IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2011
[2011] NZSC 159

MAHANA MAKARINI EDMONDS

v

THE QUEEN

Hearing: 6 October 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: A R Laurenson and H A Froude for Appellant
D B Collins QC, M J Inwood and P D Marshall for Crown

Judgment: 20 December 2011

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by William Young J)

The appeal

[1] On the night of 15 November 2008, Matiu Pahau fatally stabbed Peri Niwa. As a result, Pahau and three other men, Rangi Brown, Adrian Fenton and the appellant, were charged with murder, participating in an organised criminal group with the objective of committing serious violent offences and committing a crime with a firearm. At the conclusion of their trial before Asher J and a jury, Pahau was found guilty of murder, and the appellant and the other two men were found guilty of

manslaughter. They all either pleaded guilty to, or were convicted of, the other offences. A fifth man who was involved was not able to be charged by the police as he was outside New Zealand.

[2] All four men appealed unsuccessfully to the Court of Appeal against conviction and sentence.[1] The appellant's further appeal to this Court is confined to his conviction for manslaughter and is based on a single challenge to the trial Judge's jury directions which arises in this way. The appellant was found guilty of manslaughter on the basis of party liability under s 66(2) of the Crimes Act 1961. The Crown alleged that the appellant and the other four men had formed the common purpose of inflicting serious violence on a group of people of whom the deceased was one and that Pahau had killed him in the course of prosecuting that common purpose. The appellant's complaint is that the Judge was required to, but did not, direct the jury that they could only find the appellant guilty of manslaughter if sure that the appellant had known that Pahau was carrying the specific weapon used – a knife. The issue raised by this appeal is of the same kind as those addressed in a line of decisions which are sometimes referred to as the "knowledge-of-the-weapon" cases. We will discuss these decisions later in these reasons.

The key facts

[3] In November 2008, the deceased was working in New Plymouth with a group of scaffolders who came from out of town. They had Mongrel Mob connections[2] and their presence in New Plymouth displeased local members of the Black Power gang, including the appellant and the other four men who were to be involved in the offending.

[4] On the night of 15 November 2008 the deceased and other scaffolders went from 1A Squire Place, New Plymouth, where they had been visiting, to a party at a house nearby. Learning of their presence at the party, the appellant summoned the other four men to a meeting at his house. After the meeting they drove off towards

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1 *Pahau v R* [2011] NZCA 147.

2 In his sentencing remarks, Asher J noted that the deceased himself was neither a Mongrel Mob member nor an associate of that gang. See *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010 at [2] and [14].

Squire Place. The appellant was driving. According to Pahau's evidence at trial, he (that is Pahau) was carrying a knife. Also in the car was a police scanner, a blunt instrument in the nature of a baseball bat, a gun which was in the boot and perhaps another knife. The gun had been placed in the boot by Fenton after the meeting at the appellant's house.

[5] When they arrived in the vicinity of Squire Place, there was a police car present. So the appellant drove off. He drove back some time later and arrived just as the deceased and two or three others were making their way back from the party to 1A Squire Place. The appellant stopped the car at the top of the driveway to 1A Squire Place and the five men in the car all got out. The appellant told the others to "go, go, go". He removed the gun from the boot and stayed by the car holding the gun.

[6] The deceased's group fled up the driveway to the house at 1A Squire Place and were pursued by the other four Black Power members. The Crown case was that the deceased was the last of his group and Pahau caught up with him just as he was trying to, or about to, get into a window of the house. There he was stabbed by Pahau. He managed to get into the house but died shortly afterwards. It appears that the other three Black Power members had abandoned the chase by this stage.

The case against the appellant at trial

[7] The case against the appellant in relation to both murder and manslaughter was based on s 66 of the Crimes Act 1961. Section 66 provides:

> **66 Parties to offences**
>
> (1) Every one is a party to and guilty of an offence who—
>
> (a) actually commits the offence; or
>
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or
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> (c) abets any person in the commission of the offence; or
>
> (d) incites, counsels, or procures any person to commit the offence.

> (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

[8] At the start of the trial the Crown case against the appellant was based on both subsections of s 66 but by the end of the case only s 66(2) was relied on.

[9] The common purpose alleged by the Crown in relation to the committing a crime with a firearm, murder and manslaughter counts was:

> To pursue the group of scaffolders, and to cause serious violence to somebody in the group of scaffolders, and to assist each other with that purpose.

This common purpose was closely associated with the charge of participation in an organised criminal group to which the appellant pleaded guilty. This charge alleged that the appellant and the others had the objective of committing "serious violent offences",[3] meaning offences punishable by imprisonment for seven years or more involving:

> (i) loss of a person's life or serious risk of loss of a person's life; or
>
> (ii) serious injury to a person or serious risk of serious injury to a person; ...

The appellant's plea of guilty to the organised criminal group charge therefore acknowledged that he and two or more of his co-defendants had the objective of killing or putting at serious risk of death, or seriously injuring or putting at serious risk of serious injury, the deceased and his companions. It follows that when addressing the appellant's s 66(2) culpability for the death of the deceased, the jury was inevitably going to accept that that he had been a party to the common purpose alleged by the Crown.

[10] The Judge was of the view that the appellant could be found guilty of manslaughter only if the jury were satisfied that he appreciated that the killing of

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[3] As defined by s 312A of the Crimes Act, a definition which is incorporated into s 98A (see subs (2)(c)) which provides for the offence of participation in an organised criminal group.

somebody was a probable consequence of the prosecution of the common purpose. It is arguable that this was unnecessary, as we will explain later. For present purposes, it is sufficient to note that we are leaving for another day resolution of the issue whether the Judge was correct and we will address this appeal on the assumption that he was.

[11] The Judge's approach to what the Crown had to establish to secure the appellant's conviction for manslaughter is apparent from the question sheet which was supplied to the jury and was in these terms:

> Has the Crown proven beyond reasonable doubt:
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> (a) That Mr Edmonds and Mr Pahau with or without others agreed to carry out a common unlawful purpose on 15 November 2008, namely to pursue the group of scaffolders, and to cause serious violence to somebody in the group of scaffolders, and to assist each other with that purpose;
>
> *If "Yes", go to Question (b). If "No", find him not guilty of manslaughter.*
>
> (b) That Mr Edmonds knew that a killing was a probable consequence of the carrying out of the unlawful common purpose referred to in 2(a)?
>
> *If "yes", find him guilty of manslaughter. If "no", find him not guilty. Either way, your deliberations will be at an end on Count 1 in relation to Mr Edmonds.*
>
> *Notes*
>
> *1. In this context something will be a "probable consequence" if there is a real and substantial risk of the consequence occurring, in the sense that it is something that could well happen, in the course of carrying out the common unlawful purpose.*
>
> *2. You will only find that Mr Edmonds had the requisite knowledge if you are satisfied that he knew that Mr Pahau was carrying a weapon at the time that he and Mr Pahau began to carry out the common unlawful purpose.*

[12] The focus of the present appeal is whether the Judge should have gone further than he did in note 2 above and directed the jury that they could only find the appellant guilty if he knew that Pahau had a knife. We have some reservations as to whether there was, in the factual context of this case, much difference in substance between the direction as given and the direction which the appellant maintains

should have been given.[4] We will, however, address the appeal on the basis that a "knowledge-of-the-knife" direction would, in fact, have more been favourable to the appellant than the direction which was given.

[13] In a ruling (No 5) delivered on 4 May 2010, in advance of the summing-up, the Judge recorded why he was going to shape the issues as he did. In the course of this ruling, Asher J discussed the judgment of the Court of Appeal in *R v Vaihu*.[5] That case was a sequel to a fracas which had resulted in one of the victims receiving catastrophic injuries as a result of blows struck with a blunt instrument. The defendants faced charges of causing grievous bodily harm. The Crown case had been presented on the basis of s 66(2). A majority of the Court concluded that there had been no requirement for the jury to be directed that they could convict a defendant only if satisfied that he had been aware at the start of the fracas that one or more members of his group were armed.

[14] In his ruling Asher J accepted that, on the basis of the approach of the majority in *Vaihu*, there was no need to give a knowledge-of-the-weapon direction. He concluded, however, that he should take a more "conservative" approach. So he rejected the Crown argument that no weapons direction was required. This was for the following reasons:

(a) the appellant was more distant from the primary offending and less able to exert control or withdraw than had been the case with the parties in *Vaihu*;

(b) the manslaughter charge was more serious than the charge involved in *Vaihu*; and

(c) otherwise the jury might find the appellant guilty of offending of a fundamentally different type from what he had envisaged was likely.

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[4] The only weapons which appear to have been present were the gun, the blunt instrument like a baseball bat and either one or two knives. The appellant had the gun and one of the other men had the blunt instrument. On the basis of the Judge's direction, the jury must have concluded that the appellant knew that Pahau was armed. Given that the appellant presumably knew that the non-knife weapons were otherwise spoken for, the jury is very likely to have concluded that he knew that Pahau was armed with a knife.

[5] *R v Vaihu* [2009] NZCA 111.

[15] The Judge's reasons for not directing the jury that the appellant had to be aware that Pahau had a knife were as follows:

> [23] … where there is a range of weapons identified as being in contemplation that were obviously able to inflict a fatal wound, the secondary party should not escape liability because of a difference in the weapon used from that which the principal party in the group was seen carrying. Death caused by the use of a deadly weapon could well happen. Thus, I conclude that a generic reference to knowledge that weapons were being carried is sufficient, without weapons being further defined.

Despite the generality of those remarks, the Judge went on:

> [27] There could well be cases where a group act together in an actual attack where it is not necessary for a party to know which person is carrying a weapon. ... However, in a case such as this where ... the secondary parties were geographically removed from the principal party who carried out the physical attack, and had no ability to control his actions or withdraw, the secondary parties must have knowledge that the actual perpetrator is carrying a weapon. In this case if the secondary parties did not have knowledge that Mr Pahau was carrying a weapon, they may not have been able to foresee that violence of the "type" that was inflicted would in fact be inflicted. They might have envisaged an entirely different type of incident to that which occurred when Mr Pahau caught up with one of the scaffolders. For instance, they may not have sought to stop Mr Pahau when he ran off in pursuit because while another secondary party had expressed an intention to use a knife, Mr Pahau had not and they assumed he would not.

[16] The common purpose alleged by the Crown and defined by the Judge (see above at [9] and [11]) was very specific in time (focussing on when the pursuit started) and pitched at a high level of criminality ("cause serious violence"). As well, both in his reasons for ruling as he did in respect of the question sheet and in note 2 to the question sheet, the Judge seems to have been concerned only with the likely actions of Pahau during the pursuit. The Judge left out of consideration the fact that the appellant himself had access to, and was armed with, a gun at the time of the pursuit and likewise that one of the other pursuers was armed with a blunt instrument. In these respects at least, it was a conservative direction.

[17] The issues sheet did not direct the attention of the jury to the requirement that they also had to be satisfied that Pahau killed the deceased in the prosecution of the common purpose, a lacuna which we see as being of no moment in this case:

(a) It was obvious that Pahau killed the deceased while prosecuting the common purpose; so much so that it went without saying, which presumably explains why this particular requirement did not feature in the issues sheet and also why there has been no complaint about it to date from counsel for the appellant. The absence of complaint about the direction makes it clear that the defence at trial did not seek to argue that Pahau's actions were not part of the prosecution of the common purpose.

(b) The requirement for the killing to have occurred in the prosecution of the common purpose was referred to, at least in general terms, in the summing-up:

> This type of party charge which, as I say, comes under section 66(2) of the Crimes Act, is directed towards the situation where two or more people come to an agreement between themselves to do something that is unlawful, a criminal offence, and to help each other in doing that thing. If in the course of carrying out the unlawful act an offence is committed by any of those people, then the other parties will be guilty as parties if that offence was known to be a probable consequence of carrying out the agreement.

The judgment of the Court of Appeal.

[18] The Court of Appeal was of the view that the appellant's liability for manslaughter did not depend on his having knowledge of the actual weapon used. Referring to *R v Hartley*[6] (a s 66(1) case), the Court made the point that s 66(2) may be utilised in the situation of a group attack where the members of the group use weapons but of different types.[7] In such a case it might be thought that the group had intended not just to assault but to inflict serious violence. This is what the Court

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6 *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299.

7 *Pahau v R* [2011] NZCA 147 at [49], referring to [54] of *Hartley*.

in the case under appeal concluded was the objective of the group in this case.[8] In those circumstances, to require knowledge of the actual weapon would undermine the purpose of s 66(2). For this reason, the Court agreed with Asher J that there was no requirement to direct the jury that they had to be satisfied the appellant knew that Pahau was carrying the actual weapon he was later to use.[9] Indeed, the Court seems to have been of the view that the direction given by the Judge was too favourable to the appellant. It considered that the appellant was guilty of manslaughter if he had recognised that there was a likelihood of serious harm.[10] In other words, and contrary to the approach taken by Asher J, it was not necessary for the Crown to show that the appellant had appreciated that a killing was a probable consequence of the prosecution of the common purpose.

[19] The Court of Appeal accepted that there may well be s 66(2) cases where a knowledge-of-the-weapon direction is required.[11] The Court noted that the same point was made by William Young P in *Vaihu*, when he said:

> [88] Sometimes, however, it will not be possible for a rational jury to infer the required knowledge in relation to a particular defendant unless sure that that defendant was aware that members of his party were armed. ...

However, it noted that William Young P had also said in *Vaihu* that where the Crown invokes s 66(2) "there has to be a judgment call (in the first instance by the prosecution) as to the level at which the common intention is pitched".[12] The Court noted that, here, Pahau and the appellant had pleaded guilty to participation in an organised criminal group with the specific purpose of inflicting serious violence.[13]

[20] The Court concluded that against that background, and in the absence of a narrative to support any claim that Pahau departed from the common intention or that the appellant withdrew, the concepts of absence of control or distance were irrelevant. They also saw no substance to the suggestion that Pahau's killing of the

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8 At [49].
9 Ibid.
10 At [50].
11 At [52].
12 At [89].
13 At [53].

deceased was fundamentally different from the offending in which the appellant had willingly participated.[14]

Setting the legal scene

A preliminary comment

[21] Some legal scene-setting is appropriate before we turn to the knowledge-of-the-weapon cases. These cases come mainly from England and Wales. So in assessing their potential applicability in New Zealand, it is necessary to have a broad and comparative understanding of the laws of England and Wales and New Zealand as to party liability principles and the mens rea requirements for murder and manslaughter as they apply in cases of group violence. For reasons which we will explain, New Zealand practice is for prosecutions in such cases usually to be based on s 66(2). So s 66(2) (and the corresponding common law principles) will be the primary focus of the discussion which follows.

Party liability under s 66 and in England and Wales

[22] The drafting of s 66(1)(b), (c) and (d) is derived from (although not identical to) s 71 of the 1879 draft Code prepared by the Stephen Commission.[15] The language of aiding, abetting, counselling and procuring which appears in both s 71 of the Draft Code and s 66(1)(b), (c) and (d) was borrowed from s 8 of the Accessories and Abettors Act 1861 (UK).[16] The result is that s 66(1)(b), (c) and (d) are substantially to the same effect as s 8 of the Accessories and Abettors Act, which remains in force. That said, there has been divergence between the two jurisdictions as to the mens rea requirement. The New Zealand aiding and abetting cases require the Crown to establish that the secondary party intentionally helped or encouraged the principal offender with knowledge of the essential matters constituting the offence, including the principal's mens rea. In contradistinction there are English

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14 At [53].

15 Colin Blackburn, Charles Robert Barry, Robert Lush and James Fitzjames Stephen *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) (UK).

16 Accessories and Abettors Act 1861 (UK) 24 & 25 Vict c 94.

cases on aiding and abetting which suggest that recklessness or foresight, rather than knowledge, is sufficient.[17]

[23] The general common law principles of joint enterprise liability correspond closely to s 66(2).[18] It is, however, important to recognise that the common law status of joint enterprise liability principles means that they are more susceptible to judicial development and adaptation than s 66(2).

[24] For ease of discussion, references in these reasons to liability for aiding and abetting encompass (unless the context otherwise requires) liability under s 66(1)(b), (c) and (d) and also to the corresponding liability under s 8 of the Accessories and Abettors Act 1861. Likewise, references to common purpose liability encompass (with the same limitation) liability under s 66(2) and joint enterprise liability at common law.

[25] A party to offending may be liable under both aiding and abetting and common purpose liability principles. In practice in New Zealand, however, the prosecution in a group violence case usually relies on common purpose liability principles. This is because the mens rea requirements are higher for aiding and abetting than they are for common purpose liability. A party will be liable as an aider and abettor only if he or she had knowledge of the essential matters constituting the offence. If the charge is murder, the party will thus be liable only if he or she assisted the principal offender with the knowledge that the principal offender would act with murderous intent. On the other hand, if s 66(2) is invoked, the Crown need only establish that the party recognised that an assault with murderous intent was a probable consequence of the implementation of the common purpose.

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[17] See for instance *R v Rook* [1993] 1 WLR 1005 (CA). This case is critically discussed in AP Simester "The Mental Element in Complicity" (2006) 122 LQR 578.

[18] The closeness of the correlation is because the contemporary common law principles were largely formulated in *Chan Wing-Siu v R* [1985] AC 168 (PC) by Sir Robin Cooke who plainly had s 66(2) in mind.

The mens rea requirements for murder and manslaughter in New Zealand and England and Wales

[26] The mens rea requirement for murder in New Zealand – customarily referred to as "murderous intent" – is not confined to an intention to kill. Most prosecutions for murder are founded on s 167 of the Crimes Act, which usually requires either an intention to kill or an intention to inflict injury with knowledge that death is likely to result.[19] However, under s 168, an intention to inflict grievous bodily injury suffices where the violence was for the purpose of facilitating particular specified offences. In common law jurisdictions, an intention to inflict really serious injury (or grievous bodily harm) is sufficient and there is no requirement for the offender to have recognised that death was likely.[20]

[27] Under both the Crimes Act and at common law very limited mens rea (not extending to an appreciation that death is likely) is required to be established against a principal to justify a conviction for manslaughter.[21] The same is true of a party who is prosecuted as an aider and abettor (under both s 66(1)(b),(c) or (d)[22] and under the Accessories and Abettors Act[23]) and at common law under common purpose liability principles.[24] Whether this is also always the case in New Zealand under common purpose principles is unclear. It certainly is where the principal has been found guilty of murder under s 168[25] but the practice in other culpable

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19 Section 167(d) – seldom relied on by prosecutors – imposes liability for murder where the offender, for an unlawful object, has done an act which he or she knew was likely to cause death and death results.

20 For a recent discussion, see *R v Mendez* [2010] EWCA Crim 516, [2011] QB 876 at [25]–[30].

21 For culpable homicide by way of unlawful act under the Crimes Act, the act itself must be accompanied by the mens rea required to make it an offence, and objectively dangerous, although this is considered on the basis of facts known to the accused. See the discussion and cases cited in Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA160.02] and [CA160.07] (compare PJ Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice 2011* (Sweet & Maxwell, London) at [19-105]–[19-106]). *R v Rapira* [2003] 3 NZLR 794 (CA) at [29] makes it clear that foresight of death is unnecessary and incompatible with the scheme of the Crimes Act. In the case of manslaughter by an unlawful assault, it is sufficient that the assault is intended to cause some, even though minor, physical harm or hurt to the victim: *R v Renata* [1992] 2 NZLR 346 (CA) at 349.

22 *R v Renata* [1992] 2 NZLR 346 (CA) at 349: "where one person unlawfully assaults another by a dangerous application of force, the assailant is guilty of manslaughter if death is caused even in a most unexpected way. Unlikelihood of the result is relevant only to penalty, although it may be of great significance in that regard. No different principle applies to a person who is guilty of the assault as a secondary party under s 66(1)(b), (c) or (d)."

23 *R v Creamer* [1966] 1 QB 72 (CA).

24 *R v Yemoh* [2009] EWCA Crim 930, [2009] Crim LR 888 at [122] and [126].

25 The authorities on this point are reviewed in *R v Rapira* [2003] 3 NZLR 794 (CA) at [28]–[33].

homicide cases has been to require the Crown to show that the secondary party subjectively appreciated that death was a probable consequence of the implementation of the common purpose.[26] As we have said, it is arguable whether this is correct,[27] but it is unnecessary for us to address this further in these reasons.

Concerns about over-criminalisation

[28] As explained, at common law, the mens rea requirement for murder includes an intention to inflict grievous bodily harm, and common purpose liability requires merely an awareness that an assault with such an intention is likely. So a party to the assault who did not inflict the fatal injury, did not intend that anyone should be killed and did not even foresee the possibility of this happening can be found guilty of murder if he or she foresaw the possibility of an assault with intent to inflict grievous bodily harm. There has been much concern in England that rigorous application of these principles tends to over-criminalise the conduct of secondary parties,[28] particularly where they may not have foreseen the particular course of events which resulted in death. Such concern has been at the heart of the knowledge-of-the-weapon cases which we are about to discuss.

[29] This concern has, at best, only limited application in New Zealand. It is only where s 168 of the Crimes Act is invoked that there is any real likelihood of a party being convicted of murder without having foreseen the probability of death.[29] In the more common situation where s 167 is relied on, it is common practice for judges to tell juries that they may only convict a secondary party of murder under s 66(2) if

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[26] *R v Tomkins* [1985] 2 NZLR 253 (CA) at 255–256 (where it was said that an accused charged as a party to murder will be guilty under s 66(2) "if the Crown satisfies the jury that he knew that there was a substantial or real risk, or that it could well happen, that his confederate would kill with murderous intent in some such circumstances as in fact arose") and *R v Te Moni* [1998] 1 NZLR 641 (CA) from 647. Going the other way is an observation made by the Court of Appeal in *Rapira* at [25], discussing *Te Moni* and *Tomkins*.

[27] On the basis of the reasoning in *Rapira* at [25], the view expressed in *R v Curtis* [1988] 1 NZLR 734 (CA) at 740–741, the practice in other code jurisdictions (see *R v Barlow* (1997) 188 CLR 1 and *R v Jackson* [1993] 4 SCR 573) and the common law (where liability extends to incidents of the common purpose, so long as they are not fundamentally different from those recognised by the party to be possible incidents of the joint enterprise).

[28] See the discussion by the Law Commission for England and Wales in *Participating in Crime* (LC 305, 2007) at [2.94] and more generally from [2.76]. See also David Ormerod *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, Oxford, 2011) at [8.5.5].

[29] See *R v Morrison* [1968] NZLR 156 (CA), *R v Hardiman* [1995] 2 NZLR 650 (CA) at 652, *R v Tuhoro* [1998] 3 NZLR 568 (CA) and *R v Rapira* [2003] 3 NZLR 794 (CA).

satisfied that he or she recognised that death was probable. Whether this direction is required may be open to question, but in practical terms such a direction does not add much of significance to the undoubted requirement that the secondary party must have appreciated that the principal might act with either an intention to kill or an appreciation that death was likely to ensue.[30] Similarly, where the Crown relies on aiding and abetting principles, a party will be guilty of murder only if he or she appreciated that the principal offender would act with murderous intent.

Knowledge-of-the-weapons cases

The factual context

[30] These cases all arise out of the same factual context:

(a) a group of people attack another person;

(b) the violence is either spontaneous or the result of only limited premeditation and planning;

(c) weapons are used;

(d) the victim either dies or is seriously injured; and

(e) at trial the members of the group deny party liability on the basis of arguments that they did not know that anyone was armed (either generally or perhaps with the fatal weapon).

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[30] A jury which has concluded that the secondary party appreciated that an attack with murderous intent was probable will almost inevitably infer that the secondary party also appreciated that death was a probable consequence.

The English knowledge-of-the-weapons cases

[31] In *R v Powell (Anthony)*[31] the purpose of the group in the second case in the consolidated appeal had been to attack and cause injury to a police officer using wooden posts. In the course of that attack, the principal offender used a knife to kill the police officer. It was arguable that the secondary party may not have known that the principal was armed with a knife. He was nonetheless found guilty of murder after the trial Judge left it to the jury to convict him if, despite not knowing of the knife, he joined in an unlawful attack realising that there was a substantial risk that the principal might kill or cause really serious injury with the wooden post. His appeal having been dismissed, the secondary party appealed to the House of Lords on questions certified by the Court of Appeal. The second of these questions was in these terms:[32]

> Is it sufficient for murder that the secondary party intends or foresees that the primary party would or may act with intent to cause grievous bodily harm, if the lethal act carried out by the primary party is fundamentally different from the acts foreseen or intended by secondary party?

The form of this question builds in the assumption that the use of the knife was fundamentally different from the assault envisaged by the secondary party.

[32] Lords Mustill and Steyn were troubled by the interaction between common purpose principles and the mens rea required for murder. Lord Steyn recommended legislative reform to make an awareness of the likelihood of death part of the mens rea for murder,[33] a recommendation which Lord Mustill endorsed. As well, Lord Mustill apparently considered that common purpose liability for murder should depend on foresight that murder (and thus the death of someone) was a possible incident of the common unlawful purpose.[34]

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31 *R v Powell (Anthony)* [1999] 1 AC 1 (HL). Two appeals were dealt with together. For present purposes it is the second of the appeals which is material.

32 At 17.

33 At 15.

34 At 10–11. He had intended to write separately in detail (see 11), but in the end chose not to do so. So his thinking on the issue is not developed in his speech.

[33] The leading speech was given by Lord Hutton. He considered that the answer to the question set out above at [31] was "no". So in his view the Judge should have directed the jury that:[35]

> ... if the jury considered that the use of the knife by [the principal offender] was the use of a weapon and an action on [his] part which [the secondary party] did not foresee as a possibility, then [the secondary party] should not be convicted of murder.[36]

He went on to say:[37]

> As the unforeseen use of the knife would take the killing outside the scope of the joint venture the jury should also have been directed ... that [the secondary party] should not be found guilty of manslaughter.

In reaching this view he cited and approved the following passage from the judgment of Lord Parker CJ in *R v Anderson*:[38]

> It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.

Lord Hutton also addressed one other issue:[39]

> ... if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa.

[34] It is clear that all the judges in *Powell* had reservations whether secondary parties should be convicted of murder if not shown to have foreseen a risk of death. The knowledge-of-the-weapon requirement apparently endorsed by the House of Lords would require the secondary party to be aware of the presence of either the weapon actually used or an equally lethal weapon. In practice such a requirement would serve as a proxy (albeit rather rough) for a rule that party liability for murder

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35 At 30.

36 This particular formulation of the test may conceal a burden and standard of proof issue – see also fn 43 below.

37 At 30.

38 *R v Anderson* [1966] 2 QB 110 (CA) at 120, cited by Lord Hutton at 28.

39 At 30.

depends on actual foresight of the likelihood of death – a rule which all the judges (with the apparent exception of Lord Mustill) recognised was not part of the common law.

[35] *Powell* proved difficult to apply in practice and was reconsidered by the House of Lords in *R v Rahman.*[40] In this case, the four defendants, with others, armed with blunt instruments, had attacked the victim but the actual cause of death was stab wounds. It was not possible to identify the principal offender. Each of the defendants denied being that offender and they also denied knowing that anyone in their attacking group had a knife. In his summing-up, the trial Judge left it the jury to convict the defendants if satisfied that the production and use of the knife were "within the scope" of the common purpose or unlawful enterprise and told them that they could be so satisfied even if not satisfied that the defendants knew of the presence of the knife.[41] In addressing this issue the jury were invited to consider whether the knife in terms of its propensity to kill was "fundamentally different" from the other weapons which were openly carried. He then went on:[42]

> But if you conclude that to stab with a knife in the back was in a different league to the kind of battering to which the attackers implicitly agreed upon by the use of those other weapons, then the others are not responsible for the consequences of use of the knife ... [43]

[36] The main challenge to the summing-up was not directly associated with the absence of a knowledge-of-the-weapon direction but rather based on the proposition that, given the nature of the fatal injuries, the primary offender must have acted with an intention to kill. The complaint was that the Judge had declined to direct the jury that they should only convict a defendant of murder if satisfied that he had foreseen that one of the group would attack the victim with that intention. The contention was

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40 *R v Rahman* [2008] UKHL 45, [2009] AC 129.

41 See the portions of the summing-up reproduced at [18].

42 Ibid.

43 Again there is arguably a burden and standard of proof issue. On normal principles, it would be for the Crown to show that there was no fundamental difference and to the extent to which the issue depends on contested issues of fact, that must be so. There was, however, no challenge to this aspect of the summing-up, presumably on the basis that, once the facts were found, the issue was one of evaluation. Compare *R v Smith (Morgan)* [2001] 1 AC 146 (HL) at 174 per Lord Hoffmann.

that an assault with lethal intent was "fundamentally different" from an assault with some lesser intent.[44]

[37] Lord Bingham saw the case as turning on the principle that "a radical departure by the primary killer from the foreseen purpose of an enterprise" might relieve the secondary party of liability.[45] He noted:

> The greater the difference between the acts or behaviour in question and the purpose of the enterprise, the more ready a jury may be to infer that the particular defendant did not foresee what the other participant would do.

He rejected the appellant's argument on the basis that the Crown had to show foresight not of the principal's actual intention but rather what the principal might do.[46] He also rejected a subsidiary complaint that the Judge had not explained to the jury what was meant by "fundamentally different".[47]

[38] In his speech, Lord Scott postulated a case where the parties set out to inflict serious harm and where the victim's death was a possible and foreseeable consequence. In his view, in such a case, the parties are guilty of murder:

> [31] …It seems to me beside the point that the secondary party may not have known the killer to be carrying the weapon actually used to effect the killing and I do not understand how his criminality can be held to depend on whether the killing stroke was effected by the club the killer was known to have carried or by the knife that he was not known to have carried. It would, of course, be necessary that the killing stroke should have been an act within the scope of the joint enterprise on which the parties had embarked but if parties embark on a punishment exercise that carries with it the foreseeable possibility of death of the victim, the instruments used for that purpose seem to me of much less importance than the purpose itself.

The references to the foreseeable possibility of the victim's death appear[48] to rather suggest that he was addressing the case on assumptions which are closely analogous to the circumstances in which common purpose liability for murder might be imposed in New Zealand.

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44 At [19].
45 See [13] and [16].
46 At [24]–[26].
47 At [26].
48 The qualification is because Lord Scott used the word "foreseeable" rather than "foreseen"

[39] The other Judges did not expressly address the situation where the alleged party had actually foreseen the risk of death but not necessarily the means by which it was inflicted. Instead, the majority (through Lord Brown) summarised the law in this way:[49]

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B.*"
>
> (emphasis in original, to reflect the effect of the decision in *Powell*)

On the basis of this approach, common purpose liability depends on whether the actions of the principal were "fundamentally different" from those foreseen by the alleged party, an issue which will be heavily influenced, but not necessarily controlled, by[50] whether the alleged party was aware of the presence of the weapon used or one of equivalent or greater dangerousness.

[40] The only other case we need to refer to at this point is *R v Mendez*[51] where the current (that is the post-*Rahman*) law was summarised in this way:

> [45] … In cases where the common purpose is not to kill but to cause serious harm, D is not liable for the murder of V if the direct cause of V's death was a deliberate act by P which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by D. …

On this approach the courts must focus on the dangerousness of the situation as recognised by the alleged party and that party will not be responsible for consequences – usually the death of the victim – which result from the crystallisation of a risk which was "altogether" greater than (and different from) that identified by that party.

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49 At [68].

50 At [70] Lord Brown agreed fully with Lord Bingham's statements at [24]–[25].

51 *R v Mendez* [2010] EWCA Crim 516, [2011] QB 876.

The Australian cases

[41] The Australian decisions do not support the argument for the appellant, as is illustrated by *R v Keenan*[52] which, for present purposes, is the leading Australian case.[53]

[42] Keenan and three other men were involved in a plan to attack a fifth man. On the basis of the evidence as a whole it was open to the jury to infer that the infliction of serious injuries was a probable consequence of the implementation of the common purpose. As it turned out, one of Keenan's co-offenders shot the victim. The Court of Appeal of Queensland allowed Keenan's appeal against conviction because it concluded that, under the equivalent of s 66(2) in the Queensland Criminal Code, it was not sufficient that the generic offence (the intentional infliction of grievous bodily harm) was a probable consequence of the prosecution of the common purpose.[54] Instead, the Crown had to establish that the particular acts or omissions of the principal offender (that is, the shooting of the victim) were a probable consequence. The High Court of Australia, by a majority (Kirby J dissenting) disagreed and reinstated the conviction.

The Canadian practice

[43] The Canadian law as to common purpose liability[55] is, like s 66, based on s 71 of the Stephen Commission's Draft Code,[56] but it still provides for liability for offending which the party knew or ought to have known was a probable consequence of the implementation of the common purpose. This provision has been read down in relation to murder and attempted murder so as to provide for liability for those offences only where the party has subjectively recognised that the offence committed

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52 *R v Keenan* [2009] HCA 1, (2009) 236 CLR 397.

53 Other authoritative and reasonably recent judgments on common purpose liability include *McAuliffe v R* (1995) 183 CLR 108; *Gillard v R* [2003] HCA 64, (2003) 219 CLR 1 and *Clayton v R* [2006] HCA 58, (2006) 81 ALJR 439.

54 Referred to at [107].

55 Criminal Code 1985 RSC 1985 c C-46, s 21(2). The words "or ought to have known" were included in the New Zealand precursors to s 66(2) in the Crimes Act 1908 and the Criminal Code Act 1893.

56 See above at [22].

was a probable consequence of carrying out the common purpose.[57] In murder cases where the prosecution relies on common purpose liability, trial judges direct juries in broadly the same way as juries are directed in New Zealand with the result that common purpose liability for murder is dependent on the alleged party having recognised that a death was a probable consequence of the implementation of the common purpose.[58] Presumably for this reason, there has been no occasion for a knowledge-of-the-weapons jurisprudence to develop in Canada.

The New Zealand law

[44] As is apparent we are of the view that the English cases represent a response to the potential for over-criminalisation of secondary parties in group violence cases. This response has involved limiting common purpose principles so as to exclude liability where the risk which crystallised was fundamentally greater than, and different to, that envisaged by the alleged party. But, as we have already explained, the rather different mens rea requirements for murder under our Crimes Act means that that there is very limited scope for s 66(2) liability for murder where the secondary party has not recognised the probability of death resulting from the implementation of the common purpose.

[45] Although the English courts have now reached the position that the application of the "fundamentally different" test is not confined to knowledge-of-the-weapon considerations, such considerations still seem to be of central importance. This is despite the reality that the magnitude of the risk of death (or other serious injury) recognised by the alleged party cannot be accurately assessed by reference primarily to whether that party knew of the presence of the fatal weapon or one which was similarly lethal. A knife intended to be used only in extremis and in self-defence may pose far less risk of harm than a baseball bat which is to be used against the head of the victim. The likelihood of serious injury or death predominantly depends on the personalities and intention of those engaged. Relevant to this will be their states of emotional arousal, whether they have consumed alcohol or drugs and similar considerations. Far more important than the

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57 *R v Logan* [1990] 2 SCR 731.

58 See for example, *R v Young* 2009 ONCA 549, (2009) 246 CCC (3d) 417 at [7].

precise nature of the particular weapons they have is what they intend to do with them. So treating party liability as dependent on awareness that one or more of the participants were armed with the weapon used by the principal (or an equally dangerous weapon) cannot produce anything like a precise correlation of common purpose liability with the accuracy of the alleged party's foresight of the extent of the risk of death or serious injury. As well, legal principles which depend on a comparison of the dangerousness of weapons encourage attempts to make unmeritorious (and perhaps faintly ludicrous) distinctions. Thus in one English case concerning a young man who had been stabbed to death after a group attack, the appellants argued that the Stanley knife which was suitable for slashing (and was in the possession of one of the group to the knowledge of others) was less dangerous than a knife which could also be used for stabbing, with the result, so it was contended, that the stabbing of the deceased was fundamentally different from what they had envisaged as likely.[59]

[46] Another problem is that the "fundamentally different" test is indeterminate; both legally and factually. As the authors of *Smith and Hogan* state:[60]

> ... The case law has been unclear as to whether the enquiry is focused on the degree of difference in [the principal's] intentions, weapons, actions or the consequences of those?

And even assuming a stable judicial approach to the factors which are material to the application of the test, each case must in the end rest on a value judgment by the jury (as to whether what happened was "fundamentally different" or "in a different league" from what was envisaged as likely). Criminal liability sometimes rests on such judgments; for instance, in relation to manslaughter by negligence, whether the defendant's breach was a "major departure" from the relevant duty. But the more concrete and rooted in the facts of the case the assessment required of the jury the better, in terms of consistency.

[47] The approach of New Zealand courts to common purpose liability must be firmly based on the wording of s 66(2). That section recognises only one relevant

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59 *R v Yemoh* [2009] EWCA Crim 930, [2009] Crim LR 888. The appeal was, unsurprisingly, dismissed. Compare *Rameka v R* [2011] NZCA 75 at [139]–[158].

60 David Ormerod *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, Oxford, 2011) at 221.

level of risk, which is the probability of the offence in issue being committed. If the level of risk recognised by the secondary party is at that standard, it cannot matter that the actual level of risk was greater than was recognised. It follows that there can be no stand-alone legal requirement that common purpose liability depends on the party's knowledge that one or more members of his or her group were armed or, if so, with what weapons. As well, given the wording of s 66(2), there is no scope for a liability test which rests on concepts of fundamental difference associated with the level of danger recognised by the party. All that is necessary is that the level of appreciated risk meets the s 66(2) standard.

[48] We accept, however, that there are circumstances in which a knowledge-of-the-weapon direction may be required as part of the judge's discussion of the evidence, in particular in relation to:

(a) establishing the extent of the common purpose;

(b) deciding whether the party recognised that the commission of the offence was a probable consequence of the commission of the common purpose; and

(c) determining whether the offence committed by the principal was in the course of the implementing of the common purpose.

As we will explain, the first two respects are closely associated and the third is of less significance than the other two.

[49] The common purpose which is left to the jury is largely for the prosecutor to define. In a group violence case, there will often be a decision to be made as to where to pitch the alleged common purpose in terms of criminality. In this case, the common purpose was pitched at a high level of criminality – an intention to inflict serious violence. But the prosecutor could also have pitched it much lower, for instance to assault the deceased and the other members of his group. The lower the criminality of the alleged common purpose, the easier it will be to establish, but perhaps the harder it will be to show that the ultimate offence was recognised to be a

probable consequence of its implementation. The higher the criminality of the alleged common purpose (and thus the closer it is to the offence eventually committed), the more difficult it may be to establish that particular defendants formed the intention to prosecute that common purpose, but the easier it will be to infer that such defendants (that is, those who did form that intention) knew that the ultimate offence was a probable consequence of its implementation. For instance if the Crown can establish that the common purpose was to attack the victim with baseball bats, it will usually not be difficult for the jury to infer that anyone who was a party to that common purpose would have realised that death or serious injury (depending on the consequences for the victim and the charges laid) was a probable consequence of its implementation.

[50] Where the alleged party can be shown to have known of the presence of weapons when the fracas started, it will usually be easy to infer that he or she was party to a common purpose which extended to the use of those weapons. Whether the common purpose should be treated as confined to such use will depend on the circumstances.

(a) In some cases, evidence that the alleged party was either carrying a weapon or knew that other members of the group were armed may be the only evidence that the alleged party either (a) shared the common purpose alleged or (b) appreciated that the ultimate offence was a probable consequence of its implementation.

(b) In other cases, the common purpose may be best assessed by reference to the results the defendants intended to bring about. Thus the evidence may show that the defendant was a party to a common purpose to inflict serious and potentially life threatening violence in whatever way was convenient, including, say, kicks to the head. In such a case, the alleged party could still be found guilty of murder even if the fatal injury was inflicted not by kicking but rather with a tyre lever which, unbeknown to that party, one of the other members of the group had brought to the fracas.

[51] We recognise that there may be cases where the use by one member of a group of a weapon which other members of the group had not known about may conceivably justify the conclusion that the offence committed involved such a departure from the common purpose as not properly to be regarded as occurring in the course of its implementation. But providing the Crown can establish a relevant and sufficient common purpose and a recognition that the offence ultimately committed was a probable consequence of its implementation, it is difficult to conceive of a situation where the nature of the weapon used would be of controlling significance in determining whether the offence occurred in the course of implementing the common purpose.[61]

[52] It follows from this discussion that there is no legal requirement for a knowledge-of-the-weapon direction in a s 66(2) case. Whether such a direction is practically required will depend very much on the particular circumstances of the case and the particular charge which the alleged party faces.

This case

[53] The Judge proceeded on the basis that the appellant could be found guilty of manslaughter only if he had recognised that a killing was a probable consequence of the implementation of the common purpose. The structure of his issues sheet makes it clear that he saw the knowledge of the weapon as relevant to whether the appellant had appreciated that death was a probable consequence of the prosecution of the common purpose. As well, because the weapons direction was specific to Pahau, the Judge in effect confined the jury's attention to the appellant's appreciation of the probability that Pahau (as opposed to anyone in the attacking group) would kill someone, a restriction which we see as unnecessary.[62]

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[61] A case which perhaps provides an example is *R v Gamble* [1989] NI 268 (Crown Court). *Gamble* is discussed in *Rahman* with some of the judges doubting whether it was correctly decided.

[62] In group violence cases, common purpose liability does not depend upon the Crown being able to identify the principal: see Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA66.04]. As well, it is enough for common purpose liability that an alleged party recognised that offending of a particular type was probable without necessarily having a particular member of his or her group in mind: see the discussion in PJ Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice 2011* (Sweet & Maxwell, London) at [19-30].

[54] The Crown case was that the appellant put in train a sequence of events with the purpose of inflicting serious violence and an associated substantial risk of death. For present purposes, there is no difference between death caused by the use of a blunt instrument and death effected by stabbing. What was material for the purposes of s 66(2) was that the appellant appreciated that the ultimate result was probable rather than that he foresaw the exact concatenation of events which, in the end, brought that result about. There was thus no need for the Crown to prove that the appellant knew that a stabbing (as opposed to some other form of death-inflicting violence) was a probable consequence of the implementation of the common purpose.

[55] On the basis of the pleas of guilty to the organised criminal group charges and other evidence, it was open to the jury to conclude that the appellant and the other members of his group envisaged sufficiently serious violence to justify the inference that they appreciated that there was a substantial risk of death. The Crown contention that the appellant appreciated there was a substantial risk of death did not rest on his being aware that Pahau, in particular, was armed. There was thus in this case no practical requirement for any weapons direction. The direction given by the Judge in note 2 was, as we have said, unduly favourable to the appellant.

Disposition

[56] For the reasons given the appeal should be dismissed.

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