence on the basis of either the doctrine of joint enterprise or extended common purpose, then, provided that there is evidence concerning the respective roles played by each of the offenders, they will *not* automatically be held to be equally culpable. Depending on the facts of an individual case, the role played by each offender can nevertheless bear heavily on the assessment of their culpability.

This was confirmed by the Court of Criminal Appeal’s approval in *R v Donovan* of the sentencing judge’s “careful examination of the roles of each of the three offenders”.¹⁰⁸ In that case it was held that a significant distinction between the sentence imposed on one robbery offender and on his co-offenders was warranted as the first offender’s participation in the offence was limited.¹⁰⁹ An examination of the precise role played by offenders for the purpose of assessing those offenders’ culpability has also been made in a number of other robbery cases.¹¹⁰ And while in *R v Alameddine*¹¹¹ Wood CJ at CL approved Carruthers AJ’s statement in *R v Hoschke*, his Honour also approved *R v Donovan*. Wood CJ at CL noted that *R v Donovan* “involved ... a factual situation in which the offender’s role was clearly subservient to that of the other offenders”,¹¹² and that where there are such clear differences in role, they must be recognised on sentence.

In *R v Goundar*,¹¹³ Wood CJ at CL made this view explicit. His Honour stated that while the assessment of culpability “should begin with the proposition that each intended the crime and each set out to carry it into effect,” this “does not automatically mean that every participant in such an enterprise shares the same degree of objective criminality ... On some occasions cause will arise for differentiation between them”.¹¹⁴

102 L Barnes and P Poletti, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Research Monograph No 30, Judicial Commission of New South Wales, Sydney, 2007, p 87.

103 [2001] NSWCCA 317.

104 *ibid* at [18].

105 [2003] NSWCCA 273 at [91].

106 *ibid* at [95].

107 See *R v Hoschke* [2001] NSWCCA 317 at [19].

108 [2003] NSWCCA 324 at [25].

109 *ibid*.

110 *Charlesworth v R* [2009] NSWCCA 27 at [80]; *R v Teterycz* [2005] NSWCCA 197 at [40]–[41]; *R v Bavin* [2001] NSWCCA 167 at [64]–[68]; *R v Qi* (1998) 102 A Crim R 172 at 175.

111 [2004] NSWCCA 286 at [54].

112 *ibid* at [53].

113 (2001) 127 A Crim R 331.

114 *ibid* at [32]–[33].

R v Alameddine nevertheless establishes that where an offender is centrally involved in a well planned and organised criminal enterprise in which threats and the use of weapons is inherent, his or her culpability is “equally as great as the others who were there”.¹¹⁵ The case was “not one where his objective criminality could be reduced by the circumstance ... that he did not personally step past the front door, or directly threaten any person, or discharge a weapon”.¹¹⁶

In cases where two or more offenders have planned a robbery closely with one another and there is no clear “ringleader”, the fact that one offender participated in the violence while a co-offender stood by his side (*Hudson v R*),¹¹⁷ or followed his co-offender into the premises (*R v Randell*),¹¹⁸ or waited in a vehicle outside (*R v Goundar*),¹¹⁹ or guarded the door to the premises where the robbery took place (*Wilson v R*),¹²⁰ has been held to not mean that the violent offender is more culpable than his or her co-offender. This is the case where the robbery goes “according to plan, without violence beyond that contemplated and threatened by the presence of the weapon”¹²¹ or if “he was aware that a knife had been drawn when entry was made, and he assisted the co-offender who he knew to be disguised”.¹²²

In a case in which there was a highly planned joint enterprise to rob a hotel and where the respondent’s mobile telephone was used twenty times to contact participants on the day of the crime, Latham J remarked:

“It is rare that precise quantifications can be made as to the extent to which each offender in a joint criminal enterprise contributes to the planning and execution of an offence. In my view, it matters not whether [an offender] was involved in the planning of the offence to a substantial extent or to some

extent. The fact that the respondent was a party to such a criminal enterprise is the essence of his liability.”¹²³

Latham J’s comments that once an offender has been involved in the planning of the offence “to some extent”, it is irrelevant for the purposes of sentencing to determine the exact extent to which he or she was involved in such planning appears to be based on a very similar rationale to *Hoschke* — that it is “inappropriate to attempt to assess with any degree of precision the role which each [offender] played in the consummation of the criminal enterprise”.¹²⁴

In other cases the courts have assessed the role played by each offender in the same way as it has done for homicide and assault and wounding offences.

Participation in violence/threat of violence

If one offender “actually elects to carry out the threat of violence by using the weapon offensively to cause injury to the victim”, his or her culpability may be increased.¹²⁵ In *R v LC*, it was stated that the fact that one offender played a more violent role in the offences meant that the sentencing judge had not erred in imposing the same sentence on him as he did on the instigator of the offence.¹²⁶ However, whether the greater participation of one offender in any violence increases his or her culpability depends on the circumstances of the case.

Instigator/dominant figure

If there is an “obvious ringleader” in a robbery, this will be a factor that elevates that offender’s culpability in relation to his or her co-offenders.¹²⁷

115 [2004] NSWCCA 286 at [60].

116 *ibid* at [61].

117 [2007] NSWCCA 302.

118 [2004] NSWCCA 337 per Wood CJ at CL at [15].

119 (2001) 127 A Crim R 331.

120 [2008] NSWCCA 245.

121 *R v Goundar* (2001) 127 A Crim R 331 at [34].

122 *R v Randell* [2004] NSWCCA 337 at [15] per Wood CJ at CL, and see also [16].

123 *R v Fepuleai* [2007] NSWCCA 325 at [21] per Latham J (Hodgson JA and Hislop J agreeing).

124 *R v Hoschke* [2001] NSWCCA 317 at [18].

125 *R v Goundar* [2001] NSWCCA 198 at [33].

126 [2001] NSWCCA 175 at [58] per Hodgson JA.

127 *R v Goundar* (2001) 127 A Crim R 331 at [33]; see also *Charlesworth v R* [2009] NSWCCA 27 at [80]; *R v Bavin* [2001] NSWCCA 167.

In *R v Donovan*, for instance, the fact that one offender was the ringleader, together with his greater participation in the violence accompanying the robbery, led the court to find that he was more culpable than his co-offenders.¹²⁸ Similarly, in *R v LC*, one offender's culpability was increased by virtue of the fact that he had been the instigator of the offences and had, to an extent, manipulated his co-offender into committing them (although the majority held that, as the co-offender was more violent than the instigator in committing the offences, the sentencing judge did not err in imposing the same sentence upon them).¹²⁹

Less intelligent/manipulated participants

If an offender is less intelligent than his or her co-offender and, because of this, is manipulated into committing the offence by the co-offender, this may be a factor that mitigates his or her culpability.¹³⁰ The culpability of an offender may be reduced if she or he has been rendered vulnerable to the influence of a co-offender because, at the time of the offence, she or he was in an abusive relationship with that co-offender.¹³¹

Abuse of inside knowledge

The fact that an offender "abuses some inside knowledge or connection with the premises to carry the crime into effect" may lead to his or her culpability being assessed as being greater than that of his or her co-offender(s).¹³²

Knowledge of presence of weapon

That one of the offenders is unaware of the presence of a weapon on another participant mitigates his or her criminality in comparison with that of (a) the co-offender who held the weapon and (b) any other co-offender who knew of the weapon's presence.¹³³ In *Palmer v R*, the Crown

failed to prove to the criminal standard that a co-offender was armed with a knife.¹³⁴ He withdrew from the scene of the robbery once the knife was produced.¹³⁵ These facts were crucial to the sentencing judge's finding that his culpability was lower than that of his co-offenders.

Kidnapping and detain for advantage

In the context of detain for advantage, Grove J said in *Lin v R* that "liability shared by the participants in a joint criminal enterprise" does not translate in every case to an "equality in culpability".¹³⁶ Nevertheless, his Honour accepted that there was "no real distinction" between the culpability of the two co-offenders because of the particular facts of the case.¹³⁷ Hislop J (Kirby J agreeing) also examined the respective roles played by the offenders closely before determining that, on the facts of the case, neither was more culpable than the other.¹³⁸ The case confirms that, in detain for advantage and kidnapping cases, when assessing the respective roles played by co-offenders convicted on the basis of the doctrine of joint enterprise, similar principles to those discussed above in relation to other offences will apply.

Instigator/dominant figure

The instigator of such an offence will have his or her culpability aggravated on this account. In *R v JNN*, for instance, the fact that one offender had initiated the abduction and had recruited a co-offender to assist her in the commission of the offence, was (together with the "leading role" that she had played in the violence attending the offence) one reason why the court regarded her culpability as being at a higher level than that of her co-offender.¹³⁹ The fact that one offender had instigated the offence was also a factor leading to him being assessed as more culpable than co-offenders in *Williams v R*,¹⁴⁰ *R v Qi*¹⁴¹ and *R v Bavin*.¹⁴²

128 *R v Donovan* [2003] NSWCCA 324 at [7]–[9].

129 [2001] NSWCCA 175 per Greg James J at [25]; Hodgson JA agreeing at [59].

130 *ibid* per Greg James J at [23]–[25]; Hodgson JA at [58]; Adams J at [70].

131 *Ta v R* [2008] NSWCCA 179 at [38] per Simpson J (McClellan CJ at CL at [3] and Hislop J at [54] agreeing on this point).

132 *R v Goundar* (2001) 127 A Crim R 331 at [33].

133 *Palmer v R* [2007] NSWCCA 308.

134 *ibid* at [7].

135 *ibid* at [5].

136 *Lin v R* [2006] NSWCCA 258 at [2].

137 *ibid*.

138 *ibid* at [20]–[21].

Participation in violence or threats attending the offence

The extent to which an offender has participated in any physical violence or threats attending the offence will also be a factor that may lead to him or her being assessed as being more culpable than his or her co-offender(s). Again in *R v JNN*, the fact that during the victim's detention, the applicant kicked the victim in the head, cut her hair and stripped her, meant that her culpability was assessed as being at a higher level than that of her co-offender, who had sat in a car nearby while the violence was being enacted and had not joined in this attack.¹⁴³ In *Roberts v R* the applicant's co-offender was assessed as being the "leading offender" and therefore more culpable than the applicant, seemingly on the basis that, unlike the applicant, he had issued threats to the victims, forced the female victim to kiss him and then participated in sexual activity in front of the victims.¹⁴⁴

Hoeben J in *R v Turner* lent support to the argument that all offenders should be held equally culpable for violence inflicted during a kidnapping/detain for advantage offence. Although the court did not disturb the sentence imposed, Hoeben J (Wood CJ at CL and Barr J agreeing) stated:

"I have difficulty with the distinction sought to be drawn between the person who actually strikes the blow and the person who is present and at least implicitly, approves of, if not encourages, that action."¹⁴⁵

His Honour did acknowledge, though, that where the violence that occurs is "entirely unpredictable and unexpected" the position will be different.¹⁴⁶ In such a case, it would appear that the violence used by an offender will be a factor that aggravates his or her criminality by comparison with that of his co-offender(s).

Period of detention

Where one offender has been present for a greater length of time than a co-offender during the victim's period of detention may increase his or her culpability when compared with that of their co-offender.¹⁴⁷ For example, in *Williams v R* the fact that the period of detention during which Williams' co-offender Saunders kept guard was approximately six hours, whereas the period of detention where Williams kept guard was two hours, was one factor that elevated Saunders' culpability to a level above that of Williams.¹⁴⁸

On the other hand, in *R v Flentjar*, Buddin J held that the fact that one offender "remained guarding the victims for a period of time after the offender had left and during which time, on his own admission, he struck [the victim]" did not lead to the conclusion that there was any "significant difference in their roles particularly as [the offender who remained] was actually living in the premises at the time and may not have had the same avenues for escaping from them as did [his co-offender]".¹⁴⁹

Planning

If one offender has planned the offence, this will aggravate his or her culpability when compared with that of a co-offender who has not. In *R v Bavin*,¹⁵⁰ the fact that the appellant was the:

"instigator of the scheme, in that he both *planned it* and took crucial steps by exploiting his personal relationship to bring the victim into a position of vulnerability, was such as to justify a conclusion that the Appellant should receive a higher sentence".¹⁵¹ [Emphasis added.]

Conversely, in *Williams v R*, the fact that Williams had not been involved in any of the planning of events that led to the victim being "picked up" was a factor that mitigated his culpability.¹⁵²

139 *R v JNN* [2004] NSWCCA 426 at [48]–[49].

140 *Williams v R* [2006] NSWCCA 33 at [46].

141 *R v Qi* (1998) 102 A Crim R 172 at 177.

142 [2001] NSWCCA 167 at [68].

143 *R v JNN* [2004] NSWCCA 426 at [49].

144 *Roberts v R* [2007] NSWCCA 112 at [3], [24].

145 *R v Turner* [2004] NSWCCA 340 at [24].

146 *ibid*.

147 *Williams v R* [2006] NSWCCA 33.

148 *ibid* at [30], [38].

149 *R v Flentjar* [2008] NSWSC 771 at [44].

150 [2001] NSWCCA 167.

151 *ibid* at [68].

152 *Williams v R* [2006] NSWCCA 33 at [30], [38].

Break and enter

Where there is no evidence as to the offenders' respective roles in a break enter offence, all offenders will be held to be equally culpable. Accordingly, in *R v Humphries*,¹⁵³ the court found that:

"[T]he criminality in respect of the three [break and enter] charges which were common to each [offender] was assessed as being identical. The facts did not permit a basis for distinguishing between them and age alone was not sufficient in the circumstances."¹⁵⁴

Instigator/dominant figure

In *R v Maher*, the court upheld the sentencing judge's assessment that one offender was more culpable than his co-offenders because he was the organiser of the offence and, to an extent, influenced his co-offenders to commit it.¹⁵⁵

Less intelligent/manipulated participants

In *R v Pitt*, the court accepted that the fact that the applicant was "intellectually superior" to her co-offender and "the dominant personality in the relationship" increased her culpability by comparison with that of her co-offender.¹⁵⁶

Lookouts/cockatoos

If an offender's role is to act as a "lookout" or "cockatoo", this may mean that he or she is assessed as being less culpable than his or her co-offender(s). In *R v Mouzomenos*, the fact that the applicant's co-offender acted as a "cockatoo", staying outside the house where the offence took place, was one reason why the Court of

Criminal Appeal approved the sentencing judge's determination that he was less culpable than the applicant.¹⁵⁷

On the other hand, the extent to which the "lookout's" culpability will be reduced will depend on the circumstances of the case. For example, where the "lookout" provides the weapon that is to be used in the commission of the offence and is "central to the organisation"¹⁵⁸ of the crime, his or her culpability will be greater than that of a "lookout" who played a less significant role in the planning and organisation of the offence.¹⁵⁹

Physical participation in violence or property damage attending the offence

In *Drinan v R*, the Court of Criminal Appeal doubted whether "no distinction [should be drawn] between the objective seriousness of the offence committed by each of the co-offenders" where one offender did not participate in violence attending a break and enter offence.¹⁶⁰ There, one offender sought to have his or her violent co-offender cease the violent activity and leave the premises.¹⁶¹

Planning/use of inside information

If one offender has played a greater role in planning the offence than his or her co-offender(s), this may be a factor that increases his or her culpability in comparison with that of his or her co-offenders.¹⁶² A factor that will increase one offender's culpability in comparison with that of his or her co-offenders is that, unlike them, he or she has used inside information about, for example, the absence of an occupier of premises at a particular time or the possession within the premises of items of value.¹⁶³

153 *R v Humphries* [2005] NSWCCA 305.

154 *ibid* at [26].

155 *R v Maher* [2004] NSWCCA 177 at [29].

156 *R v Pitt* [2004] NSWCCA 454 at [24].

157 *R v Mouzomenos* [2005] NSWCCA 203 at [50]–[52].

158 *R v Rutter* [2003] NSWCCA 306 at [61].

159 *R v Mouzomenos* [2005] NSWCCA 203 at [50]–[52].

160 *Drinan v R* [2006] NSWCCA 303 at [18]–[19].

161 *ibid* at [19] per Rothman J (Spigelman CJ and Hoeben J agreeing). While the NSW Court of Criminal Appeal did not disturb the finding that the two co-offenders were equally culpable, Rothman J observed at [19] that the concession made by the Crown to this effect was "generous ... One would have thought, in those circumstances, that the objective circumstances of each offender were to some extent different."

162 *R v Maher* [2004] NSWCCA 177 at [29].

163 *R v Taylor* [2005] NSWCCA 242 at [16].

Conclusion

Although participants to a joint criminal enterprise are equally liable for the offence committed, this discussion illustrates that it is still the task of the court to assess the culpability of each offender. A central part of the sentencing exercise is to determine the objective seriousness of the crime. As the discussion demonstrates, the fact finding exercise at sentencing for joint criminal enterprise or extended common purpose offences often includes an assessment of:

- whether the offender instigated the offence or was the dominant or weak figure in the enterprise
- to what degree, if any, the offender was involved in the planning of the offence, including the use of inside information

- to what extent, if any, the offender participated in any violence perpetrated in the commission of the offence, and
- the offender's foresight, personal connection or knowledge of the presence of a weapon.

There are, of course, other factors in the sentencing process in these cases which also require close attention such as youth,¹⁶⁴ mental condition¹⁶⁵ and parity of sentence.¹⁶⁶ It is always the obligation of the court to make allowance for the differences in objective and subjective circumstances of the offenders¹⁶⁷ and in the end to pass a sentence that achieves individualised justice.¹⁶⁸

¹⁶⁴ *KT v R* (2008) 182 A Crim R 571.

¹⁶⁵ *R v Hemsley* [2004] NSWCCA 228 at [33]–[36].

¹⁶⁶ *Lowe v The Queen* (1984) 154 CLR 606.

¹⁶⁷ *R v Randell* [2004] NSWCCA 337 at [21] per Wood CJ at CL.

¹⁶⁸ *R v Way* (2004) 60 NSWLR 168 at [55].

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Location: Level 5, 301 George St
Sydney NSW 2000
Australia

Post: GPO Box 3634, Sydney, NSW 2001

Telephone: 02 9299 4421

Fax: 02 9290 3194

Email: judcom@judcom.nsw.gov.au

Website: www.judcom.nsw.gov.au

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Judicial Commission of New South Wales
Level 5, 301 George Street
Sydney NSW 2000
Phone 02 9299 4421
Fax 02 9290 3194