IN THE SUPREME COURT OF NEW ZEALAND

SC 96/2012
[2014] NZSC 153

BETWEEN	JAMIE NGAHUIA AHSIN Appellant
AND	THE QUEEN Respondent

SC 73/2013

BETWEEN	RAELEEN MATEWAI NOYLE RAMEKA Appellant
AND	THE QUEEN Respondent

Hearing:	4 July 2013 and 11 March 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Tipping JJ
Counsel:	C W J Stevenson and E A Hall for Ahsin R M Lithgow QC and E A Hall for Rameka J C Pike QC (on 11 March 2014), M F Laracy and J E Mildenhall for Respondent
Judgment:	30 October 2014

JUDGMENT OF THE COURT

The appeals are allowed, the appellants' convictions for murder are quashed and new trials are ordered.

REASONS

ELIAS CJ

[1] The appellants were convicted after trial of the murder of Paul Kumeroa. The Crown case was that they had either aided or encouraged the principal offender, Clarke McCallum, in an assault with murderous intent or had participated with him in an unlawful common purpose (a plan to assault members of a rival gang) in which killing with murderous intent was known to be a probable consequence. On these alternatives, they were liable as parties under s 66(1)(b) or (c) and s 66(2) of the Crimes Act 1961. I agree with McGrath, Glazebrook and Tipping JJ that the appeal to this Court should be allowed because of inadequacies in the summing up of the trial Judge. On that matter, dispositive of the appeal, I state my reasons shortly because they do not differ in substance from the reasons delivered by McGrath J and because his full description of the summing up makes it unnecessary for me to set it out.

[2] In addition, I address two further grounds of appeal: whether withdrawal by a secondary party is properly treated as a defence; and the need for jury unanimity in a case put on alternative bases under the party provisions contained in s 66 of the Crimes Act. It is strictly unnecessary to determine these points because the appeal is to be allowed on another ground. Since the issues raised are ones of some difficulty, it might be thought that they are better left for a case where it is necessary to decide them. I indicate my position on each briefly because the case must be sent back for retrial where the points are likely to arise again, and because they are matters dealt with in reasons of other members of the Court with which I am not in complete agreement.

Background

[3] Clarke McCallum and Daniel Rippon are members of Black Power. Jamie Ahsin, one of the appellants, was in a relationship with Mr Rippon. The other appellant, Raeleen Rameka, was associated with Black Power and was a friend of Ms Ahsin.

[4] Mr McCallum and Ms Ahsin were involved in an incident at a supermarket in the early afternoon of the day of the fatal assault, which seems to have involved

some intimidation or provocation on the part of people thought to be associated with the Mongrel Mob. Shortly after the incident, after Mr McCallum and Ms Ahsin had left the supermarket, the police (to whom the incident had been reported) stopped a Mitsubishi Galant vehicle driven by Ms Ahsin in which Mr McCallum and Ms Rameka were passengers. On search of the vehicle, no weapons were found but the police noted the presence of a large spanner.

[5] The Crown alleged that at about 8 pm that night Ms Ahsin drove Mr McCallum, Mr Rippon and Ms Rameka to the North Mole, at the mouth of the Whanganui River, flashing the headlights of the Mitsubishi Galant at other vehicles. At the river mouth, the four were said by witnesses to have intimidated the occupants of parked cars, identifying themselves as Black Power adherents and making contemptuous reference to "dog shits" (as Mongrel Mob members are referred to by Black Power), although there is no suggestion that those at the Mole were members of the Mongrel Mob. There was evidence from three witnesses that Mr Rippon threatened violence, while waving a knife.

[6] Later, Ms Ahsin drove the others to a house in Gibbons Crescent they had been at earlier in the day where a party was underway. Ms Rameka accosted a man in a vehicle outside the house and accused him of being a member of the Mongrel Mob who had assaulted her seriously on another occasion. The occupants of the vehicle drove away, but not before Mr McCallum had thrown a spanner at the car, breaking a window. All four were later charged with intentional damage arising out of this incident, although only Mr McCallum was convicted. The jury acquitted Ms Ahsin and Ms Rameka, who had been charged as parties under s 66(2) on the basis of the same common purpose of assaulting or intimidating members of the Mongrel Mob relied on in respect of the charge of murder.

[7] After leaving the party shortly before 10 pm in the Mitsubishi Galant, Mr Kumeroa was seen walking along Cross Street. It was the Crown case that because he was wearing a red hooded sweatshirt and it was suspected that he was associated with the Mongrel Mob (although he was not), the car driven by Ms Ahsin executed a U-turn to stop beside Mr Kumeroa. Some of those in the car, including women, were said by witnesses to have then got out of the car. There was yelling.

When Mr Kumeroa, who was intoxicated, started to get into the back seat of the car, he was pulled and pushed out, including, the Crown claimed, by Ms Rameka (although none of the participants in the assault was able to be identified by witnesses). The men were said to have punched Mr Kumeroa. Witnesses described a woman yelling at the men to get in the car and leave, and words such as "that's enough", "let's go". The person or persons who shouted out were not identified. Although Mr McCallum went back to the car, the Crown case was that he returned almost immediately to Mr Kumeroa and struck him with a short-handled axe, causing the blows that proved fatal. After Mr Kumeroa fell to the ground, witnesses described the female voice continuing to urge the others to get back into the car and leave. One witness reported that she had said that the police would be coming. Ms Ahsin then was said to have driven the others away.

[8] At the trial, the Crown case was that Mr Rippon and the appellants were parties to the murder of Mr Kumeroa either by reason of their assistance and encouragement of him in the assault at Cross Street or by reason of their participation in a common purpose that evening to intimidate and assault members of the Mongrel Mob, in the carrying out of which purpose killing with murderous intent (intentional killing or an intention to inflict injury likely to cause death while being reckless as to whether death ensued) was known to be a probable consequence. They were said to have had knowledge of the likelihood of recourse to weapons, as demonstrated by the waving of the knife by Mr Rippon at the car park at the river mouth. The Crown case was that the common purpose of the group in intimidating and assaulting those linked with the Mongrel Mob was prompted by the first altercation at the supermarket and was evidenced by the behaviour at the river mouth and in the verbal and physical assault on those in the car outside the party. On the Crown case, it was because of this common purpose that Mr Kumeroa had been accosted and assaulted.

[9] Mr Rippon was said to have assisted in and encouraged the murderous assault by Mr McCallum by participating in the assault on Mr Kumeroa. The two women were also said to have assisted and provided encouragement to Mr McCallum. Ms Ahsin had driven the car to stop it beside Mr Kumeroa, when he was spotted. She was said to have yelled encouragement. Ms Ahsin had also driven the others away

after the fatal assault. Ms Rameka, too, was said to have encouraged the assault by yelling to Mr McCallum at the time of the assault on Mr Kumeroa. It was suggested that she had also assisted Mr McCallum by helping push Mr Kumeroa from the car.

[10] At the trial none of the accused gave evidence. The defence for Ms Rameka was that she was not in the car either at the river mouth (when the knife was produced), or when Mr Kumeroa was assaulted. Her counsel explained the altercation at the party, in which she was involved, as having arisen out of the earlier assault on her by the individual in the car, rather than as part of an enterprise to attack members of the Mongrel Mob more generally (as the Crown case had the common purpose). Ms Ahsin, too, put the Crown to proof of her presence in the car and any knowledge that there were weapons at hand. Her case, as put by her counsel, also entailed denial that there was any common purpose in attacking members of the Mongrel Mob. Rather, it was suggested by her counsel that the four were having a night out drinking and socialising with friends. Defence counsel for the women suggested that the actions of the woman or women who had called to the men to get back into the car indicated that whoever spoke was trying to stop matters going as far. This is the evidential foundation on which the appellants rely for the appeal point they take that the Judge should have raised with the jury the question of withdrawal, both in relation to providing assistance and in relation to any common purpose, and in respect of both women. The Crown submission in response was that the yelling indicated the women were keeping a look out and assisted in getting the group away from the scene after the assault.

[11] The structure of the Judge's summing up to the jury, which was divided into four parts, is fully described in the reasons of McGrath J. For present purposes, it should be noted that the Judge directed the jury that whether Ms Ahsin had withdrawn her support was relevant to whether she remained a party to a common purpose under s 66(2) but failed to treat it as relevant also to her status as a party under s 66(1) (assistance in the assault with murderous intent), apparently on the basis that her assistance (which included driving up to Mr Kumeroa) could not at that stage be undone. No direction as to withdrawal was given by the Judge in relation to Ms Rameka, either under s 66(1) or (2), apparently on the basis that her counsel had not sought such direction. That may have been because withdrawal was

difficult to run consistently with the defence that the Crown had not proved she was in the car.

[12] All four accused had been charged with intentional damage, arising out of the incident where the spanner was thrown through the window of the car outside the party, as well as murder. Mr McCallum was convicted of both offences. Mr Rippon and the two appellants were acquitted of the intentional damage charge but convicted of murder.

[13] On appeal, the Court of Appeal indicated that if the case against Ms Rameka had relied only on her being a party under s 66(1), it doubted that a conviction based on encouragement at the scene of the attack could have succeeded. The evidence of the witnesses as to what had been shouted out by the woman who got out of the car was equivocal, as was the evidence that the woman in the rear of the car had pushed Mr Kumeroa out when he tried to enter the car.[1] The Court considered however that there was evidence upon which the jury could have convicted Ms Rameka under s 66(2).[2] As already mentioned, the defence run at trial by Ms Rameka (that she was not in the car at the time of the attack on Mr Kumeroa or at the river mouth) made it difficult to develop the case that she had withdrawn her participation in the common unlawful purpose or from assisting in the attack. Ms Rameka did not raise withdrawal as a ground of appeal before the Court of Appeal.

[14] In the Court of Appeal, it was argued for Ms Ahsin that the Judge should have directed the jury, on the basis of the urgings to "get back in the car", that it had to exclude withdrawal from participation under s 66(1) as well as s 66(2) (in respect of which the Judge had referred to the evidence relied on for withdrawal). The Court concluded that the evidentiary burden on the accused had not been discharged because the evidence was equivocal and was to be contrasted with Ms Ahsin's active participation in driving the car, including by driving the other participants away from the scene.[3] It also considered that withdrawal could have been open in relation to s 66(2) liability on the basis that the jury, to reach s 66(2), must have rejected the

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1 *Rameka v R* [2011] NZCA 75, (2011) 26 CRNZ 1 (O'Regan P, Chambers and Arnold JJ) at [118].
2 At [134].
3 At [72]–[74].

evidence of encouragement at the scene which would have made Ms Ahsin liable under s 66(1) and considered the common intention was formed earlier and might have been overtaken by a change of heart.[4] The Court however thought it doubtful whether withdrawal should have been left to the jury under s 66(2) in any event.[5]

[15] The reasoning the Court of Appeal was driven to in the case of each of the appellants (which is not entirely easy to reconcile, especially in relation to the different treatment of ambiguity in what was said at Cross Street) indicates the lack of clarity around the different bases of liability and the acts relied on in respect of s 66(1) and (2), not adequately dealt with in the summing up. Where encouragement and assistance is based on the same acts relied on as evidence of participation in an unlawful common intention, so that the basis of liability under s 66(1) and s 66(2) coincides or substantially overlaps, particularity in the directions given may not matter. But where, as here, the acts relied on did not coincide or substantially overlap, greater care was necessary to ensure jury unanimity and to ensure that the issue of withdrawal was correctly addressed. These are the matters to which it is now necessary to turn.

Party liability

[16] Section 66 of the Crimes Act establishes who are parties to an offence:

> **66 Parties to offences**
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> (1) Every one is a party to and guilty of an offence who—
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> (a) actually commits the offence; or
>
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or
>
> (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

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4 At [75].
5 At [76].

> offence was known to be a probable consequence of the prosecution of the common purpose.

[17] Section 66(1)(b) to (d) and s 66(2) describe accessory liability (an expression that has no legal significance given the terms of s 66 but which it is convenient to use). Whereas under s 66(1), such liability depends on intention to assist in the commission of the offence charged, liability under s 66(2) depends on a common intention to prosecute and assist in any unlawful purpose in which the commission of the offence charged was known to be a probable consequence. Intention to assist, abet, or incite the commission of the offence charged is the state of mind that must be proved for guilt under s 66(1). For guilt under s 66(2), the two states of mind that must be proved are an intention in common with others to prosecute and assist in an unlawful purpose, and knowledge that the crime charged is a probable consequence (in the sense that it was known to be something that might well happen in the prosecution of the common unlawful purpose).[6] The acts giving rise to the liability are either the forms of assistance contained in s 66(1)(b) to (d) or the acts evidencing adherence to a common unlawful purpose with knowledge that the crime charged is a probable consequence (which in effect is treated by s 66(2) as itself being assistance in the commission of the offence).

[18] "[W]here the nature of the crime charged will admit of such course", an indictment may charge anyone who is a party (which includes the principal offender under s 66(1)(a)) with having committed the crime.[7] Alternatively, a person who is a party may be charged "upon a count alleging how he became a party to it".[8] Section 330 of the Crimes Act provided, at the relevant time, that such an allegation is not objectionable if expressed in terms of the alternatives provided by the legislation, permitting an allegation in a count to cover the alternative provided by s 66(2) as well as the alternatives within s 66(1).[9]

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6 *R v Gush* [1980] 2 NZLR 92 (CA) at 94 per Richmond P; and *R v Piri* [1987] 1 NZLR 66 (CA) at 78–79 per Cooke J.

7 Crimes Act 1961, s 343, which was the applicable section at the relevant time. Section 343 was repealed as of 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011. The procedure for, and contents of, charging documents is now dictated by Part 2 of the Criminal Procedure Act 2011.

8 Crimes Act, s 343.

9 Crimes Act, s 330. Section 330 was, like s 343, repealed as of 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) and is now covered by Part 2 of the Criminal Procedure Act.

[19] The indictment in the present case did not take the alternative route of alleging how the accused became parties to it. It simply charged that "Clarke James McCallum, Daniel Craig Rippon, Jamie Ngahuia Ahsin and Raeleen Matewai Noyle Rameka on or about 25 September 2008 at Wanganui did murder Paul Shane Kumeroa", referring to "[s]ections 167, 172 and 66" of the Crimes Act. I have some doubts whether the nature of the crime charged "admitted of such course" and consider, in any event, that the conduct of the case would have been assisted if the indictment had identified how each of the accused became parties to the offence, in the alternative if necessary, as s 330 permits. Such a course might have given better focus for counsel and the Judge.

[20] I am unable to agree with the view of the majority in this Court that an offence by an accessory party is complete when assistance is given. I consider that the assistance or encouragement must continue at the time of the commission of the offence. Whether earlier-provided assistance or encouragement continues to operate at the time the offence is committed is intensely fact-specific and depends in particular on the nature of the particular assistance or encouragement. Proof of its existence at the time the offence is committed is an element of any offence based on assistance or encouragement and is not dependent on the defence raising an evidential foundation for its consideration.

[21] I doubt that there is room for the "practical view", suggested in the reasons given by McGrath J at [120], that there must be "evidence of withdrawal" before the jury is asked to consider whether the principal is encouraged or assisted by the accessory party at the time of the commission of the offence. That view depends on treating party liability as complete at the time of the actions relied upon as constituting encouragement or assistance, a position adopted by the majority but which I think to be contrary to the scheme of accessory liability provided for in the Crimes Act. Since the Crown must prove at the time the offence was committed that the party assisted or encouraged the crime, the Crown must exclude the view that any steps taken to remove encouragement or assistance mean that such encouragement or assistance no longer operated at the time the offence was committed. It seems to me wrong to adopt the view that the offence of a party is

complete once some assistance or encouragement is provided, even though liability remains inchoate pending commission of the offence charged.

[22] A party under s 66(1)(b) to (d) or under s 66(2) must know the facts on which the crime is based. Thus, if they were to be parties under s 66(1)(b) or (c) to the murder here alleged, the Crown had to prove that the appellants each assisted or encouraged the assault on Mr Kumeroa in the knowledge that Mr McCallum or Mr Rippon either intended to kill Mr Kumeroa or meant to cause him bodily injury likely to cause death and were reckless as to whether death would ensue. If they were to be parties under s 66(2), it was necessary that the appellants had formed the common purpose relied on by the Crown – to assault and intimidate rival gang members – in the prosecution of which common purpose it was a probable consequence that one of the other members of the group would assault someone with intent to kill or would mean to cause bodily injury likely to cause death, being reckless as to whether death ensued. The question of probable consequence is not one for objective assessment after the event but depends on the actual knowledge of each accused when prosecuting the common intention.

(a) Application of s 66 to the facts

[23] It is impossible not to regard this case with anxiety both because of the generality with which the common intention was identified on the Crown case and because of the general background of association between the accused which opened up a real risk of reasoning to guilt by presence or association if questions of intent and evidence of participation were not carefully considered.

[24] The common intention relied on for liability of the appellants under s 66(2) was very generally drawn as being one to intimidate and assault suspected Mongrel Mob members. It rested on four altercations during the course of a single afternoon and evening. The first altercation at the supermarket was relied on by the Crown as offering a reason for what later happened. There seems to have been some intimidation of Mr McCallum and Ms Ahsin by members of the Mongrel Mob. There was no evidence that either Ms Rameka or Mr Rippon was involved. The Crown case was that the common intention to intimidate and attack members of the

Mongrel Mob was formed after the first incident and in response to it. That means that the evidence of common intention to carry out an unlawful purpose of assaulting members of the Mongrel Mob had to be drawn from the actions of the accused subsequent to the formation of the intent following the first altercation at the supermarket. There were three such episodes only.

[25] The first was much later in the day, around 8 pm, and entailed the intimidation of people on the drive to the North Mole and those in cars parked at the river mouth when Mr Rippon produced a knife. This event was important to the Crown case because it was knowledge of the presence of at least one weapon (although not the weapon used in the fatal assault). The incident was also relied on by the Crown as evidence of the common intention to intimidate or assault on the basis of gang affiliations relied on in the assault on Mr Kumeroa, because those in the car had shouted threats about "dog shits", although the evidence does not suggest that those intimidated at the river mouth were themselves associated with rival gangs.

[26] The second incident relied upon as evidence of a common purpose to assault members of the Mongrel Mob occurred outside the party attended by all four accused. There Ms Rameka abused someone she identified as a member of the Mongrel Mob who had previously assaulted her. Mr McCallum had thrown a spanner through the window of the vehicle in which the man was sitting as it drove away. That incident was important to the Crown case as indicating preparedness to use violence and as evidence of actions in furtherance of what was said to be the common intention to assault members of the Mongrel Mob. The two appellants and Mr Rippon were acquitted of the charge of intentional damage arising out of this incident, although their alleged liability was based on their adherence to the same unlawful purpose under s 66(2) as was relied on in respect of the charge of murder.

[27] The final incident was the fatal encounter with Mr Kumeroa. That he was accosted as part of the common intention is said to be shown by the fact that the car executed a U-turn to intercept him, apparently on the sole basis that he was wearing red, the colour associated with the Mongrel Mob. Since on the Crown case Ms Ahsin had been driving the car throughout the day and the jury was invited to

conclude that she was driving it at the time of the execution of the U-turn, the targeting of Mr Kumeroa in this way was important evidence on the Crown case of her participation in the unlawful common intention.

[28] A spur of the moment opportunistic attack could have been based on a common intention to commit an assault in which death was a probable consequence formed when Mr Kumeroa was seen walking on the street. (In that respect, I agree with other members of the Court that the decision of the Court of Appeal in *Bouavong v R*[10] was incorrect to suggest that a common purpose to commit the offence charged is not open under s 66(2)). But that is not the basis on which the Crown in the present case relied on s 66(2). And such common purpose would have substantially overlapped with intentional assistance under s 66(1) and depended on evidence of the actions of the parties at the time of the assault, in respect of which the Court of Appeal indicated that the evidence was such that Ms Rameka could not safely have been convicted. The Crown case under s 66(2) was based on a more developed purpose, evidenced by the earlier incidents. Whether there was a common intention that night to attack Mongrel Mob members in circumstances where death was a probable consequence to the knowledge of the two appellants, was put by the Crown on the background of general gang animosity and the two earlier incidents. Neither was comparable to the assault on Mr Kumeroa. And the second, more violent, incident was potentially explained by personal animosity towards a particular individual, rather than the general purpose in seeking out members of the Mongrel Mob, which was the Crown theory.

[29] Although there was evidence that Mr Kumeroa was accosted (as appears from the evidence that the car executed a U-turn to draw up alongside him, while, on the Crown case, the women shouted abuse at him or encouragement to the men in the car), neither woman otherwise participated in the assault. The events were brief, violent, and confused. The actions of the woman in the back seat (Ms Rameka on the Crown case) in pushing Mr Kumeroa out of the car when he tried to get in were not part of the fatal assault and were consistent with her simply trying to get rid of him after he got in the car. The initial assault by the men did not entail the use of a weapon, which was obtained after Mr McCallum initially returned to the car. That,

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[10] *Bouavong v R* [2013] NZCA 484, [2014] 2 NZLR 23.

according to witnesses, was after the shouts from a woman or women to get back into the car and that what had already taken place was "enough". While presence may be sufficient to amount to assistance or participation, it may be unsafe to infer assistance or participation from presence in a sudden incident in the absence of a pre-existing understanding. Presence at the time of the crime may be equivocal as to whether it is pursuant to continuing adherence to any previously adopted common purpose in the circumstances.

[30] Although it is suggested in the reasons of the majority that Ms Ahsin's driving of the car was such critical and immediately proximate assistance that she could not effectively undo it, I wonder how realistic that assessment of the choice available to her is. The characterisation of the evidence of withdrawal as potentially raising a defence, rather than as bearing on liability, is determinative on the approach taken by the majority in respect of Ms Ahsin. It is held that she was unable to discharge the evidential burden necessary to raise the defence because she had put it out of her power to undo the harm she had unleashed by delivering the men to Mr Kumeroa. On the other hand, the majority would hold that the evidential burden of raising a defence of withdrawal is discharged by Ms Rameka because her earlier encouragement had been much more limited than Ms Ahsin's actions in driving the car.

[31] The appellants were two young women, one in a relationship with a member of Black Power and the other associated with her and the two men. Their evening had been fuelled by alcohol and had contained two incidents (that at the river mouth and that outside the party) in which the men had reacted with a degree of violence, although well short of the murderous attack on Mr Kumeroa. How the circumstances of these young women gang associates, the one said to be driving, the other said to be a back-seat passenger, were properly to be assessed and what inferences as to their adherence to a common intention or the assistance they intended in the murderous assault were properly to be drawn is in my view a matter for the jury in determining liability, not a threshold question for the judge in considering whether to leave a defence to the jury.

(b) The summing up was inadequate

[32] In considering the evidence, the jury should have been carefully instructed in relation to the legal elements necessary for liability. It was critical that the Judge explain the path to the liability of each accused as parties. Under s 66(1), that explanation entailed the necessity of intention to assist in the assault with murderous intent. Under s 66(2), it entailed the necessity of common intention to assault or intimidate with knowledge that it was a probable consequence of the common intention that one of the other members of the group would assault with intent to kill or would mean to cause bodily injury likely to cause death, being reckless as to whether death ensued. It was critical, too, to explain the possible effect of the evidence, if it were accepted by the jury, that one or both of the women had shouted to the men before the fatal assault with the axe, to get back in the car. This evidence was relevant not only to adherence to the common intention under s 66(2), but also to assistance in the assault under s 66(1)(b). And yet the Judge treated the evidence as relevant to participation only in respect of the alleged common intention.

[33] I agree with the criticisms made by McGrath J in his reasons of the summing up and in particular the failure of the Judge to link his directions as to the law and the evidence in a way that was helpful to the jury. In the circumstances of a complex case of party liability, in which liability under s 66(1)(b) and s 66(2) was based on some overlap in the facts but did not entirely coincide, there was a real risk of confusion. There was room too for concern that without careful directions as to the specific basis of liability there is a risk, in a case where the parties are members of a gang, of guilt by association rather than on objective assessment of their individual actions and intentions.

[34] In explaining the application of s 66(2) to the jury, the deficiencies in linking the law and the evidence were compounded by the fact that the Judge failed to direct the jury that it must be satisfied that each accused *knew* that killing with murderous intent was a probable consequence. This undoubted error was not adequately corrected by the written question trail supplied to the jury by the Judge (which directed consideration of whether each accused knew that "killing" was a probable consequence). Indeed, the reference to a "killing", without reference to the intent

required for murder contained in the written question trail was itself a deficiency. In any event, I do not think it can be accepted that an error in direction as to a critical element of the offence should be treated as corrected by the question trail.

Direction as to jury unanimity

[35] Where the prosecutor is not able to say whether the person charged acted as a principal or secondary party (as is not uncommon, for example when more than one participates in an assault), the count may be framed on the basis that the accused was either a principal or, at least, a secondary party. The jury in such cases must be unanimous that if the accused was not the principal he was at least a party, but need not be directed it must be unanimous as to the basis of party liability.[11] Representative counts, where properly laid,[12] fall within a similar latitude.

[36] This approach, in which the basis of liability "is a matter of legal indifference",[13] is not however available where there is a "relevant or material difference in relation to the issues between these alternatives",[14] or where the Crown "nail their colours to a particular mast" (when "their case will, generally, have to be established in the terms in which it is put").[15] When "there is a relevant or material difference as to the issues and therefore the basis on which the jury might convict",[16] as this Court held to be the case in *Mason v R*[17] (where the single charge was based on distinct acts), then the judge must direct the jury that it must be unanimous as to "the actual issues which are prerequisites to a guilty verdict in the particular circumstances of the individual case".[18] The reasons for such direction were

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11 *R v Giannetto* [1997] 1 Cr App R 1 (CA); *R v Tirnaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3029; and *R v Thatcher* [1987] 1 SCR 652.

12 As they are not where material distinctive circumstances apply. See *Gamble v R* [2012] NZCA 91 at [32]; and *R v Qui* [2007] NZSC 51, [2008] 1 NZLR 1 at [8].

13 *R v Thatcher* [1987] 1 SCR 652 at [85] per Dickson CJ.

14 *R v Tirnaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3029 at [46]–[49] per Thomas LJ giving the judgment of the Court of Appeal.

15 *R v Giannetto* [1997] 1 Cr App R 1 (CA) at 8–9 per Kennedy LJ giving the judgment of the Court of Appeal.

16 *R v Tirnaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3029 at [48].

17 *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296.

18 *R v Leivers* [1999] 1 QR 649 (CA) at 662 per Fitzgerald P and Moynihan J.

explained in *R v Brown*,[19] and discussed in the New Zealand Court of Appeal cases of *R v Chignell*,[20] *R v Mead*,[21] *Carlos v R*[22] and *King v R*.[23]

[37] In *R v Shaw*,[24] the Court of Appeal, by majority, held that a unanimity direction was required where the Crown proceeded on the basis that the charge of arson was committed by the accused either as principal or at the least as a secondary party based on his incitement of others to commit the crime charged. The Judges in the majority distinguished *Giannetto* and the other authorities which have held that there is no need for a *Brown* direction in such cases (because the basis of liability is immaterial in law), on the ground that the incitement relied on in the alternative was remote in time and place from the commission of the arson.[25] I share the tentative view expressed by other members of this Court that *Shaw* may have been wrongly decided. But I do not share the view that the approach taken in *Giannetto* is applicable in the circumstances of this case to the different bases of liability relied on by the Crown here under s 66(1)(b) and s 66(2).

[38] In many cases, the facts giving rise to liability may apply equally to liability under s 66(1)(b) and s 66(2). That will be particularly so in cases where the common purpose relied upon for liability under s 66(2) is commission of the actual offence charged (as, in disagreement with the view taken by the Court in *Bouavong* and as discussed at para [28], I consider is open). It may also be the case where, in substance, the evidence relied upon as showing assistance with intention to commit the offence charged, on the one hand, and as showing adherence to a common purpose and knowledge of the likelihood that the offence charged will be committed in carrying the purpose out, on the other, is similar enough so that "the alternate bases of criminal liability do not involve materially different issues or

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19 *R v Brown* (1984) 79 Cr App R 115 (CA).
20 *R v Chignell* [1991] 2 NZLR 257 (CA).
21 *R v Mead* [2002] 1 NZLR 594 (CA).
22 *Carlos v R* [2010] NZCA 248. See also *Fermanis v Western Australia* [2007] WASCA 84, (2007) 33 WAR 434.
23 *King v R* [2011] NZCA 664.
24 *R v Shaw* [2009] NZCA 232, (2009) 24 CRNZ 501.
25 At [94]–[95] and [98] per Heath J and [139]–[141] per Fogarty J. See *R v Giannetto* [1997] 1 Cr App R 1 (CA) and the other authorities cited in n 11 above.

consequences".[26] The Queensland Court of Appeal in *Leivers* suggested such similarity might justify departure from the approach taken in *Brown*.

[39] That might have been the case here had the Crown relied on the evidence of adherence to the suggested common purpose as itself evidence of assistance in the attack with murderous intent on Mr Kumeroa. So, in *Leivers*, the majority judgment of the Queensland Court of Appeal treated the alternative bases of party liability as immaterial. They were "unpersuaded that on the evidence, there might have been findings which would satisfy the prosecution's case based on s 7(1)(c) [of the Criminal Code (Qld), equivalent to s 66(1)(b)] but fail to satisfy its case based on s 8 [equivalent to s 66(2)]".[27] That is not however the way the Crown case was put here. The evidence of assistance relied on for the purposes of s 66(1)(b) liability was limited to the assistance provided when Mr Kumeroa was confronted.

[40] The facts relied on for the Crown case differed according to whether liability was under s 66(1)(b) or s 66(2). It was perfectly possible on the Crown case that the jury might not have been unanimous on the issue of assistance with intention in the murderous attack and might not have been unanimous on the alternative basis of adherence to a common purpose with knowledge that murder was a probable consequence.

[41] The Court of Appeal itself thought that the evidence against Ms Rameka was insufficient to justify conviction under s 66(1)(b) on the basis advanced by the Crown. The evidence it treated as "equivocal" in the case of Ms Rameka was equally equivocal in the case of Ms Ahsin. There was very little direct evidence of the role played by either woman in the attack. The principal difference was that Ms Ahsin was alleged to have driven the car. Even if the jury accepted that Ms Ahsin drove the car, some members of the jury might well have taken the view that it did not amount to intentional assistance with the murderous assault.

[42] It was equally possible for members of the jury to have declined to accept that the appellants had joined a common purpose to intimidate or attack Mongrel

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[26] *R v Leivers* [1999] 1 QR 649 (CA) at 662.
[27] At 663.

Mob members that night. Its rejection of the charge of intentional damage against both women could well have been on that basis. The evidence of such a common purpose – providing an extended liability with lower mens rea (knowledge of risk rather than intention to assist in a murderous attack) – was based on two earlier episodes which could be explained without acceptance of a wider undertaking within the scope of which the attack on Mr Kumeroa could be brought. Even if of the view that there was a general purpose to attack members of the Mongrel Mob, to which the appellants adhered, the jury may not have been unanimous in the view that they participated with knowledge that an assault with murderous intent was a probable consequence.

[43] This was not a case such as those described in para [35] where the accused were at least guilty on one basis. Each basis depended on different facts which meant that the legal basis of liability under s 66 was not a matter of indifference. In the circumstances of the case presented by the Crown, I am of the view that the Judge should have directed the jury that it had to be unanimous either that the appellants intended to assist in the murderous assault in Cross Street or that they were part of a common purpose to assault and intimidate members of the Mongrel Mob in which the crime of murder was known to be a probable consequence.

Result

[44] In accordance with the opinions delivered the appeals are allowed unanimously in the case of Ms Rameka and by majority in the case of Ms Ahsin. The convictions are quashed and a new trial ordered.

McGRATH, GLAZEBROOK AND TIPPING JJ

(Given by McGrath J)

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Introduction

[45] The appellants, Ms Ahsin and Ms Rameka, along with two other defendants, were convicted by a jury in the High Court of the murder of Paul Kumeroa on 23 September 2008. The Crown case was that Clarke McCallum had assaulted and killed Mr Kumeroa while the appellants and another defendant, Daniel Rippon, were

parties to the offence. They were parties under either s 66(1) of the Crimes Act 1961, having acted for the purpose of aiding or encouraging Mr McCallum to commit murder, or under s 66(2), having formed a common intention to intimidate and assault members or associates of the Mongrel Mob, a murder being a known and probable consequence of prosecuting that common purpose.

[46] The Court of Appeal dismissed the appeals against conviction by the appellants and their co-offenders.[28]

[47] This Court granted Ms Ahsin leave to appeal on the question of whether the trial judge should have directed the jury on withdrawal, in relation to whether she was a party to murder under s 66(1)(b) of the Crimes Act.[29] Her appeal was heard on 4 July 2013. Subsequently, Ms Rameka applied for leave to appeal. The lateness of her application was not her fault. She was granted leave on the question of whether the Court of Appeal was correct to dismiss her appeal.[30] Although leave was granted in general terms, the Court indicated it was primarily interested in the following issues:[31]

> (a) Whether the Judge was required to give a unanimity direction in respect of liability under [s] 66(1) and (2) [of the Crimes Act].
>
> (b) Whether the Court of Appeal was correct to conclude that there was insufficient evidence to go to the jury under s 66(1).
>
> (c) If the Court of Appeal was correct in this respect, did a miscarriage of justice result because liability under s 66(1) was left to the jury?
>
> (d) Were the jury given sufficient and adequate directions on withdrawal?
>
> (e) Whether the Judge's direction as to party liability sufficiently differentiated between liability under [s] 66(1) and (2) and as between the two female defendants.

[48] Ms Rameka's appeal was heard on 11 March 2014 at which time counsel for Ms Ahsin also appeared and made further submissions. As a result, we have

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28 *Rameka v R* [2011] NZCA 75, (2011) 26 CRNZ 1 (O'Regan P, Chambers and Arnold JJ) [Court of Appeal judgment].

29 *Ahsin v R* [2013] NZSC 13.

30 *Rameka v R* [2013] NZSC 121.

31 At [1].

considered as further grounds in Ms Ahsin's appeal those on which Ms Rameka was granted leave to appeal.

[49] In this judgment, after setting out the relevant factual and procedural background, we accordingly consider the following issues in relation to both Ms Ahsin's and Ms Rameka's appeals:

(a) the legal elements of party liability under s 66(1) and (2) and the trial Judge's discussion of these elements in directing the jury;

(b) the adequacy and sufficiency of the trial Judge's directions on withdrawal;

(c) the particularity with which the Judge's directions identified the case against each appellant and differentiated between s 66(1) and (2); and

(d) the requirement of jury unanimity.

Background

[50] Mr McCallum and Mr Rippon are patched members of the Black Power gang. The appellants are associates of the gang.

[51] Earlier on the day that Mr Kumeroa was fatally injured, the four persons charged were, according to the Crown case, involved in a sequence of events in Whanganui that culminated in the fatal assault. First, shortly before 2 pm, Mr McCallum became involved in an altercation with a member of the Mongrel Mob gang at a local supermarket. Ms Ahsin was with him at the time.[32] The police were called but both had left the supermarket by the time the officers arrived.

[52] A short time later, police officers spoke with Mr McCallum and the other occupants of the Mitsubishi Galant car in which he was travelling. They included Ms Ahsin and Ms Rameka. Ms Ahsin told an officer that Mongrel Mob members had wanted a fight with those in her group at the supermarket. The police searched

[32] As to whether Ms Rameka was also present, see below at [197]–[198].

the car, observing a large spanner but no weapons. Later that afternoon, the group visited a house in Gibbons Crescent. By then, they had been joined by Mr Rippon. The appellants and Mr Rippon were seen wearing black items of clothing said by the Crown to mark their allegiance to Black Power.

[53] Secondly, between 8 pm and 9.30 pm that evening, the four defendants were in the Mitsubishi Galant, while it was being driven by Ms Ahsin to the "North Mole", at the mouth of the Whanganui River. During this journey, the car's lights were being flashed on and off high beam at a vehicle they were following. At the North Mole, the Mitsubishi Galant was stopped near parked cars. The occupants of the Mitsubishi Galant were heard yelling Black Power slogans. As well, evidence was given that Mr Rippon made threats of violence, while brandishing a knife.

[54] Thirdly, the four persons, still travelling in the Mitsubishi Galant, returned to the house in Gibbons Crescent that they had visited earlier, where a number of people had by this time gathered. There, Ms Rameka had an argument with a person sitting in another car. She accused him of being a Mongrel Mob member who had broken her jaw in a previous incident. As the other vehicle was being driven away with its passengers, Mr McCallum threw a spanner at it, breaking the rear window. The appellants, along with the other defendants, were charged with intentional damage in respect of this incident.

[55] Finally, the group, including both appellants, left the party at about 9.45pm. Ms Ahsin drove the car to Castlecliff, an area of Whanganui considered by Black Power to be its territory. They saw Mr Kumeroa walking along the other side of Cross Street, down which they were travelling. He was wearing a red hooded sweatshirt (hoodie). Red is a colour with which Mongrel Mob members are associated, although Mr Kumeroa had no association with the gang. Ms Ahsin completed a U-turn and stopped the vehicle near Mr Kumeroa. Witnesses heard yelling as the car entered Cross Street and came to a stop; the Crown argued that the voices could be attributed to Ms Ahsin and Ms Rameka. Some of the passengers got out. Mr Kumeroa then tried to get into the back of the car. He was pulled from the vehicle by Mr McCallum, allegedly assisted by Ms Rameka pushing Mr Kumeroa. Mr McCallum, along with Mr Rippon, started punching Mr Kumeroa.

[56] Witnesses at the trial said that they saw women getting in and out of the car at various times. They also gave evidence that they had heard a woman's voice shouting out to the others, giving different accounts of her words. They included that she had yelled "that's enough", "get in the car", "the police are coming" and "come on, let's go". It is not clear from the transcript of evidence whether it was Ms Ahsin or Ms Rameka who was shouting. For the purposes of these appeals we are unable to resolve this question and assume in considering their respective appeals that each of the appellants might have said the words.

[57] Mr McCallum then went back to the car, before returning to the scene of the assault where he pulled from his clothing a short axe and struck Mr Kumeroa twice with it. Mr Kumeroa fell to the ground. Witnesses said the female voice continued to yell out, saying, "get in the car", "come on, let's go", "let's go, the police are coming" and, "we should go now 'cos the police might come".

[58] The car was then driven closer to where Mr Kumeroa was. The other defendants got into it, leaving Mr Kumeroa lying on the ground. Mr Kumeroa died from his injuries at Wanganui Hospital on 25 September.

[59] The key events alleged to have taken place on 23 September can be summarised as follows:[33]

Time	**Location**	**Participants**	**Events**
1.45 pm	Countdown supermarket Victoria Avenue	Mr McCallum Ms Ahsin	Altercation with member of the Mongrel Mob
2.20 pm	Victoria Avenue	Mr McCallum Ms Ahsin Ms Rameka	Police search the Mitsubishi Galant
Between 8 pm and 9.30 pm	The "North Mole"	Mr McCallum Mr Rippon Ms Ahsin Ms Rameka	The Mitsubishi Galant is driven with lights on high beam, and the inhabitants of other parked cars are threatened

[33] Times are approximate.

Between 8.30 pm and 9.30 pm	Gibbons Crescent	Mr McCallum Mr Rippon Ms Ahsin Ms Rameka	Mr McCallum throws a spanner at another vehicle
9.40 pm	Gibbons Crescent and Cross Street	Mr McCallum Mr Rippon Ms Ahsin Ms Rameka	The group leaves the party at Gibbons Crescent and drives to Cross Street where the assault on Mr Kumeroa occurs

The trial

[60] The Crown's case at the trial was that Mr McCallum was the principal offender with Mr Rippon and the appellants being liable for his murder as parties under s 66 of the Crimes Act. Section 66 states:

> **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
> (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.

[61] The Crown's case in relation to s 66(2) was that the first incident at the supermarket had led to the four defendants forming a common intention with the purpose of intimidating and assaulting people who they believed to be Mongrel Mob members or their associates. This purpose was evidenced by their behaviour while in the car driving to the North Mole and while they were there. The altercation at the party, followed by Mr McCallum throwing a spanner at the departing car, were also indicative of the common intention. These events had culminated with the attack on Mr Kumeroa, who was targeted because his red hoodie indicated to the defendants that he had an association with the Mongrel Mob. The appellants were acting in concert with the other defendants in prosecuting the shared unlawful purpose. The

appellants were aware that the two male defendants had weapons and that killing of a person assaulted was a probable consequence of the prosecution of the common purpose. This made both appellants a party to the murder under s 66(2).

[62] In relation to s 66(1), the Crown alleged that Ms Ahsin had provided assistance and encouragement to Mr McCallum as the driver throughout the day and evening and, in particular, at the time of the attack on Mr Kumeroa. Her assistance at that point included her encouragement of the attack by yelling out while she was driving, completing the U-turn, parking the vehicle near Mr Kumeroa and later moving the car closer to Mr Kumeroa while the attack continued, to facilitate the perpetrators getting away.

[63] The Crown's case against Ms Rameka in relation to s 66(1) was that she, too, had provided encouragement and assistance to Mr McCallum. In particular, she had encouraged him at the time of the attack by yelling out as the car entered Cross Street and stopped near Mr Kumeroa, and had provided assistance in helping to push Mr Kumeroa back out of the car.

[64] None of the defendants gave evidence at the trial. Each, through their counsel, disputed the evidence identifying them as being present at the attack on the deceased. Ms Rameka's defence was very much focused on contesting her identification as one of the occupants of the car at the North Mole and later at Cross Street. While she was present at the time when Mr McCallum threw the spanner through the car window, it was argued that this incident was not a manifestation of a common purpose but merely a response on recognising a person she had previously had an altercation with.

[65] Ms Ahsin's alternative defence, if the jury concluded she was part of the group, was that the events of 23 September were not motivated by gang antipathy. The group's purpose was not to attack Mongrel Mob associates; rather, it was to spend the day drinking with people they knew. She had no knowledge of weapons carried by others. Ms Ahsin's actions at the time of the attack – telling people to get back in the car – demonstrated that she did not want to be part of what was

happening nor did she want matters to go further. The words indicated that she had withdrawn from any common purpose to undertake violent activity.

[66] On the Crown case, the shouted words did not indicate withdrawal, but rather constituted actual continuing assistance by Ms Ahsin as a lookout and a person concerned with helping the group to avoid detection and arrest.

[67] In the first part of his summing up to the jury, Dobson J discussed the relevant law, describing the elements of murder, manslaughter and intentional damage, and the law on secondary liability. In the second part of his address, the Judge described the question trail that he later gave to the jury, setting out the matters on which they had to be satisfied beyond reasonable doubt before they could convict the defendants. The third part of the summing up reviewed the Crown and defence cases in relation to each defendant in the following order: Mr McCallum, Mr Rippon, Ms Ahsin and Ms Rameka. The fourth section of the Judge's summing up directed the jury as to the approach they should take to the evidence and covered matters such as the onus and standard of proof, and warnings in respect of certain evidence, including identification evidence. The final part explained the decision-making process to be followed by the jury.

[68] The jury convicted all four defendants of murder. Mr McCallum was also convicted of the intentional damage charge, on which Mr Rippon and the appellants were acquitted. All appealed to the Court of Appeal against their convictions for murder.

The Court of Appeal judgment

[69] The primary basis of Ms Rameka's appeal to the Court of Appeal was that the guilty verdict was unreasonable having regard to the evidence.

[70] The Court of Appeal dismissed Ms Rameka's appeal against conviction. The Court was satisfied that the evidence that Ms Rameka was in the car at certain times

during the day was an adequate basis for the jury to conclude that she was present when the attack happened.[34]

[71] In relation to s 66(1), the Court identified the differences in the witnesses' accounts of Ms Rameka's conduct at Cross Street.[35] None of the witnesses was able to comment on what the yelling female voices were saying other than that there was swearing and, at some point, shouts to get back in the car:[36] the evidence was too equivocal to provide a basis for a finding that Ms Rameka was encouraging the others.[37] The Court said that, if the case against Ms Rameka had relied entirely on s 66(1), it "would have had real misgivings about a conviction based only on the alleged act of incitement or encouragement at the murder scene".[38] Nor did the Court of Appeal think it was sufficiently clear that it was Ms Rameka who pushed Mr Kumeroa from the car.[39] The Court was, however, satisfied that there was sufficient evidence for the jury to convict Ms Rameka under s 66(2).[40]

[72] Ms Rameka and Ms Ahsin also submitted that the Crown prosecutor had wrongly said in closing that Ms Rameka and Ms Ahsin could be seen in the CCTV footage of the altercation at Countdown. The expert witness on this point had not identified either appellant in his testimony. The Court of Appeal decided that the prosecutor had been wrong to "embellish the Crown case by reference to her own observations" but, given the forceful comments by defence counsel in closing and two directions from the Judge on this point, this did not give rise to any miscarriage of justice.[41]

[73] Ms Ahsin appealed on the ground that the Judge should have addressed the jury on whether she had withdrawn from her participation under s 66(1). The Judge had only put to the jury the issue of whether or not the appellants had withdrawn from the offending in relation to s 66(2).

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34 Court of Appeal judgment, above n 28, at [94].
35 At [98]–[115].
36 At [115].
37 At [118].
38 At [118].
39 At [118].
40 At [134].
41 At [42] and [135].

[74] Counsel for Ms Ahsin, who had been her trial counsel, acknowledged that he had not himself advanced that defence, explaining that at the time he had thought that if the jury decided Ms Ahsin had given assistance to the killer by driving the car, doing a U-turn, and pulling up alongside Mr Kumeroa, such assistance could not be withdrawn. On appeal, counsel argued that he was mistaken in this view and that on the evidence Ms Ahsin had been entitled to have the Judge put to the jury whether she had withdrawn her assistance before the murder took place.[42]

[75] Counsel for Ms Ahsin also argued that her acquittal on the intentional damage charge indicated that the jury had accepted his submission that there was no common purpose in which she participated so that she must have been convicted as being a party to murder under s 66(1). The absence of a direction on withdrawal from participation under that provision was accordingly a matter of importance.[43]

[76] In its judgment, the Court of Appeal did not accept that the acquittal of Ms Ahsin on the intentional damage charge necessarily indicated that the jury had found that she was not part of a common purpose to intimidate and assault persons associated with the Mongrel Mob.[44] The jury had probably seen the throwing of the spanner by Mr McCallum as an impulsive act outside of the common purpose.[45]

[77] The Court accepted that participation in a crime could be withdrawn as long as the act of withdrawal took place before the offence making the party liable occurred. The Court pointed out that a defendant raising withdrawal as a defence to a charge of being a party has an evidentiary burden to put withdrawal in issue.[46] Once that burden has been discharged, the Crown has to disprove that withdrawal had occurred.

[78] In this case, the Court decided that Ms Ahsin had not discharged the evidentiary burden.[47] Applying principles stated in *R v Pink*,[48] the Court concluded

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42 See [61].
43 See [62].
44 At [63].
45 At [63].
46 At [68].
47 At [72].
48 *R v Pink* [2001] 2 NZLR 860 (HC). The *Pink* formulation of the requirements for withdrawal is set out below at [124].

that the shouted exhortation to return to the car did not meet the requirement that unequivocal withdrawal of assistance had been given.[49] The Court said:[50]

> This was not a case where the only basis for party liability was verbal encouragement. Given the significant action already taken in driving the car to the scene and manoeuvring it to a position from which the attack could be launched, it required more than the equivocal statement about returning to the car to provide a proper evidential foundation for the issue of withdrawal to be left to the jury. It should be noted that Ms Ahsin also drove the car away after the attack, with the offenders in it. Thus on the argument now put forward she withdrew for the few moments in which the killing occurred, then resumed her assistance immediately thereafter.

Nor had Ms Ahsin taken all steps she could to undo her previous action in driving the car and positioning it to facilitate the attack. Ms Ahsin had also later acted as the getaway driver.[51]

[79] In holding that the evidentiary burden was not discharged, the Court of Appeal recognised that the Judge had put withdrawal to the jury under s 66(2), based on the same evidence and actions that the Court of Appeal had just found inadequate for the purpose of s 66(1). The Court did not, however, consider this to be anomalous.[52] The Judge may have reasoned that the jury would only be considering s 66(2) if they had earlier found that the appellant's acts of assistance and encouragement of a nature required to be a party under s 66(1) had not been proved. On that line of reasoning, the Judge recognised that the jury might conclude that the requisite common intention had been formed some time before the killing took place, but Ms Ahsin had second thoughts prior to the assault and had withdrawn from the common intention. If the jury had decided that her acts of assistance had not been proved, that could give support to such a conclusion. On this reasoning, a direction on withdrawal was therefore necessary under s 66(2) although not on s 66(1). Alternatively, it may have been that the Judge should not have left withdrawal to the jury in relation to either s 66(1) or (2).

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49 Court of Appeal judgment, above n 28, at [72].
50 At [72].
51 At [73].
52 At [75].

[80] The Court of Appeal concluded that, on either view, the Judge was right not to leave withdrawal to the jury under s 66(1).[53] The Court also rejected the submission that the guilty verdict for Ms Ahsin was unreasonable on the evidence.[54] For these reasons, Ms Ahsin's appeal against conviction was dismissed. She had been sentenced in the High Court to life imprisonment and had also appealed against imposition of a minimum term of imprisonment of 10 years 6 months. That minimum term was reduced to 10 years by the Court of Appeal, being the statutory minimum. Ms Rameka's sentence was reduced in the same way.

Section 66(1) of the Crimes Act

[81] Section 66 of the Crimes Act, which provides for party liability, has already been set out above at para [60].

The elements of s 66(1)

[82] For the conviction of a person as a party to an offence under s 66(1)(b), proof is required of an action by that person that aids another to commit the offence. Such action must be deliberately taken, with the intention that the conduct will aid the principal offender in his or her criminal actions, the essential aspects of which must be known to the assisting person. What is essential includes both physical and mental aspects of that person's conduct, that is, the actions to be taken and the intention with which they are to be done. Section 66(1)(c) and (d) have the same requirements, but with reference to abetting or inciting, and counselling or procuring, rather than to aiding. A particular feature of s 66(1) is that it concerns conduct providing assistance or encouragement that may be complete prior to commission of the crime for which it is provided.

[83] A full explanation of the legal elements of s 66(1)(b) would set out that the Crown must prove beyond reasonable doubt that:

> (a) the offence to which the defendant is alleged to be a party was committed by a principal offender; and

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53 At [76].
54 See [137]–[158].

(b) the person alleged to be a party assisted the principal offender in the commission of the crime, by words or conduct or both;[55] and

(c) the person alleged to be a party in fact intended to assist the principal offender to commit that particular offence; and

(d) the person alleged to be a party knew both the physical and mental elements of the essential facts of the offence to be committed by the principal offender.

The trial Judge's explanation of s 66(1)

[84] The role of the trial judge is to inform the jury as to the law that is to be applied, so that the jury is able to apply its findings of fact to the legal requirements for criminal liability and thereby reach its verdict. In this case, the first part of the Judge's summing up explained to the jury the legal elements of criminal liability under s 66(1). The Judge provided the jury with a question trail which supplemented what he said in the second part of his address.

[85] The first two of the legal elements of s 66(1)(b) set out in para [83] above were outlined fully in both the summing up and in the question trail. The remaining two, however, were not so thoroughly addressed.

[86] The legal requirement that a person act with the intention of assisting or encouraging the principal offender was discussed in summing up but omitted by the Judge from the question trail. This was unfortunate because the jury were entitled to think that by working through the written material provided to them they would have considered all the matters that they were required to decide. If a written question trail is given to the jury they are likely to focus on it in their deliberations rather than on the judge's oral directions. It is therefore important that the question trail be both accurate and appropriately comprehensive.

[87] In relation to the requirement of knowledge of the essential facts under s 66(1), the Judge's oral explanation referred only to physical aspects of the

[55] See *Larkins v Police* [1987] 2 NZLR 282 (HC).

offending. He referred to knowledge that there would be an attack on someone associated with the Mongrel Mob using weapons of a type that could inflict the injuries that were ultimately incurred. No direction was given of the requirement of knowledge of the essential mental aspects of the principal offender's conduct, in particular, his intention or recklessness in carrying out the assault. In his question trail, however, the Judge directed the jury to consider whether those accused as parties knew Mr McCallum intended to kill Mr Kumeroa or to inflict injury likely to cause death, and was reckless as to whether death ensued. The jury, however, would have approached this question without further elaboration.

[88] Overall, we conclude that as a result of these deficiencies, the jury was not given adequate assistance as to the meaning and necessity of the legal elements of party liability under s 66(1).

Section 66(2) of the Crimes Act

[89] Under s 66(2), proof is first required that the defendant formed a common intention with one or more others to prosecute an unlawful purpose and to assist the other(s) in doing that. Each participant in such a common purpose will become liable as a party if one of the others commits an offence while prosecuting the common purpose, whether or not that offence was an intended outcome, as long as that offence was known by the participant to be a probable consequence of the prosecution of that purpose.

Section 66(2) applies to intended offences

[90] An issue that arose in this Court was whether s 66(2) applies where the offence that occurs is an intended offence, such as one which was the very object of the common purpose, or only to offences that were not intended by the party but that were known to be a probable consequence of the joint enterprise. We are satisfied that s 66(2) applies in either context.

[91] In reaching this view, we have considered the Court of Appeal's recent judgment in *Bouavong v R*,[56] where the Court held that a participant in a common purpose was not liable as a party under s 66(2) where the offence which was committed by another participant, while prosecuting the common purpose, was the intended offence.[57]

[92] The Court of Appeal found support in the description of joint enterprise liability in the judgment of the Privy Council delivered by Sir Robin Cooke in *Chan Wing-Siu v The Queen.*[58] In that case, the Privy Council explained the principle of party liability encapsulated in s 66(2) in the following way: [59]

> … a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. … The case must depend rather on the *wider principle* whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not *necessarily* intend.

In *Bouavong*, the Court of Appeal said that it did not see any suggestion in the case law that the "extended form of liability" discussed in *Chan Wing-Siu* "could apply to the very crime intended to be committed".[60]

[93] The Court's reasoning, however, does not recognise the significance of the inclusion of "necessarily" in the passage from *Chan Wing-Siu* quoted above (despite using the same word in its own reasoning).[61] Common purpose liability is a "wider principle" that is not confined to cases where the intended offence is committed. Nor are intended offences to be excluded from its ambit.

[94] The offence that was intended by the participants falls naturally within the scope of the words in s 66(2): "every offence committed by any one of them … that … was known to be a probable consequence". Although there is perhaps some infelicity in the language, Parliament cannot have contemplated that s 66(2) was

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56 *Bouavong v R* [2013] NZCA 484, [2014] 2 NZLR 23.
57 At [104].
58 *Chan Wing-Siu v The Queen* [1985] 1 AC 168 (PC) .
59 At 175 (emphasis added).
60 *Bouavong*, above n 56, at [111].
61 At [81].

confined to offences other than those intended at the time of entry into the common purpose. If that were so, there would be circumstances where participants in a common purpose resulting in the exact crime intended could not be charged under s 66 at all, because assistance or encouragement could not be attributed with certainty to any individual.[62] Such participants are at least as culpable as those involved in a common purpose that results in an unintended but foreseen offence.[63]

[95] Moreover, as the Court of Appeal in *Bouavong* acknowledged, its decision was contrary to a longstanding judgment of the Court in *The Queen v Currie* in which North P said:[64]

> Now, what s 66(2) does is this: if the facts show that two or more persons have formed a common intention to prosecute an unlawful purpose and to assist each other therein, then, in those circumstances, the group of persons so involved may be liable not merely for the crime which was in their immediate contemplation but for other crimes as well, provided the jury is satisfied that the commission of the other offences was a probable consequence of the prosecution of the common purpose. We reject the argument of counsel that the words "to every offence committed by any one of them" exclude the offence which was the immediate object of the formation of the common intention.

[96] For completeness, we add that we do not accept that the passage cited by the Court of Appeal from the judgment of Lord Lane CJ in *R v Hyde*[65] provides any support for the conclusion reached in *Bouavong*. If anything, the formulation in *Hyde* is contrary to that conclusion.

[97] For these reasons, with which Elias CJ agrees,[66] as well as further reasons given in his judgment by William Young J,[67] we do not consider *Bouavong* correctly states New Zealand law on s 66(2) and prefer the statement set out above from *Currie*.

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62 Where a person agrees with another to pursue commission of an offence and that very offence is the one committed, a charge of conspiracy will be available. But the penalty for conspiracy may not be adequate in such a situation where the person's agreement and involvement amounts to formation of and participation in a common purpose. Hence there is practical force in the construction of s 66(2) that we adopt.

63 See *Chan Wing-Siu v The Queen*, above n 58, at 175: the criminal culpability lies in participating in a criminal venture with foresight that the offence may be committed. There must certainly be such foresight where the commission of the offence is the very purpose of the venture.

64 *The Queen v Currie* [1969] NZLR 193 (CA) at 209 per North P.

65 *R v Hyde* (1991) 92 Cr App R 131 (CA).

66 See the reasons of Elias CJ above at [1] and [28].

67 See the reasons of William Young J below at [239]–[240].

"Known to be a probable consequence" in s 66(2)

[98] In the course of his submissions for Ms Rameka, Mr Lithgow QC was critical of the Judge's description of the requirement under s 66(2) that the commission of the offence was known by a person said to be a party to be a "probable consequence" of prosecuting the common purpose. In the first part of his summing up, the Judge described this as meaning that commission of the offence "could well happen in the sense that there was a real or substantial risk that it would happen". Although the question trail used the language of "could well happen", in explaining the questions to the jury, the trial Judge repeated orally that "could well happen" was intended to be the same standard as "real or substantial risk".

[99] While accepting that the Judge's direction on "probable consequence" was an orthodox one, Mr Lithgow argued that it could operate unfairly in the context of general purpose gang associations. He submitted that it would be better for Judges to give directions on s 66(2) using the words of the statute – "probable consequence", only providing elaboration if requested by the jury.

[100] Counsel's criticism is directed at established law on the requirements of s 66(2). In *R v Gush*, the Court of Appeal, construing the words "probable consequence" in the provision purposively and in their context, held that they meant an event that could well happen rather than one which is more probable than not.[68] In *R v Piri*, Cooke P reiterated that "the words do not require proof that the accused thought that the result which in fact eventuated was more likely than not".[69] He added that while no single formula is "preferable or adequate", the degree of foresight required to be proved may be referred to as "a real risk, a substantial risk, [or] something that might well happen".[70]

[101] These decisions have been consistently followed since in New Zealand.[71] The Judge's direction in this case is entirely in accordance with them and the present case does not require reconsideration of this aspect of the law.

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68 *R v Gush* [1980] 2 NZLR 92 (CA) at 94 per Richmond P.
69 *R v Piri* [1987] 1 NZLR 66 (CA) at 78.
70 At 79.
71 See, for example, *R v Hagen*, CA162/02, 4 December 2002; *R v Te Pou* CA 37/04, 24 August 2004; *R v Vaihu* [2009] NZCA 111; and *Reddy v R* [2011] NZCA 184, [2011] 3 NZLR 22.

The elements of s 66(2)

[102] To summarise, in order to establish party liability under s 66(2), the Crown must prove beyond reasonable doubt that:

(a) the offence to which the defendant is alleged to be a party was committed by a principal offender; and

(b) there was a shared understanding or agreement to carry out something that was unlawful; and

(c) the person(s) accused of being parties to that agreement had all agreed to help each other and participate to achieve their common unlawful goal; and

(d) the offence was committed by the principal in the course of pursuing the common purpose; and

(e) the defendant intended that the offence that eventuated be committed, or knew that the offence was a probable consequence of carrying out the common purpose. This requires foresight of both the physical and mental elements of the essential facts of the offence.

The trial Judge's explanation of s 66(2)

[103] Both the Judge's summing up and question trail adequately covered elements (b), (c) and (d) of party liability under s 66(2) as set out above. One deficiency, in treatment of element (e), was that, in explaining the law in the first part of his summing up, the Judge did not refer orally, other than very briefly in passing, to the need for *knowledge* that the offence was a probable consequence. Rather, the Judge explained that the offence committed must have been a probable consequence, which implies a more objective standard. The question trail, however, directed the jury to consider whether each defendant knew the killing was a probable consequence. But, because there was no oral explanation of this legal requirement,

if or when members of the jury reached and considered this issue in their deliberations, they did so without any assistance as to its meaning or importance.

[104] The Judge's direction to the jury in relation to element (e) was also deficient in that the summing up and the question trail identified only that it was necessary, in order to be liable for murder as a party under s 66(2), for a defendant to be aware that a "killing" was a probable consequence. This did not specifically identify that what needed to be foreseen (or intended) included both the physical and mental essential facts of the offence, including murderous intent.[72]

[105] We therefore conclude that, in relation to s 66(2) too, the jury was not given adequate assistance as to the meaning and necessity of the legal elements of party liability.

Withdrawal

[106] We turn next to the issue of whether the Judge gave the jury sufficient and adequate directions on withdrawal by each appellant.

The trial Judge's summing up on withdrawal

[107] In the first two parts of his summing up, the Judge explained to the jury that they must consider whether or not the appellants had withdrawn from the common purpose alleged in relation to s 66(2). He said:

> It is also necessary to be satisfied, in respect of any accused person who agreed to that common purpose, that they have not effectively withdrawn from the agreement. There has to be clear and unequivocal communication to the principal that the party is withdrawing from the common purpose. Also, if the party is helping the principal, then he or she must stop any assistance in an obvious way.

The question trail provided to the jury also directed them to consider whether any of the defendants had withdrawn from the common purpose at the time the fatal injuries were inflicted.

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[72] See the reasons of Elias CJ above at [22] and [32].

[108] By contrast, the trial Judge did not direct the jury to consider the possibility of withdrawal from the offending in relation to s 66(1), nor was this issue identified in the question trail.

[109] Later in the summing up, in his review of the Crown and defence cases in relation to Ms Ahsin, the Judge specifically referred to the defence contention that Ms Ahsin had withdrawn from the common purpose when she told the other defendants to stop what they were doing and get back in the car. There was no reference made to withdrawal in terms specific to Ms Rameka. This reflected the different approaches taken in the closing addresses by counsel for each appellant.

The parties' submissions

[110] In this Court, Mr Stevenson (who did not appear for Ms Ahsin in the courts below) reiterated the submission made in the Court of Appeal on her behalf that the Judge should have given a direction on withdrawal under s 66(1). He submitted that there is a common law defence of withdrawal, which must be put to the jury where the defendant has satisfied the evidential burden to put the defence "in play". Mr Stevenson said that all the defence requires is that it is established that the defendant in fact withdrew, and, wherever possible, communicated that withdrawal to the other person or persons involved in the offending. He submitted that the law does not require that a party seeking to withdraw must also take steps to undo his or her previous actions.

[111] Mr Lithgow, for Ms Rameka, adopted Mr Stevenson's legal submissions on the issue of withdrawal, but also pointed to different factual aspects of the case against Ms Rameka, in particular, her more limited involvement. Mr Lithgow also submitted that the jury directions were deficient because the explanation of withdrawal under s 66(2) was limited and there was no discussion of withdrawal in terms specific to Ms Rameka.

[112] On the issue of withdrawal, Mr Pike QC and Ms Laracy for the Crown submitted that the formulation by Hammond J in *R v Pink*[73] of four requirements for

[73] *R v Pink*, above n 48.

a defence of a withdrawal was correct.[74] Counsel said that there must be timely and unequivocal communication of withdrawal. As well, Ms Laracy emphasised that case law from New Zealand and other jurisdictions on the elements of withdrawal from party offending establishes a principle that a defendant must undo, neutralise or nullify the effect of previous involvement. Counsel for the respondent maintained that there was no "air of reality" to the defence of withdrawal in relation to either of the appellants and the minimum legal threshold for withdrawal was not met for either appellant. The exhortation to get back in the car could not be construed as unequivocal disengagement from the criminal conduct.

Opportunity for withdrawal

[113] Under both subsections of s 66, party liability unconditionally attaches only when the principal offender attempts or commits the crime to which the secondary offender becomes a party. Those whose conduct prospectively makes them a party to an offence upon its commission may have a window of opportunity before the offence is perpetrated during which it is conceptually possible to withdraw from involvement before criminal liability attaches.[75]

Withdrawal within the elements of party liability?

[114] The common law has long recognised that actions of withdrawal may excuse a party from criminal liability.[76] The discussion in the cases, however, does not fully recognise or resolve whether the reason there may be no liability in cases of withdrawal is because an element of party offending has not been proved, or because a true defence to liability as a party has been established.

[115] It is sometimes said that conceptually the elements of party liability under s 66(1) and (2) require consideration of whether or not the alleged party has

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74 The *Pink* formulation of the requirements for withdrawal is set out below at [124].

75 We are not in this judgment deciding the impact of withdrawal on a charge of conspiracy.

76 See *The Queen v Saunders* (1576) 2 Plow 473, 75 ER 706 (QB); and Matthew Hale *The History of the Pleas of the Crown* (London, 1800) vol 1 at 436.

withdrawn from the offending.[77] In relation to s 66(1), the premise is that liability requires proof that the defendant's conduct has in fact actually aided or encouraged the principal offender. It is said that this cannot be established where a withdrawing party takes steps that effect complete neutralisation of earlier involvement. In such cases, the alleged party has not provided any assistance or encouragement.

[116] On the other hand, although s 66(1) requires proof that the defendant has in fact aided or encouraged the principal offender,[78] s 66(1) does not stipulate a requirement that the assistance or encouragement provided remain operative, whatever that concept may entail, at the time the offence is committed by the principal. On the language of s 66(1)(b), (c), and (d), the actus reus is complete when the actual assistance or encouragement, counsel, procurement or incitement occurs provided the principal offender subsequently commits the relevant offence. On this approach, the completed actus reus is not negated by subsequent acts of withdrawal. Recognition of withdrawal in our law must accordingly be as a true defence.

[117] In relation to s 66(2), the premise of the view that the elements of liability require some consideration of withdrawal is that liability requires proof that the party remained part of the common purpose at the time the offence occurred and had not previously withdrawn. But under s 66(2) the actus reus for party liability is complete at the time the defendant forms or joins a common purpose. Liability is then contingent only on commission of the offence by the principal offender in prosecution of that purpose.[79] Recognition of withdrawal in relation to s 66(2) must therefore also be as a true defence.

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[77] See KJM Smith "Withdrawal in complicity: a restatement of principles" [2001] Crim LR 769; and David Lanham "Accomplices and Withdrawal" (1981) 97 LQR 575. See also *White v Ridley* (1978) 140 CLR 342 where, because the applicable statute did not preserve common law defences, the High Court of Australia was required to consider the extent to which actions of withdrawal could negate the actus reus of party liability under the provision equivalent to s 66(1). A similar approach is taken by Elias CJ and William Young J in the present case: see the reasons of Elias CJ above at [20]–[21] and the reasons of William Young J below at [244]–[252].

[78] See above at [83].

[79] If the principal is acting outside the scope of the purpose agreed upon when the offence is committed, or is acting in pursuit of some other purpose (whether individual or shared with those other than the defendant), then the offence will not have been committed "in prosecution of the common purpose".

[118] We are satisfied that the better approach for the New Zealand criminal law is to recognise withdrawal as a true defence under the common law in respect of both s 66(1) and (2). Common law defences remain available in New Zealand under s 20 of the Crimes Act but may apply only to the extent that they are not altered by or inconsistent with legislative provisions. We do not see the common law withdrawal defence as being excluded by the Crimes Act. Recognition of withdrawal as a defence does not conflict with the language of s 66, and it would not undermine the operation of the elements of party liability as identified above.[80]

[119] This approach also has the considerable advantage of avoiding complexity in the jury directions because withdrawal can be put to juries in a more straightforward way in respect of both s 66(1) and (2), in cases where both provisions are relied on.

[120] Giving effect to withdrawal as a defence in this way does have the result that, as with other defences, a defendant who seeks to rely on a defence of withdrawal has an evidentiary burden to raise evidence that indicates the reasonable possibility of the defence before it will be put to the jury. Taking a practical view, however, there would need to be evidence of withdrawal before there would be any reason to direct the jury to consider it even if lack of withdrawal were seen as an offence element of party liability. The end position in both contexts is the same: where there is evidence of withdrawal before the court, the Crown must prove beyond reasonable doubt that the defendant has not withdrawn from party offending.

[121] We next consider the rationales for recognising a withdrawal defence, and identify the scope of the defence in New Zealand.

Rationales underlying the withdrawal defence

[122] The main reason for allowing the defence is the potential beneficial effect of withdrawal by a party in preventing the commission of the crime and thus avoiding the harm it will cause. Withdrawal by one party may dissuade or frustrate a principal from committing the offence. As well, as Mr Stevenson submitted for Ms Ahsin, evidence of withdrawal may demonstrate a lack of entrenched criminal purpose or

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[80] See above at [83] and [102].

future dangerousness, that may reduce blameworthiness or future risk of offending. Such considerations have lead to acceptance that, even though the elements of criminal conduct by the party concerned have been satisfied:[81]

> The law should encourage persons who participate in criminal arrangements to change their mind and take steps to prevent the crime reaching consummation … .

The premise of a defence of withdrawal is that if a person who has become implicated in a criminal enterprise can avoid liability through extraction, he or she has an incentive to do so.

[123] On the other hand, as Ms Laracy for the Crown pointed out, application of the defence of withdrawal raises important questions of what should be required of a person in order to be absolved from criminal liability as a party once the conduct giving rise to his or her criminal liability is complete, but the offence has not yet been committed. What redemptive actions will be sufficient to excuse such a defendant from criminal responsibility? In answering this question it is to be borne in mind that where the requirements of the law for exculpation cannot be met, it will usually remain open for the Court to recognise actions by a party who repented as a mitigating factor in sentencing. There is, however, limited room to do so in cases of murder.

The scope of the withdrawal defence

[124] There is little New Zealand authority on the scope of the defence of withdrawal. The Court of Appeal has on several occasions referred to the test set down in *R v Pink*[82] as a statement of the law on this issue.[83] In *Pink*, Hammond J decided there were four conditions to be met before a withdrawal defence will be available to a defendant:[84]

- First, there must in fact be a notice of withdrawal, whether by words or actions.

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81 Lanham, above n 77, at 579. See also *R v Pink*, above n 48, at [21] per Hammond J.

82 *R v Pink*, above n 48.

83 *R v Ngawaka* CA111/04, 6 October 2004; *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299; and *R v Vaituliao* [2007] NZCA 525.

84 *R v Pink*, above n 48, at [22] (citations omitted).

- Secondly, that withdrawal must be unequivocal.

- Thirdly, that withdrawal must be communicated to the principal offenders. There is some debate as to whether the communication must be to all the principal offenders, but here all were told.

- Fourthly, the withdrawal may only be effected by taking all reasonable steps to undo the effect of the party's previous actions. As with any test of "reasonableness", it is impossible to divorce that consideration from the facts of a given case. The accused's actions may have been so overt and influential that positive steps must be taken by him to intercede, and prevent the crime occurring. There is at least one authority which suggests that where the accused's participation was in the form of counselling, attempts by the accused to dissuade the principal offenders from proceeding with the crime are sufficient.

[125] In other jurisdictions, different views are expressed in the cases over the standard to be met for acts of withdrawal to be sufficient to exculpate a secondary participant. What is clear is that the judgement is an intensely contextual one.

[126] An example of this contextual approach is found in the description of the scope of the defence by the English Court of Appeal in *R v O'Flaherty* where Mantell LJ said:[85]

> We have noted that for there to be withdrawal, mere repentance does not suffice. To disengage from an incident a person must do enough to demonstrate that he or she is withdrawing from the joint enterprise. This is ultimately a question of fact and degree for the jury. Account will be taken *inter alia* of the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal. In cases of assistance it has sometimes been suggested that, for there to be an effective withdrawal, reasonable steps must have been taken to prevent the crime. It is clear, however, this is not necessary.

[127] In a much-cited Canadian judgment, Sloan J said in the context of a common purpose party liability case:[86]

> I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon

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85 *R v O'Flaherty* [2004] EWCA Crim 526, [2004] 2 Cr App R 20 at [60].

86 *Rex v Whitehouse* [1941] 1 DLR 683 at 685 (BCCA); cited in *R v Becerra* (1975) 62 Cr App R 212 (CA) at 218.

> the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

[128] The importance of context was also emphasised by Wilson J in a dissenting judgment in the Supreme Court of Canada in *R v Kirkness*.[87] Her Honour said that the standard of what is required for an effective withdrawal may depend on the nature of a secondary party's involvement:[88]

> Commentators on the defence of abandonment appear to agree that a defendant will be held to a different standard depending upon the degree of his participation in the crime. Glanville Williams has suggested that where a defendant has acted positively to assist a crime beyond merely inciting or encouraging it, he must do his best to prevent its commission in order to escape liability.

[129] Wilson J added that it would be impossible and inadvisable for the Court to attempt to state precisely what should be required of a defendant in order to demonstrate he or she has withdrawn. Rather the jury should be directed to consider the quality of the withdrawal in relation to both the offence and the type of participation.[89] This approach focuses on the earlier conduct of the party seeking to withdraw. For Wilson J, the issue was whether in all the circumstances the withdrawing conduct negated participation in the crime.

[130] The Supreme Court of Canada recently considered the defence of withdrawal in *R v Gauthier*.[90] A majority of the Court[91] set out four elements of the withdrawal defence available to persons charged under s 21(1) and (2) of the Canadian Criminal Code.[92] These are the equivalents of s 66(1) and (2) of New Zealand's Crimes Act. The defence requires evidence that shows:[93]

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87 *R v Kirkness* [1990] 3 SCR 74.
88 At 114.
89 At 115.
90 *R v Gauthier* 2013 SCC 32, [2013] 2 SCR 403.
91 The reasons of LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ were delivered by Wagner J.
92 Criminal Code RSC 1970 c C-34.
93 *Gauthier*, above n 90, at [50].

> (1) that there was an intention to abandon or withdraw from the unlawful purpose;
>
> (2) that there was timely communication of this abandonment or withdrawal from the person in question to those who wished to continue;
>
> (3) that the communication served unequivocal notice upon those who wished to continue; and
>
> (4) that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence.

[131] The majority judgment then added in relation to what steps would be reasonable:[94]

> … there will be circumstances, even where the accused is a party within the meaning of s 21(1) of the *Criminal Code*, in which timely and unequivocal communication by the accused of his or her intention to abandon the unlawful purpose will be considered sufficient to neutralize the effects of his or her participation in the crime. But there will be other circumstances, primarily where a person has aided in the commission of the offence, in which it is hard to see how timely communication to the principal offender of the person's intention to withdraw from the unlawful purpose will on its own be considered reasonable, and sufficient to meet the test [for withdrawal].

[132] The issue in *Gauthier* was, as in the present case, whether the Judge should have left the withdrawal defence to the jury in relation to offending under s 21(1). In *Gauthier*, it was alleged that the defendant was party to the murder by her spouse of their three children, where they had entered into a murder-suicide pact and she had supplied the drug used to cause the children's deaths. One of her defences at trial was that she had abandoned the pact earlier in the afternoon on the day they died. She said that she had told her spouse that she did not agree with the plan and had ripped up the document which recorded it. She understood from his reaction that he was resigned to abandoning the plan so that when, during the evening, her spouse had prepared drinks for the family, she did not suspect that they had been poisoned. Her spouse and the three children died as a result of poisoning.

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94 At [51].

[133] The majority of the Supreme Court upheld the Judge's decision not to put the defence of withdrawal to the jury. Although there was "some evidence" of withdrawal, the appellant had not only agreed to carry out the murder-suicide with her husband, she had also provided assistance by obtaining the drugs. In those circumstances, she had to do more than communicate that she was no longer willing to be involved, for example, hide the medication, take the children away, or call the authorities.[95] The majority of the Supreme Court decided that the Judge, who had not put the defence to the jury, had not erred because the evidence relied on was not reasonably capable of supporting the existence of each of the required elements of the defence.[96]

[134] Against the background of this case law and the nature of party liability under s 66, we are satisfied that there are two requirements of the common law defence of withdrawal in New Zealand.[97] First, there must be conduct, whether words or actions, that demonstrates clearly to others withdrawal from the offending. Secondly, the withdrawing party must take reasonable and sufficient steps to undo the effect of his or her previous participation or to prevent the crime. Some actions will be relevant to both the first and second requirements of the defence. For example, clear communication to the other participant(s) of withdrawal from offending may both demonstrate withdrawal and be a step towards prevention of the offence, on the basis that it may dissuade the principal from continuing on the criminal activity alone. Likewise, a clear and communicated countermand revoking earlier instruction, encouragement or advice, will often clearly convey that the party is withdrawing his or her participation and, at the same time, be a step directed at undoing the effect of a prior command or support.

[135] Application of the second requirement of the defence involves a careful factual inquiry. In deciding whether what has been done by way of withdrawal is reasonable and sufficient in the circumstances of the case, particular consideration must be given to the nature and degree of assistance or encouragement that has been given and the timing of the attempted withdrawal in relation to the perpetration of

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95 At [63].

96 At [60].

97 For the avoidance of doubt: we do not see the four conditions in *Pink*, above n 48, (set out above at [124]) as correctly stating the law in New Zealand.

the offence. What is done to withdraw must be proportionate to the impact of the assistance earlier given.

[136] In relation to the nature and extent of the party's prior involvement:

(a) Communicating discouragement or dissuasion to the principal offender, orally or in writing, with sufficient clarity and communication may be enough actually to undo, or be capable of undoing, the influence of previous party conduct which consisted solely of words.

(b) If the party's previous participation consists of actions of assistance, further reasonable steps to undo that previous assistance or to otherwise prevent the crime will be required for there to be a valid withdrawal. Such steps may include, for example, retrieval of a weapon provided, warning the victim or contacting the police.

[137] The timeliness of the acts said to amount to withdrawal will often be significant. The acts must of course be undertaken before the crime with which they are linked is committed. Further, withdrawal must occur at a time when it is possible for the party either to undo his or her previous assistance or prevent the crime.

[138] The sufficiency of the conduct must be judged by reference to the potential of what was done to be effective in the circumstances. Actions of withdrawal or to prevent commission of an offence are more likely to be capable of being effective if they were done at a preliminary stage, rather than immediately before or while the offence is being committed. If attempted withdrawal is left too late, there may be circumstances in which withdrawal is extremely difficult if not impossible.[98] If in all the circumstances the withdrawing conduct has insufficient potential to be effective to either undo the party's prior involvement or prevent the crime – either because it is too little or too late, it will not be enough to be a withdrawal. In this respect, withdrawal will sometimes be unachievable because no action will be capable of undoing what has been done as the matters have gone too far.

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[98] See *R v Menniti* [1985] 1 QR 520 (CA) at 527 per Thomas J; *R v Pink*, above n 48, at [22].

Summary of the withdrawal defence

[139] The common law defence of withdrawal must be put to a jury in relation to s 66(1) and (2) where there is evidence that indicates the reasonable possibility of the availability of the defence. It is for the trial judge to decide if an evidential basis for both requirements of the defence exists. If that is so, the jury should be directed as to the defence. The defendant will then be liable as a party only if it is proved beyond reasonable doubt that he or she had *not* withdrawn from involvement. If there is a reasonable possibility that the defendant has withdrawn from the offending, he or she has a defence to criminal liability under s 66.

[140] Although the way the trial judge frames the questions for the jury must always reflect the circumstances and issues in the particular case, it will often be helpful to direct the jury to consider whether it was reasonably possible that:

(a) the defendant demonstrated clearly, by words or actions, to the principal offender that he or she was withdrawing from the offending before the offence was committed?

(b) the defendant took steps to undo the effect of his or her previous involvement or to prevent the crime?

(c) the steps taken by the defendant for those purposes amounted to everything that was reasonable and proportionate, having regard to the nature and extent of the defendant's previous involvement?

(d) the steps taken by the defendant were timely, in the sense that the defendant acted at a time when it was reasonably possible that he or she may be able either to undo the effect of his or her prior involvement or to prevent the crime?

[141] If each of these questions is answered "yes" on the basis that there is a reasonable possibility that it is so, the Crown will not have disproved the defence of withdrawal beyond reasonable doubt.

[142] Finally, the judge must, in cases where the evidential burden is met, give directions on these legal requirements in a manner that ties them to the particular facts of the case and is tailored to reflect the cases for and against each defendant.[99] For example, rather than directing in general terms on whether the defendant has, by words or actions, demonstrated withdrawal or whether steps were taken to undo the effect of previous involvement or prevent the crime, the judge should describe the actions raised by the defence as constituting steps of withdrawal. Likewise, where the only alleged involvement is by words, the Judge could indicate that the law only requires words that dissuade or discourage the principal offender.

Ms Ahsin's appeal on withdrawal

[143] In relation to s 66(2), the trial Judge expressly directed the jury that they must be satisfied that each defendant had not effectively withdrawn from the unlawful common purpose before the fatal injuries were inflicted. He did so in terms favourable to the defendants because, while he stated that it was necessary for a defendant to communicate his or her withdrawal to the principal offender and to stop providing assistance, he did not direct the jury that it was also necessary for a person to take reasonable and proportionate steps to undo the effect of his or her previous involvement.

[144] The trial Judge did not, however, address the possibility that withdrawal could also excuse Ms Ahsin from liability as a party under s 66(1). That is the central issue in Ms Ahsin's appeal. It turns on whether the relevant evidence at the trial was capable of founding a defence of withdrawal.

[145] Ms Ahsin's relevant acts of assistance, on the Crown case, involved her driving Mr McCallum in the Mitsubishi while the group were looking for persons that he might assault, making a U-turn on seeing Mr Kumeroa, driving up to and stopping the vehicle alongside him in order to facilitate an assault, and keeping the car in position until the attack was over, then driving the participants away.[100]

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[99] See the discussion below at [162]–[169].

[100] Ms Ahsin's defence at trial did not dispute that, if she was present, she was the driver of the car, that being the basis of the submission that she had withdrawn from her involvement.

[146] The acts which were said by Mr Stevenson to meet the evidential onus for withdrawal by Ms Ahsin were telling Mr McCallum to return to the car, that he had done enough and that the police were coming after he had struck preliminary blows with his fists. Mr McCallum did come back to the car but then approached Mr Kumeroa with an axe, which he used as a weapon in administering the fatal blows. At this time, Mr Stevenson emphasised that Ms Ahsin continued to call out to Mr McCallum to end his attack and join her in the car to be driven away.

[147] We accept that Ms Ahsin's conduct while Mr McCallum was assaulting Mr Kumeroa provided an evidential basis on which the jury could have found that she had clearly disengaged from the assistance she had been and was giving. What she called out did not unequivocally communicate an intention not to provide further assistance or to disassociate herself from the group. Her words could be taken as evidence of her concern that the group should leave the scene as soon as possible, or, particularly because she remained at the scene, her words were also consistent with an intention to provide the principal offender with continuing assistance as a look out who was available to drive him away. That was what she in fact did. But it was for the jury to interpret her words and to decide whether, although capable of bearing different meanings, there was a reasonable possibility that Ms Ahsin's words and conduct demonstrated clearly her withdrawal from offending.

[148] There was, however, no evidential foundation for the second requirement of the defence. The evidence, considered objectively, does not show that Ms Ahsin's actions amounted to all reasonable steps to undo her earlier crucial assistance or to prevent the crime. The acts said to amount to withdrawal of this physical assistance were entirely oral. In light of her considerable prior involvement in driving and positioning the car for the attack, more was required than an attempt to verbally dissuade Mr McCallum. Certainly what she shouted out was never likely to undo the effects of the assistance she had given. Had she driven off, with or without a prior warning that she was going do so, that conduct might have been sufficient and capable of influencing Mr McCallum to end the attack. But she did not.

[149] Mr Stevenson emphasised that in her situation there was little else that Ms Ahsin could do. That is true but it is because the nature of the assistance she had

given and the clear imminence of the assault once she had provided it meant that undoing the effect of what she had done was probably unachievable. If Ms Ahsin did not have many other steps available to her, this was because she had provided such considerable and crucial assistance and had allowed the course of events to progress too far before attempting to withdraw. The nature of the assistance was such that it was impractical to undo it. Nothing could be done which might have any reasonable prospects of doing so or of preventing the crime. Hence, there is no arguable case of withdrawal.

[150] Even on the most favourable interpretation of what Ms Ahsin might have been trying to achieve, her actions could not properly be held by a jury to amount to a timely withdrawal of assistance. The assistance Ms Ahsin gave to the principal offender was crucial in facilitating his murderous assault. She put him in a position to launch the intended attack immediately and that is what transpired. Events moved quickly, culminating in infliction of the blows that killed the victim. What she did was too little and too late. When it was done it was incapable of having an effect that could undo or neutralise the assistance she had given. Ms Ahsin therefore did not meet the evidential onus for the defence of withdrawal.[101]

[151] The case against Ms Ahsin was not one where there was an issue as to the extent of her involvement: there was no dispute that, if she was present at Cross Street, she was the driver of the vehicle. In cases where the extent and nature of the party's participation is at issue, however, particular caution will be required before concluding that there is no evidential foundation for the defence of withdrawal because whether the conduct relied upon as amounting to withdrawal is capable of satisfying the requirements of the defence will depend on what form of previous involvement the jury finds proven.

Ms Rameka's appeal on withdrawal

[152] We next consider whether the Judge's directions to the jury on withdrawal in relation to Ms Rameka were adequate. As indicated above, the Judge did not direct

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[101] As the same conduct was relied on as implicating her under s 66(2), it may not have been necessary for the Judge to direct the jury on withdrawal by Ms Ahsin in relation to s 66(2) either. This result is consistent with *Gauthier*, above n 90.

the jury that withdrawal may excuse a party from liability under s 66(1). In Ms Rameka's case, too, the issue is: was there an evidential foundation for the defence of withdrawal in relation to s 66(1), so that the Judge erred in failing to direct the jury on the defence?

[153] On the Crown's case, Ms Rameka's actions relevant to s 66(1) involved yelling encouragement as the car approached and stopped near Mr Kumeroa, and assisting Mr McCallum by pushing Mr Kumeroa out of the car. The actions of withdrawal relied upon by Mr Lithgow as meeting the evidential onus for the defence were shouting out, both before and after the weapon used to inflict the fatal injuries was produced, that Mr McCallum should get back in the car, that he had done enough and that the police were coming.

[154] In our view, this evidence was sufficient to discharge the evidential burden borne by Ms Rameka. We acknowledge that this is part of the evidence that we have found to be insufficient in relation to Ms Ahsin, but we are satisfied that there are differences in the evidence and thus the cases against the two women that warrant a different conclusion in Ms Rameka's case.

[155] First, as in the case of Ms Ahsin, there was an evidential foundation for the first requirement of the defence. Indeed, although the shouted words were, as we have pointed out, capable of being interpreted in different ways, the evidence of Ms Rameka's conduct was not fundamentally inconsistent with interpreting the words as a genuine attempt to dissuade Mr McCallum from the attack. Although Ms Rameka remained at the scene, she did not provide any further assistance or continue to encourage the assault. We are therefore of the view that it would have been open to the jury to find that by exhorting Mr McCallum to stop and return to the car, Ms Rameka had clearly withdrawn her support for the offending.

[156] Secondly, it would have been open to the jury to find that Ms Rameka had taken all reasonable steps to undo the effect of her prior involvement or to prevent the crime. Ms Rameka's earlier encouragement and assistance was much more limited than Ms Ahsin's involvement in the group's activities. Ms Rameka's participation was almost entirely limited to shouts of encouragement, rather than

actions of assistance. If the jury was not satisfied that Ms Rameka had assisted or intended to assist Mr McCallum, by pushing Mr Kumeroa out of the car, the shouted words were capable of undoing the effect of Ms Rameka's earlier verbal encouragement. The exhortation to stop and return to the car was timely, given that at least some shouts were heard before Mr McCallum produced the weapon that was used to kill Mr Kumeroa.

[157] We conclude accordingly that the evidence at trial was capable of supporting a defence of withdrawal from Ms Rameka's liability as a party. Ms Rameka's sole defence at trial had of course been that she was not present at Cross Street at all.[102] But, as indicated,[103] we are required to proceed on the assumption that it could have been Ms Rameka's voice that was heard and, on that basis, the failure of the Judge to put to the jury in his directions the common law defence of withdrawal in relation to Ms Rameka's liability as a party under s 66(1) was in error.

[158] The Judge's summing up to the jury on the issue of withdrawal in relation to Ms Rameka was incomplete in another respect. Although the Judge identified satisfactorily the possibility of withdrawal from a common purpose in his general discussion of s 66(2),[104] in summarising Ms Rameka's case for the jury, he did not point to the evidence relevant to withdrawal by her under s 66(2). Nor did the Judge link that evidence to the requirements of the law. By contrast, when summarising Ms Ahsin's case, the Judge referred to the specific evidence that the defence relied on as constituting the legal requirements for withdrawal as he had described them.

[159] The absence of a direction to the jury on the evidence of withdrawal by Ms Rameka may well have led the jury to overlook its significance in relation to s 66(2) in the Judge's question trail. We reiterate that the Judge had no significant assistance from counsel on this point, but nevertheless, we accept Mr Lithgow's submission that, because of the general nature of his direction, the Judge did not sufficiently assist the jury on whether Ms Rameka might have had a defence of withdrawal in relation to s 66(2).

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102 See above at [64].
103 See above at [56].
104 This was in a manner favourable to the defendant: see above at [143].

Failure to link the law and the evidence

[160] We next consider whether the Judge sufficiently identified the cases against Ms Rameka and Ms Ahsin under s 66(1) and (2). We have already referred to a lack of particularity in the discussion of the evidence that related to the issue of withdrawal by Ms Rameka under s 66(2). This inadequacy is apparent more generally in the summing up of the cases in relation to both appellants.

The structure of the trial Judge's summing up

[161] Having already summarised the structure of the summing up,[105] we now consider it in more detail. The first and second parts of the summing up discussed the legal elements of party liability at a general level.[106] Although a distinction was drawn between the accused principal offender and those accused as parties, the summing up did not discuss the law in relation to their individual cases. The question trail was also expressed generally rather than tailored to each defendant. In summarising the Crown and defence cases in the third part of his summing up, the Judge focused on the competing cases on the evidence, assuming knowledge of the foregoing legal discussion rather than reiterating it in relation to each defendant.

More connection between the law and facts was required

[162] It is usually helpful in a summing up if the law relevant to each defendant's criminal liability is discussed at the same time as the evidence is discussed or at least mentioned again at that point. This will facilitate specific directions linking the law to the evidence so that it is made clear to the jury what facts it must be satisfied of in order to establish each legal requirement in the individual circumstances of each defendant. In cases where the same law is applicable to multiple defendants, it may be appropriate to give a detailed explanation of the law that applies to all before turning to the case against each defendant. It is still, however, necessary to discuss how the law applies to each individual case, making clear to the jury how the law relates to the particular evidence against each defendant.

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[105] See above at [67].

[106] We have identified the deficiencies in these legal directions above at [84]–[88] and [103]–[105].

[163] In this instance, the discussions of the law and the evidence against each individual defendant were separated in the summing up and there was insufficient connection drawn between the two. The Judge did not identify specifically for the jury what it was that they had to be satisfied of in relation to the evidence against Ms Rameka and Ms Ahsin and each of the legal requirements of s 66(1) and (2) that the evidence had to prove. As well, in summing up the Crown and defence cases in relation to both appellants, the trial Judge did not explain to the jury which evidence or arguments related to s 66(1) and which to s 66(2). In part this was a result of the overlap in the Crown case against Ms Ahsin and Ms Rameka under s 66(1) and (2). But, in a complex case of party liability, these factors together raised a risk of jury confusion.

[164] What was necessary can be illustrated by examples in relation to Ms Rameka's case, although we emphasise that what we say applies equally to Ms Ahsin's appeal.[107] An adequate direction on the matters required to be proven against Ms Rameka under s 66(1) would have told the jury that in order to find Ms Rameka guilty of murder, it must be satisfied that:

(a) Ms Rameka was present in the car in Cross Street; and

(b) Ms Rameka shouted out as the car entered Cross Street and/or that she pushed Mr Kumeroa from the car; and

(c) Ms Rameka's conduct encouraged or assisted Mr McCallum in his attack on the victim; and

(d) Ms Rameka acted with the intention to encourage or assist Mr McCallum and not for some other reason or purpose; and

(e) at the time Ms Rameka encouraged or aided Mr McCallum, she had knowledge of the essential facts that:

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[107] We also emphasise that the exact form of the directions to the jury in every case will depend on the evidence that is presented at trial.

(i) he would assault Mr Kumeroa using a weapon of a type that would inflict the sort of injuries that occurred; and

(ii) he would do so intending to kill Mr Kumeroa, or he would inflict bodily injury on Mr Kumeroa in circumstances likely to cause his death and be reckless as to whether Mr Kumeroa died or not.

In the course of describing these requirements to the jury, the competing Crown and defence cases and evidence on each point should also be explained. This would assist the jury to identify any weaknesses or gaps in the evidence.

[165] For example, in summing up the cases against Ms Ahsin and Ms Rameka, the Judge did not refer to the need for the jury to be satisfied that the defendants intended to assist or encourage Mr McCallum under s 66(1) or to the evidence relevant to this issue.[108] A better summing up would have pointed out to the jury that there was no direct evidence of Ms Rameka's or Ms Ahsin's knowledge and intention at the relevant time, and that whether or not these elements were satisfied was a matter of inference contested by the Crown and the defence.

[166] A better direction in relation to the case against Ms Rameka under s 66(2) would have likewise identified what facts the jury must be satisfied of in relation to the legal requirements for liability, and the evidence relied on in relation to each one.[109] For example, in relation to the legal requirement that Ms Rameka had formed with Mr McCallum (and the other defendants) a shared agreement to carry out something unlawful,[110] the summing up could have pointed to the need to consider the evidence in relation to the situation at the Countdown supermarket, the North Mole, Gibbons Crescent and Cross Street, where the attack took place. It could have directed the jury to assess whether Ms Rameka was present on each occasion and, if so, the nature of her involvement. The jury could then have been directed that it had to be satisfied on this evidence that Ms Rameka had agreed to a

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[108] Likewise, in relation to s 66(2), there was no reference to the requirement of knowledge that an assault of the kind that led to Mr Kumeroa's death was a probable consequence of any common purpose formed, or the evidence pertaining to that issue.

[109] See above at [102].

[110] See above at [102](b).

common purpose of intimidating and attacking people thought to be associated with the Mongrel Mob. Similarly detailed directions should have been given in relation to Ms Ahsin.

[167] The adequacy of the Judge's summing up must be assessed in the context of the trial, the issues that arose, and the case against each defendant. It is also particularly important in cases of gang violence that the jury directions are detailed and specific, in order to avoid the possibility of defendants being found guilty by association, rather than on examination of their particular role, state of mind and circumstances.

[168] The lack of specificity or connection between the law and evidence in the Judge's summing up, and the failure to identify distinctly the different cases under s 66(1) and (2) are relevant to the appeals of both Ms Ahsin and Ms Rameka but were of particular importance for the jury's scrutiny of the case against Ms Rameka. The case against Ms Rameka needed this level of care in the Judge's summing up and question trail because, although sufficient to be left to the jury, the evidence of her adherence to the principal offender's conduct was not strong. The evidence against her was considerably weaker than that against Ms Ahsin, particularly under s 66(1), because of the limited and ambiguous nature of Ms Rameka's alleged involvement at the scene of the attack in Cross Street. For example, her alleged action in pushing Mr Kumeroa out of the car could be seen in different ways.

[169] The required assistance might have been given by the Judge through providing individual question trails to the jury or, as the Court of Appeal suggested, by going through the generally expressed question trail separately, in relation to each defendant, to isolate and identify the elements of party liability that had to be proved against each of them and the evidence relied on as doing so.

Jury unanimity

[170] We next consider whether the Judge was required to direct the jury to be unanimous as to the basis for their verdicts on the charges that Ms Ahsin and Ms Rameka were parties to murder under s 66(1) or (2) of the Crimes Act.

The parties' submissions

[171] Mr Lithgow, for Ms Rameka, submitted that the Judge should have directed the jury that they had to be unanimous on the legal basis for her guilt under either s 66(1) or (2), before they could find her a party to murder by Mr McCallum. Mr Stevenson made the same submission in respect of Ms Ahsin. Both counsel submitted that a unanimity direction was required because there were different bases for liability under the two provisions.

[172] Mr Pike, for the Crown, submitted that a case by case approach is required in assessing whether a unanimity direction is required. Where the possible routes to liability are congruent rather than logically inconsistent, particularly where mutually overlapping facts are relied on, a unanimity direction is not appropriate and would add unnecessary complexity to the jury directions. A unanimity direction would be required where there was an evident risk that a defendant may have been found guilty of an offence on the basis of alternative but incompatible facts.

The requirement of jury unanimity

[173] A jury in a criminal trial must be unanimous in reaching its verdict, except in the circumstances specified in statute where a majority verdict is permissible.[111] This requirement derives from the fundamental principles of the criminal trial including the burden and standard of proof, the presumption of innocence, and the fairness of proceedings, all of which are protected by the New Zealand Bill of Rights Act 1990. The jury must be unanimous on the essential ingredients of the offence and, in that sense, unanimity is required in every case.

[174] More difficult, however, can be the identification of the essential elements that will constitute a sufficient basis to support a guilty verdict. Judges must approach and be able to approach this in a practical and realistic way.[112] To that end, we outline the key principles.

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111 Juries Act 1981, s 29C.

112 See also *R v Mead* [2002] 1 NZLR 594 (CA) at [17] per Elias CJ.

The legal basis for the verdict

[175] The essential legal ingredients of criminal liability are the statutory elements of the offence. Ordinarily, different legal bases for criminal liability will be reflected in different charges. This is not, however, always required.

[176] Section 66 of the Crimes Act may provide multiple legal routes to liability within a single charge and in this case, all four defendants were charged in a count of murder without any distinction being drawn between those charged as principals or parties. Nor was any distinction drawn as to whether Ms Rameka and Ms Ahsin were parties providing assistance under s 66(1) or parties to a common purpose that encompassed the offence that occurred, under s 66(2).

[177] In *R v Thatcher*, the Supreme Court of Canada considered s 21 of the Canadian Criminal Code, which is expressed in terms that are closely similar to s 66.[113] The Court decided that s 21(1) was designed to make "legally irrelevant" the difference between criminal liability as a principal and as a party.[114] The section removed the necessity for the Crown to choose between and charge separately different forms of participation in a criminal offence. Participation as a principal or a party on the basis of aiding or abetting were "not only equally culpable, but should be treated as one single mode of incurring criminal liability".[115]

[178] Section 66 of the New Zealand Crimes Act operates in the same way. In cases where different provisions of s 66 are relied on in a single charge, it will be sufficient for a unanimous verdict if each member of the jury is satisfied that the legal elements of one form of liability under s 66(1) or (2) are established.

[179] There are other contexts, too, in which different legal routes to liability may be included in a single charge.[116] The Crimes Act provides:

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113 *R v Thatcher* [1987] 1 SCR 652.
114 At 690 per Dickson CJ, at 703 per Lamer J and at 705 per La Forest J.
115 At 694 per Dickson CJ.
116 Section 330 of the Crimes Act has now been replaced by s 19 of the Criminal Procedure Act 2011.

> **330 Crimes may be charged in the alternative**
>
> (1) A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts, or omissions which are stated in the alternative in the enactment describing any crime, or declaring the matters, acts, or omissions charged to be a crime, or on the ground that it is double or multiple.

[180] For example, the Crown commonly relies, in a single charge of murder, on both ss 167(a) and (b) of the Crimes Act in alleging that a defendant intended either to cause the death of the victim or to cause the victim some bodily injury known to be likely to cause death and was reckless as to whether death ensued. Only in exceptional cases would a judge require such alternative murderous intents to be subject to separate charges. That is because the alternative mental states will almost always arise out of a single transaction, as we now explain.

The factual basis for the verdict

[181] The essential factual ingredients of criminal liability in any particular case must be identified in relation to the nature of the evidence and the prosecution and defence cases. In this exercise, the context of the trial and the need to ensure fairness of criminal proceedings are also important.

[182] Unanimity will generally be required as to the particular transaction or event on which criminal liability is based.[117] Where alternative factual bases for liability are separated in time, place or nature, so that they should properly be seen as different transactions, rather than relating to a single one, unanimity will be required as to the particular event that provides the factual basis for the jury's verdict. The necessary unanimity may be achieved either by laying separate charges in relation to each alternative or by a clear direction to the jury that they must be agreed as to the same factual basis for their verdict.[118]

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[117] See s 329(6) of the Crimes Act, now replaced by s 17 of the Criminal Procedure Act. See also, for example, *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296. See also *R v Brown* (1984) 79 Cr App R 115 (CA). Representative charges are a statutory exception to this principle.

[118] The approach is similar to that which is followed in relation to differences in incidents the subject of representative counts: *KAW v R* [2012] NZCA 520 at [50]–[53].

[183] The facts of *R v Chignell* are indicative of where a jury must be directed to choose unanimously between different possible factual bases for liability.[119] The Crown case was that the deceased may have died at Auckland from a blow struck by one of the defendants, or subsequently by drowning when he was thrown by the defendants over the Huka Falls. The alternatives were accordingly separated by place and time and involved different actions. A Full Court of the Court of Appeal said:[120]

> Against the background of the complex factual alternatives arising, it was essential that the jury's mind be directed to the issues of the act or acts causative of death, and of the person or persons responsible for them. They had to be clearly told that they must be unanimous before they could convict on either alternative. Directions were also necessary as to the way in which they should approach their task, and as to the different considerations of fact and law that applied to each of the alternative charges.

The Court of Appeal held that the directions of the trial Judge were not adequate in this respect as they had left open the possibility that the jury need not be unanimous as to which point in the chain of events the victim had perished.

[184] The underlying principle also applies in the context of party liability with an important clarification. In many cases, different factual routes to liability under s 66 can properly be seen to be alternative forms of participation in a single transaction, rather than involving separate transactions. A notable instance is where the Crown case is that the offending took place at a certain time and place and in a particular manner, and the defendant is guilty either by personally committing the offence or by engaging someone to do so.[121]

[185] Whether the factual alternatives amount to separate transactions or are merely different forms of involvement in a single one may require careful analysis. Sometimes the different ways in which participation is said to have occurred may be distinct in time and place, but nevertheless relate to the same transaction. The facts of *R v Shaw*, relating to the arson of the Rangiatea Maori Anglican Church in Otaki,

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119 *R v Chignell* [1991] 2 NZLR 257 (CA).

120 At 266.

121 See *R v Giannetto* [1997] 1 Cr App R 1 (CA) at 8–9; and *R v Shaw* CA159/05, 22 November 2005 as to the importance of the way the Crown puts its case in this context.

provide an example.[122] In that case, it was alleged that the defendant had either (i) suggested the church as a target whilst he was in prison some time before the arson, thereby inciting the arson; (ii) personally committed the arson; or (iii) at the scene of the arson, assisted or encouraged those who lit the fire.

[186] A majority of the Court of Appeal in *Shaw* held that, although the jury could return a guilty verdict if some were satisfied that the defendant personally committed the arson and the remainder were satisfied only that he assisted at the scene, the jury could only find the defendant guilty on the basis of the incitement in the prison yard if all were unanimously agreed on that fact.[123] This was because the "essential facts" of the incitement were "separated by time, place and circumstance".[124] We, however, prefer the dissenting view of Ellen France J that the alternatives were no more than different possible ways in which the defendant was involved in the same arson. Although separated in time and place, the incitement on a previous occasion nevertheless related to the same single event: the arson of the church in the early hours of the morning.

[187] Accordingly, where the alternatives relate only to the form of involvement in a single transaction or event, there will be a sufficient factual basis for a guilty verdict if the jury is unanimously of the view that the defendant was involved in that transaction one way or the other.[125] Separate charges will not be required, and it will not be necessary for the jurors to be unanimous as to the precise manner in which the defendant was involved if each juror is satisfied that one form of involvement is proven. This was the basis on which the case was left to the jury in *Shaw*.[126]

[188] This approach, however, is itself not without exception and in some circumstances unanimity will be required as to the particular form of involvement of the defendant, even though the alternatives all concern a single transaction. That will be so when that is necessary to protect the fairness of criminal proceedings.

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122 *R v Shaw* [2009] NZCA 232, (2009) 24 CRNZ 501.

123 At [95] per Heath J and at [139] per Fogarty J.

124 At [94] per Heath J and at [139]–[140] per Fogarty J.

125 *Giannetto*, above n 121, at 8–9; applied in New Zealand in *R v Peters* [2007] NZCA 180 at [43]; and *R v Donnan* [2009] NZCA 171 at [15]–[16]. See also *Thatcher*, above n 113, at 699 per Dickson CJ.

126 The direction to the jury is set out in *Shaw*, above n 122, at [13].

[189] For example, there may be cases where the nature of the evidence put forward in support of each factual alternative raises a risk that the jury could misuse the evidence unless directed to unanimously agree upon the specific way in which the defendant was involved. This possibility was discussed in *Thatcher*:[127]

> Depending on the nature of the evidence presented by the Crown, the jury unanimity issue may arise in any case where the Crown alleges factually inconsistent theories, even if those theories relate to the particular nature of the accused's participation in the offence. If the Crown presents evidence which tends to inculpate the accused under one theory and exculpate him under the other, then the trial judge must instruct the jury that if they wish to rely on such evidence, then they must be unanimous as to the theory they adopt. Otherwise, the evidence will be taken into account by some jurors to convict the accused under one theory while the fact that the evidence exculpates the accused under the other theory is being disregarded by the other jurors who are taking the latter route. In effect, the jury would be adding against the accused the inculpatory elements of evidence which cannot stand together because they are inconsistent.

In such cases, in order to ensure a fair trial, it will be necessary to have separate charges or to instruct the jury to distinguish in their deliberations between the significantly different factual bases for liability and to be unanimous on the basis on which they find a defendant guilty.

The present case

[190] In this case, although the Crown put forward alternative legal bases for party liability by reference to both s 66(1) and (2) and different aspects of the appellants' conduct, these alternatives related only to the different forms of involvement in a single transaction: the killing of Mr Kumeroa by Mr McCallum in Cross St. As such, there would be a sufficient factual basis for guilty verdicts if the jury were unanimously agreed that, one way or another, the appellants were involved as parties in that transaction.

[191] Applying that approach did not give rise to any risk to the fairness of the trial in the circumstances of this case. There was no possibility that, in reaching its verdicts, the jury could misuse the evidence in the sense explained above. The

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[127] *Thatcher*, above n 113, at 704 per Lamer J. See also at 704–705 per La Forest J; and *Giannetto*, above n 121, at 7.

Crown relied on the same evidence of the same actions by each appellant to prove that she was a party under both or either of those provisions.

[192] The factual basis for the Crown case for common purpose liability of Ms Rameka under s 66(2) was that she was present at the Countdown supermarket, actively involved in the incident at the North Mole, present at Gibbons Crescent in a way that showed continuing adherence to a plan and, ultimately present at Cross Street where the principal, acting in accordance with the plan to attack those appearing to be associated with the Mongrel Mob, attacked Mr Kumeroa. The same facts were also relied on by the Crown to prove Ms Rameka was a party under s 66(1), by providing assistance to the principal offender. All evidence, including that Mr Kumeroa was pushed out of the vehicle prior to being attacked by Mr McCallum, was relevant to her liability under both limbs of s 66.

[193] The Crown case against Ms Ahsin under s 66(1) relied principally on the evidence of her assistance through driving the vehicle up to Mr Kumeroa at Cross Street and later driving the car forward. In her case too, the evidence of her liability under s 66(2) (which we have summarised in relation to Ms Rameka) was relevant to her liability under s 66(1). Again, the essential facts in relation to each legal basis for liability are the same.

[194] In both cases, the same evidence supported each alleged form of participation and there was nothing indicating a risk that the jury would misuse the evidence relevant to one factual basis when considering the other. The absence of any conflict in the evidence meant that it was unnecessary for the Judge to direct the jury to be unanimous as to the basis on which Ms Ahsin and Ms Rameka were guilty. It was sufficient that in his directions, including those given through the question trail, he required that they be unanimous as to the guilt of Ms Rameka and Ms Ahsin as parties. A finding of guilt on that basis would demonstrate that they were unanimous as to the essential facts in relation to each appellant's liability as a party to murder.

[195] For these reasons, the principles underpinning the requirement of unanimity were not breached by the Judge's direction. The Judge directed the jury to reach unanimous verdicts, while acknowledging the possibility of majority verdicts, which

he would explain to the jury if it became necessary. It was not necessary for him to direct that the jury had to be unanimous as to whether their verdicts in respect of Ms Rameka and Ms Ahsin were based on s 66(1) or (2), nor that they had to agree unanimously upon the precise acts that were the factual basis for the verdicts. This ground of appeal by both Ms Rameka and Ms Ahsin accordingly fails.

[196] We would, however, add that we agree with William Young J that in cases like the present it will often be helpful if the Judge encouraged the Crown prosecutor, when addressing the jury, to limit the issues that the jury had to decide in relation to one of the two statutory bases for party liability.[128] In this case the complexities of the alternative bases for the defendants' liability might have well been reduced by the Crown to whether Ms Ahsin was a party under s 66(1) and Ms Rameka under s 66(2), or both were parties under s 66(2). Such a direction would have avoided unhelpful complexity. The prospects of obtaining conviction of Ms Rameka under s 66(1) were too slim to warrant perseverance with it as a basis for liability.

The prosecutor's closing address

[197] Counsel for Ms Rameka was also critical of the way that the Judge in his summing up addressed certain observations by prosecuting counsel in her closing address. The prosecutor asserted that Ms Rameka could be seen on CCTV footage as present at the Countdown supermarket early in the afternoon. This was relevant to the issue of whether she became implicated with others in any common purpose of the group, which the Crown alleged was a response to the altercation at Countdown.

[198] The Judge told the jury that because the prosecutor had not given evidence they must disregard her personal opinion and put it out of their minds. Identification was a matter entirely for the jury to decide. In agreement with the Court of Appeal we are satisfied that the Judge's warning was appropriate, and that it sufficiently negated the prejudice arising from the prosecutor's observations. A specific ruling on the danger of suggestibility arising from counsel's remarks was not necessary.

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[128] See the reasons of William Young J below at [242]. Such a decision could also be made by the Crown before trial commences, but it may also be the case that it only becomes apparent which provision of s 66 is most appropriate to rely on after the evidence has been heard at trial.

Miscarriage of justice

[199] This brings us to whether, in terms of the proviso to s 385(1) of the Crimes Act, a substantial miscarriage of justice has actually occurred in the convictions of the appellants as a result of the errors of law we have identified. Two of these errors relate to both appellants:

(a) the inadequate explanation, in some respects, of the legal elements of party liability under s 66(1) and (2); and

(b) the failure to link the law and evidence in a way which identified and distinguished the different cases against each appellant under s 66(1) and (2).

In addition, in respect of Ms Rameka, we have held that insufficient and inadequate directions were given on the defence of withdrawal.

[200] To determine this issue we apply the principles laid down in *Matenga v R*.[129] This requires that the Court first "put to one side and disregard those irregularities which plainly could not, either singly or collectively, have affected the result of the trial".[130] Then the Court must consider whether the error that was capable of affecting the result has in fact had that adverse effect. The Court may only dismiss an appeal if, having reviewed all the admissible evidence, it considers that "the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence".[131]

[201] In relation to both appellants, the imprecision of the summing up and the lack of connection between the law and the facts could well have influenced jurors towards too general an examination of both the evidence and the legal requirements of s 66(1) and (2). This is particularly so in relation to the mens rea elements of party liability – such as knowledge of Mr McCallum's intention, on which there was no direct evidence and the assistance given to the jury on the law to be applied was

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129 *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145.
130 At [30].
131 At [31].

in some respects incomplete. There is a resulting risk that when deliberating the jury may not have focussed on the particular facts to be proved against the appellants and whether they met the legal requirements for party liability. We are accordingly satisfied that these errors were capable of affecting the result at trial.

[202] Moreover, in the case of Ms Rameka, the failure to leave to the jury the defence of withdrawal excluded from consideration a basis on which she may have been excused from criminal liability. This is self-evidently capable of affecting the outcome of the trial.

[203] The final question, then, is whether we are satisfied that a guilty verdict against each of the appellants was inevitable, under either s 66(1) or (2). We are not so satisfied. On that basis, the proviso in s 385(1) of the Crimes Act is inapplicable.

Conclusion

[204] For these reasons, both appeals against conviction are allowed, the convictions for murder are quashed and new trials are ordered.

WILLIAM YOUNG J

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Overview

[205] In these reasons I discuss the unanimity and withdrawal issues and then explain why I would allow the appeal of Ms Rameka and dismiss that of Ms Ahsin.

Unanimity

The unanimity problem – an introductory comment

[206] The unanimity issue in this case falls to be decided within the broader jurisprudence as to unanimity directions, including the decisions of this Court in *Mason v R*[132] and the decisions of the Court of Appeal in *R v Mead*,[133] *R v Chignell*[134] and *King v R*.[135] In those cases the particulars as to how the offence was alleged to have been committed offered more than one route to a verdict of guilty and the question was whether the jury had to be unanimous as to specific particulars in order to return a verdict of guilty. Sitting alongside these cases are those dealing with representative charges in respect of multiple offending (usually, but not always, of a sexual character), the use of which now has statutory imprimatur.[136] Unanimity is not required in relation to the specific offences represented by such charges. As to whether unanimity is required in particular circumstances, counsel and judges are likely to be assisted by the cases I have mentioned, as well as by the examples provided in *Archbold*.[137]

[207] In issue in the present case is whether unanimity is required where there is uncertainty as to the precise role played by the defendant in the alleged offending. As I will explain, I think that this question can be resolved by reference to the law as to parties.

Evolution of the law as to parties

[208] At common law, a critical determinant of party liability was whether the alleged party was present when the crime was committed. A person who aided and abetted the commission of a felony and was present[138] at its commission was a

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132 *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296.
133 *R v Mead* [2002] 1 NZLR 594 (CA).
134 *R v Chignell* [1991] 2 NZLR 257 (CA).
135 *King v R* [2011] NZCA 664.
136 See *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [8], now specifically provided for in s 20 of the Criminal Procedure Act 2011.
137 PJ Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice 2014* (Sweet & Maxwell, London, 2014) at [4–453].
138 This encompassed those who were sufficiently close to be useful if required: see William Oldnall Russell *A Treatise on Crimes and Misdemeanors* (5th ed, Stevens & Sons, London, 1877) at 156–157; and *R v Betts* (1930) 22 Cr App R 148 (Crim App) at 154.

principal in the second degree.[139] It was not necessary to show that the aider and abettor intended or even envisaged the commission of the crime actually committed. It was enough that the commission of that crime was a probable consequence of the implementation of an underlying unlawful purpose which was shared by the aider and abettor and principal.[140] Those who had counselled or procured an offence but were not present when the offence was committed were accessories before the fact.[141] The principles associated with common purpose liability were developed in respect of those who were aiders and abettors, albeit that a similar principle was also applicable to accessories before the fact[142] which is now reflected in s 70 of the Crimes Act 1961.

[209] The law drew a very sharp distinction between principals (whether in the first or second degree) on the one hand and accessories before the fact on the other. Principals in the second degree were indicted as principals and jury unanimity was not required as to whether a particular defendant was a principal in the first or second degree, as long as the jury was sure that the defendant was one or the other.[143] On the other hand, it was not possible in the same indictment to allege liability as both a principal (whether in the first or second degree) and an accessory before the fact.[144]

[210] The law as to parties was addressed by statute in the mid-nineteenth century, most relevantly for present purposes by s 1 of the Accessories and Abettors Act 1861 (UK) which provided:[145]

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139 James Fitzjames Stephen *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan and Co, London, 1877) at 23.

140 At 23. This is the effect of art 38 of Stephen's *Digest* which, although expressed in stand-alone terms, is predicated on the assumption that the party was present at the commission of the offence. See also *R v Betts*, above n 138, at 154–155.

141 At 24–25.

142 Stephen certainly thought so: at 25–26. So did Russell: see Russell, above n 138, at 169–170. See also *Regina v Bernard* (1858) 1 F & F 240, 175 ER 709.

143 This was so at common law before the criminal law reforms of the mid-nineteenth century, see for instance *Regina v Downing* (1844) 1 Den 52, 169 ER 146. That was quite a striking case as there were two counts in the indictment, one proceeding on the basis that one defendant fired the fatal shot and the other was an aider and abettor and the other with reversed roles. The jury returned verdicts of guilty saying that they were not sure who fired the shot but were satisfied that one of the defendants had done so and that the other was an aider and abettor.

144 See the discussion in Russell, above n 138, at 165; and *The King v Gordon* (1789) 1 Leach 515, 168 ER 359.

145 Accessories and Abettors Act 1861 (UK) 24 & 25 Vict c 94. Section 1 of the Criminal Procedure Act 1848 (UK) 11 & 12 Vict c 46 was to the same effect.

> Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.

In the 1877 edition of Russell's *Treatise on Crimes and Misdemeanors*, the author commented on s 1 of the 1861 Act in this way:[146]

> In every case where there may be a doubt whether a person be a principal or accessory before the fact, it may be advisable to prefer the indictment under this section, as *such an indictment will be sufficient, whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other, but it is uncertain which he was … .*

In other words, just prior to the preparation of the 1879 Draft Criminal Code,[147] from which the Crimes Act 1961 is derived, the consequence of s 1 of the 1861 Act was that any party to a felony could be prosecuted as a principal and, in such event, jury unanimity as to the basis of liability was not required.

The key provisions of the Crimes Act 1961

[211] The primarily relevant provisions of the Crimes Act 1961 are ss 66, 330 and 343. Each had a precursor in the Draft Code,[148] which was developed by the Royal Commission Appointed to Consider the Law Relating to Indictable Offences.

[212] In the commentary to s 71 of the Draft Code (corresponding to s 66 of the Crimes Act which I am about to discuss), the Commissioners noted:[149]

> This section is so framed as to put an end to the nice distinctions between accessories before the fact, and principals, in the second degree, already practically superseded by [the 1861 Act].

[213] The Commissioners' Report makes it clear that root and branch reform, by way of simplification, of the law of indictments was proposed. The Draft Code

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146 Russell, above n 138, at 175 (emphasis added).

147 Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (HMSO, 1879) (UK). An appendix to the report contained a Draft Code "embodying the suggestions of the Commissioners".

148 Sections 71, 483 and 496 (respectively) of the Draft Code.

149 Criminal Code Bill Commission, above n 147, at 76 of the Appendix. Section 71 of the Draft Code and the equivalent provisions of the Criminal Code Act 1893 and the Crimes Act 1908 provided for an objective probable consequence test and in this respect differed from s 66(2) of the Crimes Act 1961.

contained a provision[150] permitting offences to be charged in the alternative which was in substantially the same terms as s 330(1) and (3) of the Crimes Act (set out below at [217]). Section 496 of the Code (corresponding broadly to s 343 of the Crimes Act, set out below at [219]) was in these terms:

> Every one who is a party to any offence within the meaning of Section 71 of this Act may be convicted either upon a count charging him with having committed that offence or upon a count showing how he became a party to it within the meaning of that section.

[214] The Commissioners based s 496 of the Draft Code on the substance of s 1 of the 1861 Act but (a) adapted the language to reflect the abandonment of the concepts of principals in the second degree and accessories before the fact, and (b) made explicit what was implicit in the permissive terms of s 1 of the 1861 Act: that it remained open to a prosecutor to frame an indictment so as to allege party liability only.

[215] In those circumstances, it seems clear to me that the Commissioners envisaged that s 496 of their Draft Code would enable a single count based on evidence that the defendant was a principal or party and, as well, conviction if the jury was satisfied that the defendant was either a principal or a party but was uncertain as to which.

[216] Section 66 of the Crimes Act 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
>
> (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

[150] Section 483 of the Draft Code.

> 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.

[217] Section 330 of the Crimes Act is in these terms:[151]

> **330 Crimes may be charged in the alternative**
>
> (1) *A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts, or omissions which are stated in the alternative in the enactment describing any crime, or declaring the matters, acts, or omissions charged to be a crime, or on the ground that it is double or multiple*.
>
> (2) The accused may at any stage of the trial apply to the Court to amend or divide any such count on the ground that it is so framed as to embarrass him in his defence.
>
> (3) The Court, if satisfied that the ends of justice require it, may order any count to be amended, or divided into 2 or more counts; and on the order being made that count shall be so divided or amended, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

[218] Section 330(1) suggests that a prosecutor may rely in the alternative on all heads of liability provided for in s 66(1) as they are stated in the alternative in that subsection, albeit that it is not explicit as to whether jury unanimity is required as between the alternatives.

[219] Rather more important is s 343 of the Crimes Act, which provides:[152]

> **343 Indictment of parties**
>
> Every one who is a party to any crime may be convicted either upon a count charging him with having committed that crime, where the nature of the crime charged will admit of such course, or upon a count alleging how he became a party to it.

As will be observed, this section, with some inconsequential variations,[153] is taken from the Draft Code and can thus be seen to be a development of s 1 of the 1861 Act.

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151 (Emphasis added.) Section 330 was repealed as of 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011 and is now covered by Part 2 of the Criminal Procedure Act 2011.

152 Section 343 was repealed as of 1 July 2013 by s 6 of the Crimes Amendment Act (No 4). The procedure for, and contents of, charging documents is now dictated by Part 2 of the Criminal Procedure Act.

Given this, it seems to me that it should sensibly be construed as having the consequences which were attributed by Russell's *Treatise on Crimes and Misdemeanors* to s 1 of the 1861 Act, namely that there is no need for jury unanimity as to the basis of liability.[154]

The relationship between s 66(2) and s 66(1)(b) and (c)

[220] On the structure of s 66, subs (2) operates independently of subss (1)(b) and (c). I also recognise that the language of s 66(2) imposes conditions as to its application which may not be applicable where s 66(1)(b) and (c) are relied on.

(a) Section 66(2) applies only where there was a common purpose. It is possible to conceive of circumstances in which one person assists another in the commission of an offence without there being a common purpose of the kind envisaged by s 66(2).[155]

(b) More significantly, I consider that liability under s 66(2) is dependent on the common purpose being current at the time the offence was committed.[156] This imposes a limit on liability under s 66(2) which, as will become apparent, I consider does not apply to party liability under s 66(1)(b) and (c).

[221] All of that said, it is clear that there is scope for very substantial overlap between s 66(1)(b) and (c) and s 66(2). When two people agree to prosecute an unlawful purpose and to assist in its implementation, each of them thereby encourages the other to commit the proposed crime and is potentially liable under s 66(1)(c). Where such people actually assist in the implementation of the common

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153 The words "where the nature of the crime charged will admit of such course" were presumably intended to catch cases where the offence could only be committed by someone having characteristics (for instance being a male) which the alleged party might not have. Thus a woman who is prosecuted as being a party to the offence created by s 194(b) of the Crimes Act which makes in an offence for a male to assault a female could not sensibly be prosecuted as a principal.

154 See the discussion above at [210].

155 See the discussion in David Ormerod *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, Oxford, 2011) at 217. I agree that an actual consensus between principal and party envisaged by s 66(2) is not an element of liability under s 66(1)(b) and (c). Compare this with the view of Eichelbaum J in *Larkins v Police* [1987] 2 NZLR 282 (HC) at 287.

156 In this respect I differ from the approach of McGrath, Glazebrook and Tipping JJ (the majority): see above at [117]. I explain why later in these reasons: see below at [248]–[250].

purpose, s 66(1)(b) is likely to be engaged. For these reasons, and given the legal history to which I have referred, I see the primary purpose of s 66(2) as being to supplement s 66(1)(b) and (c) so as to result in liability where the alleged party assisted or encouraged the principal either:

(a) knowing of the principal's intention to commit the crime which was committed; or

(b) recognising that the commission of such a crime was a probable consequence of the implementation of the underlying common purpose.

[222] The essence of the mens rea requirement under s 66(2) is recklessness – that the alleged party, despite knowing that the crime ultimately committed was probable, nonetheless joined the venture. Under s 167(b) of the Crimes Act, the mens rea requirement for murder also encompasses recklessness – intentional infliction of bodily injury despite knowing that death is likely to result. The result is that in cases of group violence resulting in murder, the mens rea requirement for party liability is practically the same under both s 66(1)(b) and (c) and s 66(2). I can illustrate this in concrete terms by reference to the case against Ms Ahsin. Under s 66(1)(b), the Crown had to prove that she deliberately facilitated an assault which she knew was intended to inflict injury likely to result in death. Under s 66(2), the Crown had to prove that she knew that a probable consequence of implementing the common purpose would be such an assault and a resulting death. As was recognised in *R v Gush*, these states of mind are very similar.[157] Indeed, in the present context, where a central feature of the case was the known presence of lethal weapons in the car, it is difficult to discern a practical distinction between them.

[223] On the basis of this example, I think that where the mens rea requirement for the substantive offence encompasses recklessness, it should make little difference whether party liability is approached under s 66(1)(b) and (c) or under s 66(2).

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[157] *R v Gush* [1980] 2 NZLR 92 (CA).

Unanimity as between liability as a principal and liability as a party under s 66(1)(b), (c) and (d)

[224] With the exception of a single case which I regard as wrongly decided, the practice in New Zealand has always been that unanimity is not required as to whether the defendant offended as a principal or as an aider and abettor. Thus in a case involving group violence by armed men, the inability of the prosecution to identify the person who struck the fatal blow has never precluded convictions for murder against members of the group. The same approach has been taken in overseas jurisdictions in the slightly different context of uncertainty as to whether the defendant personally murdered the victim or procured someone else to do so. The leading cases are the English decision *R v Giannetto*[158] and the Canadian decision *R v Thatcher*.[159] The former judgment was cited with approval by Lords Phillips and Judge in the United Kingdom Supreme Court in *R v Gnango*.[160] *Giannetto* and *Thatcher* were both followed by the Court of Criminal Appeal in New South Wales in *R v Serratore*.[161]

[225] In each of the cases just discussed, there was evidence of an attempt to recruit a third party but there was also evidence which was consistent with the defendant having acted alone. On my appreciation of the evidence in each of the cases, it would not have been possible for a jury (or any jurors) to be satisfied beyond reasonable doubt as to whether the defendant had personally killed the victim or had commissioned someone else to do so. In each case, therefore, the verdict of guilty must have reflected a collective conclusion that, one way or another, the defendant had murdered the victim.

[226] The exception which I mentioned at [224] is *R v Shaw*.[162] In that case, the defendant was charged with the arson of a church. The case against him rested largely on admissions he had made. In one set of admissions, he acknowledged having burnt the church down. In the other admissions (made in the course of giving evidence at his first trial), he said that he had suggested to three other men that they

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158 *R v Giannetto* [1997] 1 Cr App R 1 (CA).
159 *R v Thatcher* [1987] 1 SCR 652.
160 *R v Gnango* [2011] UKSC 59, [2012] 1 AC 827 at [62].
161 *R v Serratore* [1999] NSWCCA 377, (1999) 48 NSWLR 101.
162 *R v Shaw* [2009] NZCA 232, (2009) 24 CRNZ 501.

burn down the church but denied having been present when they did so. As will now be apparent, there were two trials. At the first, the trial Judge left it to the jury to convict the appellant either as a principal or as a party but directed the jury they must be unanimous as to the basis for liability. The jury found the defendant guilty as a party. The conviction was set aside, in part on the basis that the defence had been prejudiced because the Crown had only at a very late stage advanced an allegation of party liability, and a new trial ordered.[163] At the second trial, the Crown proceeded against the defendant in the alternative as a principal or as a party. The Judge at the second trial left it open to the jury to convict on the basis that some were sure that he was the principal and others a party.

[227] On appeal after the second trial, the Court of Appeal, by a majority and over the dissent of Ellen France J, held that a unanimity direction was required.[164] This was essentially on the basis that the alleged inciting had been well-removed in time and place from the actual burning of the church so as to amount to a different transaction. I prefer the judgment of Ellen France J to that of the majority. Both *Giannetto* and *Thatcher* could have been analysed in the same way as the majority analysed the situation in *Shaw*.[165] There is a necessary mutual inconsistency between allegations, for example, that a defendant personally murdered the victim or, at another time, in another place and thus in different circumstances, procured a third party to do so. In such a case, I think it is sufficient for the judge to direct the jury to return a verdict of guilty if satisfied beyond reasonable doubt that the defendant either killed the victim or was, at the least, an aider or abettor. It follows that I do not think it is helpful to tell the jury that they may convict if some are sure the defendant was a principal and others are sure that the defendant was a party. This is because the one thing jurors might be sure about is that the defendant is guilty either as a principal and if not as a principal, as a party.

[228] As noted, s 66(1) uses language derived from s 8 of the Accessories and Abettors Act which was in issue in *Giannetto* and, as well, s 66(1) is in substantially the same terms as s 21(1) of the Canadian Criminal Code[166] which was under

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163 *R v Shaw* CA 159/05, 22 November 2005.
164 *R v Shaw*, above n 162.
165 *Giannetto*, above n 158; *Thatcher*, above n 159; and *Shaw*, above n 162.
166 Criminal Code RSC 1970 c C-34.

consideration in *Thatcher*. It seems to me, as it plainly did to the English Court of Appeal in *Giannetto*[167] and the Supreme Court of Canada in *Thatcher*,[168] that uncertainty as to the precise form of participation by the defendant is irrelevant provided the jury is collectively of the view that the defendant is guilty under one or more of the bases provided for. As is apparent, I think that *Shaw* was wrongly decided and for the moment find it difficult to envisage circumstances in which it would be necessary to give a unanimity direction.[169]

Unanimity as to party liability under s 66(1)(b), (c) and (d) or s 66(2)

[229] As will be apparent from what I have already said, I do not think it makes any sense to distinguish for unanimity purposes between s 66(1)(b), (c) and (d) parties and common purpose parties under s 66(2). This is consistent with the legal history to which I have referred. It is also consistent with my understanding of New Zealand practice but we were not taken to any decision which expressly addresses this point.

[230] In England, there is one decision which suggests that unanimity is required[170] but the point was not addressed in any detail and the case was treated dismissively in *Giannetto*.[171]

[231] The predominant view in Australia is that taken by a majority in the Court of Appeal of Queensland in *R v Leivers*.[172] In this case, the Judge had left the case to the jury under the equivalents of our s 66(1) and s 66(2). The Judge in the minority (Pincus JA) saw the approach taken in *Thatcher* as appropriate in this context and that accordingly a unanimity direction was not required. The majority (Fitzgerald P and Moynihan J) adopted a slightly more stringent approach:[173]

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167 *Giannetto*, above n 158.

168 *Thatcher*, above n 159.

169 A possible exception is the situation postulated by Professor John Smith in his commentary to *R v Gaughan* [1990] Crim LR 880 (CA) at 882 in which the only evidence against a defendant comes from (a) an eye witness to the crime saying the defendant committed it and (b) a witness who says that shortly beforehand, the defendant was in another city and giving directions as to its commission by telephone. Compare the remarks of Lamer J in *Thatcher*, above n 159. I do not see the facts in *Shaw* as analogous to this example for the reasons given by Ellen France J.

170 *R v Fitzgerald* [1992] Crim LR 660 (CA).

171 *Giannetto*, above n 158, at 8–9.

172 *R v Leivers* [1999] 1 QR 649 (CA).

173 At 662.

> It will not necessarily be sufficient for some members of the jury to be satisfied that the requirements of one basis of liability are established and for other members of the jury to be satisfied that the requirements of another basis of liability are established. However, that will be sufficient if the alternate bases of criminal liability do not involve materially different issues or consequences.

As the more recent decision of the Victorian Court of Appeal in *R v Bui*[174] shows, this represents the predominant approach in Australia.

Unanimity was not required

[232] The case against the appellants under s 66(1)(b) focused on the stopping of the car beside the deceased and the events which followed. The case against them under s 66(2) was more general.

[233] There was an evidential basis for the conclusion that Ms Ahsin was guilty under both s 66(1) and s 66(2). On the basis of the principles which I have discussed, it was open to the jury to find her guilty of murder without being unanimous as to the particular basis. A unanimity direction was therefore not required.

[234] In the case of Ms Rameka, the position, as I will explain, is a little different. The view of the Court of Appeal was that there was insufficient evidence to leave liability under s 66(1)(b) and (c) to the jury.[175] As I will explain, I agree with this conclusion. The case against her should thus have been left to the jury only under s 66(2) and, had this course been taken, no unanimity issue would have arisen.

Summing up to the jury in a group violence case

[235] As I have already explained, in a case such as the present where, pursuant to a common purpose, the defendants were present at the time of the murder and allegedly actively involved in assisting or encouraging the principal to inflict violence, the combined effect of s 66(1)(b) and (c) and s 66(2) is that the mens rea to be established is either (a) an intention to assist or encourage the principal with

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174 *Bui v R* [2011] VSCA 404.

175 *Rameka v R* [2011] NZCA 75, (2011) 26 CRNZ 1 (O'Regan P, Chambers and Arnold JJ) at [118].

knowledge of the principal's intention to inflict bodily injury likely to cause death or, (b) an awareness that such an assault (and a resulting death) was a probable consequence of the implementation of the common purpose. In this situation, (a) and (b) are virtually indistinguishable and it should make no practical difference whether the case is put under s 66(1)(b) and (c) or s 66(2). It does, however, seem to me that it is unnecessarily confusing if both options are left to the jury and I would very much encourage prosecutors or judges not to do so.

[236] Similar but not identical considerations arise where it is open to question whether the common purpose extended to an assault. Say A and B form a common purpose pursuant to which A keeps a look out and B enters a house armed with a firearm. B shoots C, the occupant of the house. On the primary Crown theory, the underlying purpose was for B to murder C. A, however, maintains that the underlying purpose was only robbery and that he did not foresee the probability of B killing C. The prosecution could present its case on the basis that A was guilty of murder under s 66(1)(b) if he had shared B's murderous intent or alternatively liable under s 66(2) as a party to an unlawful common purpose with murder a foreseen probable consequence of its implementation. For the reasons I have already given, the jury would not have to be unanimous as to the basis of liability providing they were satisfied that A, if not liable under s 66(1)(b), was liable under s 66(2).

[237] In the situation just postulated, although the mens rea requirements under s 66(1)(b) and s 66(2) are not practically the same, I consider that the former can be seen as a subset of the latter. For this reason, my preference is that such a case be approached solely under s 66(2) with the jury being asked to determine whether an attack with murderous intent was a known probable consequence of the implementation of the common purpose.

[238] Possibly standing in the way of such an approach is *Bouavong v R*, where the Court of Appeal held that s 66(2) is not engaged when the unlawful purpose relied on is to commit the crime that is ultimately committed.[176] If this is correct, it is presumably not possible to rely simply on s 66(2) where it is reasonably possible that

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[176] *Bouavong v R* [2013] NZCA 484, [2014] 2 NZLR 23.

the crime committed was the crime intended. I am, however, of the view that *Bouavong* is not correct.

[239] The purpose of s 66(2) is to impose liability where it cannot be established that the alleged party's mens rea encompassed the commission of the crime which was committed. Given this, the interpretation adopted in *Bouavong* is understandable and, unsurprisingly, there is other authority to the same effect.[177] There is, however, also authority going the other way, including the judgments of the Court of Appeal in *The Queen v Currie* and *Chen v R* in which it was held that s 66(2) can be invoked where the crime committed was the crime proposed.[178] Also relevant, to my way of thinking, are the following much-cited remarks of Sir Robin Cooke in *Chan Wing-Siu v The Queen*:[179]

> … [I]t should first be recalled that a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. In view of the terms of the directions to the jury here, the Crown does not seek to support the present convictions on that ground. The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees *but does not necessarily intend*.
>
> That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.
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> A line of relevant English authorities from 1830 onwards was considered by the Court of Criminal Appeal in *R v Anderson* [1966] 2 QB 110. Delivering the judgment of a court of five, Lord Parker CJ accepted a submission by Mr Geoffrey Lane QC and stated the law as follows, in terms very close to those reported at 114 to have been formulated by counsel at 118–119:
>
> > "… where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, [and] … that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) … if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. … ."

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177 See [47]–[60].

178 *The Queen v Currie* [1969] NZLR 193 (CA); and *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158.

179 *Chan Wing-Siu v The Queen* [1985] AC 168 (PC) at 175–176 (emphasis added).

I see this passage as meaning that common purpose liability extends to the crime intended to be committed but may also encompass crimes which were foreseen but not *necessarily* intended. On this approach, common purpose liability is not excluded just because it is possible that the crime committed may have been the crime intended.

[240] As is apparent, I prefer the view taken in *Currie* and *Chen* and by Sir Robin Cooke in *Chan Wing-Siu* to that expressed in *Bouavong*. This is primarily because I see the *Bouavong* approach as giving rise to unnecessary complexity where – as is almost always the case – there is uncertainty as to the scope of the common purpose. In *Bouavong*, the Court regarded s 66(2) as engaged where a group of men rob a bank and in the course of the robbery one of them commits a murder, providing the commission of the murder was foreseen as a probable consequence of the robbery.[180] I agree that this is so. But what is not addressed by the Court is whether s 66(2) would be applicable where it is possible, but not certain, that the common purpose was murder.[181]

Some concluding comments

[241] I see it as essential for cases involving party liability to be put to juries in a way which is as simple, and in language which is as concrete, as possible.

[242] In prosecutions arising out of group violence, such as the present, it will not always be clear to the prosecutor at the start of the trial just how the evidence will come out. For this reason, it is generally appropriate for a prosecutor to ensure that all realistic options as to party liability remain on the table. But once all the evidence has been completed, a prosecutor should usually be able to discern the strongest basis upon which the Crown case can be presented to the jury. A jury is likely to be confused if the Crown case is presented on the basis of closely overlapping alternatives associated with s 66(1) and s 66(2). As well, the more varied the liability permutations on which the judge must sum up, the more difficult it will be for the judge to identify for the jury the critical questions which they must resolve.

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[180] *Bouavong*, above n 176, at [111].

[181] As in the example which I have given above at [236].

[243] In the past, judges have sometimes deprecated the use of s 66(2)[182] and expressed a preference for the Crown to rely on s 66(1). I am inclined to think that the judges who have done so must have overlooked the background to s 66(2) which I have reviewed in these reasons and the very substantial overlap in operation between s 66(1)(b) and (c) and s 66(2). As noted in *Edmonds v R*, s 66(2) is often relied on in group violence cases and I see no reason why its use should be discouraged in favour of s 66(1)(b) and (c).[183] Indeed, where there is scope for uncertainty as to the state of mind of the alleged party, I consider that reliance on s 66(2) alone will usually be the preferable course.

Withdrawal

Withdrawal negating the actus reus of party liability.

[244] The approach of the majority, as set out in the reasons given by McGrath J, is that withdrawal arguments do not bear on the elements of an offence and can only operate through a distinct common law defence. Thus in relation to party liability under s 66(1), the majority favours an approach under which:[184]

(a) Assistance, encouragement or counselling, etc, constitutes the actus reus for liability under s 66(1)(b),(c) and (d), subject only to the intended crime being committed.

(b) Accordingly, the Crown is not required to prove any continuing connection between an act of assistance, encouragement or counselling and the eventual offence.

(c) But the alleged party's liability may be negated where the common law defence of withdrawal is available.

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182 See, for instance, *R v Curtis* [1988] 1 NZLR 734 (CA).
183 *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 at [21].
184 See the reasons of the majority above at [116].

In the case of s 66(2), the majority maintain that the Crown does not need to establish that the common purpose was current when the offence was committed but that again withdrawal may be a defence to liability which would otherwise accrue.[185]

[245] I disagree with these components of the reasoning of the majority.

[246] Section 66(1)(b) is expressed to apply to "an act for the purpose of aiding any person to commit the offence" – wording which, if construed literally, does not require actual assistance. The subsection, however, has not been construed in this way. Rather, the approach has been that the "act" must have been of actual assistance in the commission of the offence. That this is so is apparent from the careful review of the authorities by Eichelbaum J in *Larkins v Police*,[186] which I am content to adopt. Similar considerations apply to abetting, which requires actual encouragement.[187] I favour a like approach to the language of s 66(1)(d) – "incites, counsels, or procures" – albeit that where the allegation is that the defendant procured another to commit an offence, it is arguable that causation might also have to be established.[188]

[247] I can illustrate the difference between my approach and that of the majority by reference to the application of s 66(1)(c) against Ms Rameka. It will be recalled that the alleged encouragement occurred at effectively the same time as the alleged withdrawal. It seems to me to be unnecessarily artificial to approach her liability under s 66(1)(c) in two stages, as would be the result of the majority approach, of first, whether there was an act of encouragement and secondly, if so, whether the defence of withdrawal has been excluded. I think a far simpler and better approach would be to approach this aspect of the case by reference to the single question whether she, by her actions, encouraged McCallum to murder the deceased.

[248] Under s 66(2) the prosecution must establish that the defendant was a party to a common purpose and that the offence in question was committed in, and known by the defendant to be a probable consequence of, the prosecution of that common

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185 See the reasons of the majority above at [117].
186 *Larkins v Police*, above n 155, at 287–290.
187 See, for instance, *R v Shriek* [1997] 2 NZLR 139 (CA).
188 See *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773 (CA).

purpose. I cannot see how an offence can be so committed unless, at the time of its commission, the common purpose was still current as between the principal and alleged party.

[249] To date, the New Zealand approach has been that the prosecution must prove continuity of the common purpose. The requirement to do so is not usually onerous. A defendant who claims that the common purpose was brought to an end by withdrawal will usually have to point to evidence to that effect. And showing (or raising a reasonable possibility of) withdrawal is likely to be difficult, especially if based on a change of heart once the offending was underway. As well, because a person who joins a common unlawful purpose thereby encourages the other parties in their offending, communication of withdrawal will usually be required. For these reasons, it is understandable that in many cases, judges have talked about what a defendant must show to establish withdrawal.

[250] It is, however, is important to recognise the question whether an offence was committed in the prosecution of the common purpose can may turn on a number of issues, for instance as to formation, scope and intended duration. As to duration, it will be for the Crown to prove that the common purpose was not spent by the time the offence was committed. Depending on the facts of the case, it may also be necessary for the Crown to prove that it had not been abandoned by mutual consent of the principal and alleged party before the offence was committed or perhaps frustrated by the arrest of one of the parties.[189] Where possibilities of this kind are on the table, they are encompassed by the prosecution's obligation to prove continuity and, the practical considerations I have mentioned notwithstanding, I consider that this is also so where the question is whether the common purpose was brought to an end by withdrawal.

[251] More generally, the primary exculpatory effect of an alleged withdrawal is the negation of one or more of the elements of party liability. In the case of s 66(1), a defendant who relies on withdrawal is in substance denying that his or her actions, when viewed as a whole, amounted to assistance, encouragement, or counselling etc.

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[189] This was one of the issues in *R v Bentley* [2001] 1 Cr App R 307 (CA) where the defendant had been under arrest for some 15 minutes before the principal offender killed a police officer.

And in the case of s 66(2), the substance of a defence of withdrawal is to negate the assertion that the common purpose to which the defendant is said to have been a party was still in existence when the offence was committed. In this context I think it unreal to deny that withdrawal can bear on, and negate, the elements of party liability.

[252] The differences between the majority and me on this issue might be thought to be of limited practical moment and to have an academic character and I agree that there is a sense in which this is so. They are, however, of practical significance in the present case. This is because the majority, by treating withdrawal as irrelevant to the actus reus of party liability, creates space for the operation of the common law defence of withdrawal which they adopt. Although this approach leaves rather more scope than I would for withdrawal arguments in relation to liability under s 66(1)(b), I suspect that it will widen the liability net in relation to s 66(1)(c) and (d) and s 66(2).

[253] In reading the balance of this section of my reasons, it should be borne in mind that I consider that the obligation of the Crown to prove the elements of party liability will require it to negate any reasonable possibility of withdrawal which may have served to negate the elements of party liability. In relation to s 66(1)(c) and (d) and s 66(2), there is little or no practical distinction between my approach and that of the majority. The real point of difference is in respect of s 66(1)(b) and in particular whether withdrawal which does not negate assistance previously provided is a defence.

An authentic defence

[254] Although I see the approach of the majority in relation to the actus reus of party liability as novel, the idea that withdrawal may operate as a distinct defence is not new. In 1981, Professor David Lanham concluded that withdrawal could amount to a defence to party liability in circumstances where the actus reus of the alleged party was not negated.[190] This line of reasoning was picked up and developed in 2001 by Professor KJM Smith who drew a distinction between withdrawal which

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[190] David Lanham "Accomplices and Withdrawal" (1981) 97 LQR 575 at 591–592.

serves to negate elements of the offence and withdrawal which gives rise to what he termed a "true" or "authentic" defence.[191] I propose to utilise his terminology. The essence of the approach favoured by the majority is that withdrawal is an authentic defence.[192] The approach I favour is that withdrawal is not an authentic defence and withdrawal arguments should thus be determined by applying the language of s 66 to the facts of the case at hand. In other words, withdrawal can do no more than negate the components of party liability as what I will refer to as an elements of the offence defence.

Section 20 of the Crimes Act

[255] The majority suggests that withdrawal as an authentic common law defence is provided for by s 20 of the Crimes Act:[193]

> **20 General rule as to justifications**
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> (1) All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.
>
> …

A defence for the purposes of this section is available even though the elements of the offence have been made out and is thus an authentic defence.

[256] Acts or omissions that create a potential for party liability sometimes amount to discrete offences. By way of examples only, these include attempting to commit the proposed offence,[194] counselling or attempting to procure murder,[195] conspiracy[196] or participation in an organised criminal group.[197] Subsequent withdrawal from the criminal enterprise does not retrospectively erase liability for

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191 KJM Smith "Withdrawal in Complicity: A Restatement of Principles" [2001] Crim LR 769 at 770-772.
192 See the reasons of the majority above at [116]–[118].
193 See the reasons of the majority above at [118] .
194 Crimes Act, s 72.
195 Section 174.
196 Section 310.
197 Section 98A.

any such offence. Accordingly, subsequent withdrawal is not a circumstance which serves generally to justify or excuse the particular acts or omissions in issue.

[257] On the approach favoured by the majority, withdrawal as an authentic defence is nevertheless within the scope of s 20 as providing a defence to "any charge" – in this instance, the charge of being a party to the principal's offence. I accept that this approach is available on the language of s 20. But for reasons which I will come to, I do not think that it represents the correct interpretation. In my view, s 20 should be construed as applying only to defences that are general in character, in the sense of excluding all criminal liability for particular acts or omissions. This interpretation too is available on the language of the section on the basis that "or" can mean "and" and "any" can mean "every" or "all".

Section 20 in the context of a criminal code

[258] That withdrawal might negate what would otherwise be party liability was well-known, as is illustrated by Sir Edmund Plowden's notes to the ancient decision, *The Queen v Saunders*,[198] and Hale's *History of the Pleas of the Crown*.[199] As is already apparent, the language of s 66 (which is based closely on that proposed in the 1987 Draft Code) is sufficiently broad to encompass withdrawal as an elements of the offence defence.

[259] Section 20 of the Crimes Act can be traced back to s 19 of the Draft Code. In light of this, the comments of the Commissioners in respect of s 19 of the Draft Code are of interest:[200]

> We have already expressed our opinion that it is on the whole expedient that no crimes not specified in the Draft Code should be punished, though in consequence some guilty persons may thus escape punishment. *But we do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risk of a Code being so framed as to deprive an accused person of a defence to which the common law entitles him … .* While, therefore, *digesting and declaring the law as applicable to the ordinary cases,* we think that the common law so far as it affords a

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198 *The Queen v Saunders* (1576) 2 Plow 473, 75 ER 706 (QB).

199 Matthew Hale *The History of the Pleas of the Crown* (London, 1800) vol 1 at 436.

200 Criminal Code Bill Commission, above n 147, at 10 (emphasis added).

> defence should be preserved in all cases not expressly provided for. This we have endeavoured to do by Section 19 of the Draft Code.

[260] In this context, I think it is most implausible to attribute to those responsible for codification – not least the New Zealand legislature – a purpose of building concepts of withdrawal into what is now s 66 but allowing for a largely overlapping but slightly different concept of withdrawal as a defence via s 20 and its precursors. Unsurprisingly, there is nothing in the report of the Commissioners to suggest such a purpose and there is not the slightest indication in their report that what is now defined as s 20 would encompass a defence of the kind now postulated.

[261] Section 20 is the first section in pt 3 of the Crimes Act which is headed "Matters of justification or excuse". All general defences recognised explicitly in pt 3 of the Crimes Act:

> (a) relate to the circumstances at the time of the defendant's act or omission which would otherwise amount to an offence; and
>
> (b) are general in character and are not confined to a particular offence-creating provision.

In their explanation of the precursor to s 20,[201] the Commissioners' discussion of common law defences which were preserved was confined to necessity, a defence which shares the characteristics just mentioned of the defences explicitly recognised in pt 3.[202] So in this respect, the proposed defence of withdrawal, confined as it is to having effect only in relation to party liability under s 66, differs from other defences provided for by pt 3 and as contemplated by the Commissioners as being encompassed by s 20.

[262] The scheme of the Crimes Act is that defences which are particular to specific offences are provided for in the same place in the Act as the provision which provides for the offence. By way of example only, the partial defence of provocation in relation to murder was provided for in amongst the sections which provide for the

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201 At 11.

202 See *IA v R* [2013] NZSC 88, [2014] 1 NZLR 17.

offence of murder. The same remains true of the partial defence which s 180 of the Crimes Act recognises in relation to suicide pacts. There are in fact a large number of exculpatory provisions which are confined in their operation to particular liability imposing sections and, without exception, they all appear in the Crimes Act as part of, or alongside, the sections which define the offence to which they apply. All of this has occurred as part of a codification process which very much focused on defining the circumstances that give rise to criminal liability.

[263] In short, if an authentic defence of withdrawal had been envisaged, I consider that it would have appeared in pt 4 of the Crimes Act which deals with parties to the commission of offences and includes s 66. Such a defence would not have been a natural fit for pt 3 as all the defences provided for in that part are quite different in character from the proposed withdrawal defence (as already explained).

New Zealand cases as to common law defences specific to particular offences

[264] From time to time New Zealand courts have been confronted with the argument that what is said to be a common law defence specific to particular offences applies, via s 20, to the corresponding statutory offence in the Crimes Act. There are three cases to which I will refer.

[265] The first case concerned the common law principle that a husband and wife could not be found guilty of conspiring with each other and its inconsistency with the definition of conspiracy under s 219 the Crimes Act 1908 which applied to "[e]very one … who conspires with any other person". In *The King v McKechie*, Stout CJ saw the application of the common law principle as derogating unacceptably from the terms of s 219.[203] The Chief Justice was in a minority in that case,[204] but his position was ultimately to prevail with the enactment of s 67 of the Crimes Act 1961.

[266] The second case concerned the question whether absence of gross negligence was a defence to manslaughter for a death resulting from a breach of the duty of care specified in s 171 of the Crimes Act 1908. In *The King v Storey*, the Court of Appeal

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[203] *The King v McKechie* [1926] NZLR 1 (CA) at 9.

[204] The majority consisted of Sim, Reed and Adams JJ. Ostler J also dissented.

held that s 40 of the 1908 Act, corresponding to s 20 of the 1961 Act, could not be relied on, so as to import the common law defence of absence of gross negligence into the statutory offence of manslaughter.[205] Myers CJ explained why:[206]

> Section 40 is contained in Part III of the Act, under the title of "Matters of Justification or Excuse." Section 171 is not in Part III, but in a later Part of the Act, under the title "Duties tending to the Preservation of Life." Assuming the common law to be as [counsel for the appellant] contends, his argument is answered by s. 171, which supersedes the common law.

[267] The third case is *R v Cargill*, in which the Court of Appeal concluded that s 20 did not permit a claim of right defence in respect of the statutory offence of extortion.[207] The offence was defined in a way which did not provide for such a defence.

[268] The common law arguments which were relied on in the three New Zealand cases just discussed all involved the contention that the statutory provisions imposing liability should be supplemented by common law principles. Thus in *McKechie*, the successful argument was that the definition of the offence of conspiracy should be varied so as to exclude agreements solely between husband and wife. In *Storey*, the argument was that the sections in the Crimes Act imposing duties (or perhaps the definition of manslaughter) should be varied so as to make conviction for manslaughter possible only where there was gross negligence. And in *Cargill*, the substance of the appellant's argument was that the definition of the offence of extortion should be supplemented by a requirement to prove that the defendant acted without claim of right (at least where the point was properly raised). That these were simply arguments as to the definition of the relevant offences is perfectly obvious in respect of the first two examples and is at least true in substance in respect of the third.[208]

[269] It seems to me that where the Crimes Act defines the circumstances that attract a particular form of culpability, supplementation of that definition by

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205 *The King v Storey* [1931] NZLR 417 (CA).

206 At 436.

207 *R v Cargill* [1995] 3 NZLR 263 (CA).

208 The defence relied on by *Cargill* might arguably have been authentic in the sense that perhaps it was for the defendant to raise it. But it is more plausible to treat the defendant's argument as coming down to the proposition that just as absence of claim of right is an element of the offence of theft, so too should it be in respect of extortion.

reference to a defence which is specific to that form of liability is inconsistent with the concluding words of s 20, which preclude resort to common law principles if "they are altered by or are inconsistent with this Act or any other enactment".

The authorities as to withdrawal

[270] There are a great many cases which could be discussed but in the interests of proportionality I will confine myself to those relied on or cited by the majority.

[271] In *R v Pink*, Hammond J reviewed the authorities as to withdrawal.[209] In his application of the law to the facts he did not distinguish between s 66(1) and s 66(2) and he expressly did not attempt "to resolve the jurisprudential debate as to the basis of [the] 'defence'".[210] I therefore see his judgment as inconclusive as to the nature of the defence.

[272] Most of the relevant cases involved common purpose liability under s 66(2). *Rex v Whitehouse*, a Canadian case referred to by the majority and which is often cited in this context, was a common purpose case.[211] There is nothing in the judgment of Sloan JA to suggest that he saw withdrawal as an authentic defence. Indeed, it is perfectly clear that he did not consider that there might be a different elements of the offence defence sitting alongside the defence which he was prepared to recognise.[212] The dissenting judgment of Wilson J in *R v Kirkness*, also relied on by the majority, is to a similar effect because she saw the elements of the defence of withdrawal as restricting what might otherwise have been the ability of a s 66(2) party to deny that the substantive offence was committed in the prosecution of a still current common purpose.[213] Broadly similar is *R v Becerra*, also cited by the majority.[214]

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209 *R v Pink* [2001] 2 NZLR 860 (HC) at [14]–[22].

210 At [21].

211 *Rex v Whitehouse* [1941] 1 DLR 683 (BCCA) at 685.

212 The question arose in an unusual way. In issue was whether two Crown witnesses should have been treated as accomplices for the purposes of the requirement for a corroboration warning. They had embarked on a robbery with the defendant but had not participated directly in the resulting murder. The trial Judge took the view that they had withdrawn and were thus no longer parties to the unlawful common purpose at the time of the murder. The defence of withdrawal recognised by Sloan JA was more limited and, on the basis of it, they were parties to the principal's offending and there should thus have been a corroboration warning.

213 *R v Kirkness* [1990] 3 SCR 74.

214 *R v Becerra* (1975) 62 Cr App R 212 (CA).

[273] Read in context, these (and other like) judgments must proceed on the basis that the restrictive approach which they adopt to withdrawal in the context of common purpose liability reflects the substantive law as to when a particular offence will be held to have been committed in the prosecution of an extant common purpose. They are thus best analysed as supporting my elements of the offence approach.

[274] What makes the common purpose cases a little difficult to analyse is that the judges were not explicit as to the basis of their decisions. I should note, however, that there are a number of common purposes cases where courts have referred to the view that in a common purpose case, a defence of withdrawal may simply be a denial that the elements of party liability have been made out. Thus in *R v O'Flaherty*, a case cited by the majority, it was suggested that the issue of withdrawal "may be no more than a consideration of the scope of the joint enterprise".[215]

[275] I turn now to look at the authorities which are more referable to s 66(1)(b).

[276] *R v Whitefield* might, at first sight, be thought to provide some support for the majority's approach.[216] Whitefield had told an associate, Gallagher, that the flat next door to him was unoccupied. Whitefield and Gallagher formed a plan to use Whitefield's flat to facilitate the burglary of the other flat. Whitefield subsequently told Gallagher that he did not want to be involved but, despite this, Gallagher and another person went ahead and burgled the flat anyway. Whitefield knew that the burglary was going to take place on a particular night and heard it happen that night but did nothing to stop it. The trial Judge said that withdrawal was not a defence. The Court of Appeal disagreed and allowed the appeal.

[277] In my view, Whitefield had provided assistance to Gallagher with a view to facilitating the burglary when he told him that the flat was unoccupied and was thus ripe for burgling. So I consider that he would have been liable under s 66(1)(b). On that basis, the case might be thought to suggest that withdrawal can amount to an

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215 *R v O'Flaherty* [2004] EWCA Crim 526, [2004] 2 Cr App R 20 at [63].
216 *R v Whitefield* (1984) 79 Cr App R 36 (CA).

authentic defence. That, however, is not the basis upon which the Court of Appeal decided the case. The possibility that Whitefield was an aider, and thus liable under s 66(1)(b), was overlooked. Rather the Court considered that Whitefield's potential liability as a party was based upon him having counselled Gallagher to commit the burglary, a counselling which he could withdraw by notice to the effect that if Gallagher went ahead it would be without his aid or assistance.[217]

[278] In *White v Ridley*, the defendant had sent cannabis to himself from overseas.[218] On his arrival in Australia, the customs authorities expressed some interest in the consignment note, which he had in his possession. He then tried to have the shipment cancelled but was unsuccessful. The package arrived in Australia and was opened by customs and he was later found guilty of importing cannabis. There were five different judgments in the case. Although the case turned on offending by an innocent agent (being the airline which carried the package), party liability principles were seen as being relevant by analogy. I accept that the judgment of Gibbs J provides some support for the view that withdrawal operates as an authentic defence, albeit that again this was on a restrictive basis. In other words, the defence recognised by Gibbs J was narrower than the simple elements of the offence on which the appellant relied.[219] On the other hand, the judgments of Stephen, Aickin and Jacobs JJ simply looked at the case in terms of the elements of the offence and therefore focused on causation (in the case of Stephen and Aickin JJ) and mens rea (in the case of Jacobs J). The fifth judge, Murphy J, based his judgment on deficiencies in the case stated. What is significant about the case from my point of view is that a majority of the judges proceeded on bases which are closely akin to my elements of the offence approach.

[279] Also mentioned by the majority is the Queensland case, *R v Menniti* in which a majority of the Court of Criminal Appeal, after referring to *White v Ridley*, also took an elements of the offence approach.[220]

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217 See 39–40.

218 *White v Ridley* [1978] 140 CLR 342.

219 Effectively that because he tried to stop the importation he had not relevantly imported the drugs and that in any event there was no mens rea at the time of the importation.

220 *R v Menniti* [1985] 1 QR 520 (CA).

[280] I am aware of only one case which proceeds expressly on the basis of withdrawal as an authentic defence and which may be relied on despite the elements of liability for aiding and abetting having been established. This is the 2013 judgment of the Supreme Court of Canada in *R v Gauthier*.[221] As the Court recognised, withdrawal had not previously been explicitly recognised as providing a defence to liability as an aider and abettor. It is fair to say, however, that the Court's basis for concluding that withdrawal was an authentic defence (albeit in limited circumstances) seems to have been primarily on the basis that it considered that this had previously been implicitly accepted[222] and most of the associated discussion is devoted to why the defence should only be recognised in limited circumstances.

Policy

[281] In their reasons, the majority explains the policy underlying the proposed defence of withdrawal in this way:

> [122] The main reason for allowing the defence is the potential beneficial effect of withdrawal by a party in preventing the commission of the crime and thus avoiding the harm it will cause. Withdrawal by one party may dissuade or frustrate a principal from committing the offence.

[282] I confess to seeing this policy consideration as unrealistic. This is for two reasons:

(a) Those who have incurred potential liability as a party and are contemplating withdrawal may appreciate at a very general level that the more quickly and decisively they withdraw and the more effectively they negate their earlier actions (particularly if they stop the offence occurring) the better off they are likely to be later. But it is not very plausible to assume that people in that situation have sufficient knowledge of the criminal law (or are in the frame of mind) such that their actions will be affected by whether the Court adopts the majority's approach or my approach.

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221 *R v Gauthier* 2013 SCC 32, [2013] 2 SCR 403.
222 At [41].

(b) In any event, my approach provides a stronger incentive for a party to stop the offending because on the majority's approach ineffective attempts to do so are more likely to provide a defence.

[283] Leaving aside the practical problems just mentioned, the primary significance of the authentic defence approach is that a defendant who intentionally assisted the principal offender to offend may, in some circumstances, rely on a defence of withdrawal even though the assistance provided (a) was not negated, and (b) materially facilitated the commission of the offence. There is obviously scope for debate whether the more appropriate outcome for such a defendant is an acquittal or simply an argument by way of mitigation of penalty. For myself, however, I see that debate as having been resolved by the legislature and by the text of s 66.

Why I would allow Ms Rameka's appeal and dismiss Ms Ahsin's appeal

A preliminary comment

[284] As I will explain, I think that the resolution of the two appeals is relatively straight-forward, albeit that the reason why I would allow Ms Rameka's appeal differs from that of the majority and, in respectful disagreement with the majority, I would dismiss Ms Ahsin's appeal.

[285] The majority has rejected a number of the arguments advanced by the appellants and, in respect of those arguments, I am content to adopt the reasons of the majority.[223] In this section of my judgment, I will therefore confine myself to some general comments on the Judge's summing up, discussion of the withdrawal defences in respect of both appellants and the particular reasons why I would allow Ms Rameka's appeal and dismiss that of Ms Ahsin.

The Judge's summing up

[286] I should acknowledge at the outset that the task of the Judge was made unnecessarily difficult. This is because the case against both Ms Ahsin and Ms Rameka was advanced under both s 66(1)(b) and (c) and s 66(2). In her closing

[223] See the reasons of the majority above at [98]–[101] and [197]–[198].

address, counsel for the Crown had not sought to differentiate between the two subsections but had asserted both active participation (including encouragement) in the attack on the deceased and, as well, common purpose liability.

[287] There were some difficulties with the way the Judge summed up. The Judge did not identify in simple and concrete language – and on a defendant-by-defendant and count-by-count basis – what the Crown had to establish to secure verdicts of guilty. There are some particular issues in the summing which, on my approach, are primarily material to the case against Ms Ahsin and I will deal with them in that context.

Withdrawal – Ms Ahsin

[288] The words of alleged withdrawal relied on were shouts of "that's enough", "get in the car", "the police are coming" and "come on, let's go". It is unclear whether these shouts came from Ms Rameka or Ms Ahsin or perhaps both. For this reason, I will assume that it is reasonably possible they could have come from either of them.

[289] On my approach to withdrawal, nothing that Ms Ahsin may have said could be a defence in respect of s 66(1)(b). On the Crown case she had deliberately stopped the car near the deceased with the intention of facilitating what she knew would be a murderous attack. The only way she could avoid liability for murder was to prevent McCallum killing the deceased.

[290] To find Ms Ahsin guilty under s 66(2), the jury had to be satisfied that the murder occurred in the course of the implementation of a common purpose and thus that Ms Ahsin was still a party to that common purpose at the time of the murder. The question whether this was so was thus one which the jury had to address and therefore had to be left to the jury, as it was. That said, I do not see much substance in the contention that the shouted words served to remove Ms Ahsin from the common purpose.

[291] Ms Ahsin's principal role in the offending was as the driver of the car. She had driven up to and stopped beside the deceased. It is clear that it was envisaged by

all concerned that she would wait in the car while McCallum and Rippon assaulted the deceased and then drive them away when they had finished. This is exactly what she did. Her shouts to McCallum were consistent with her role, in that she was inviting McCallum to return to the car so that she could drive him away. I accept that the shouts could be seen as a late indication that Ms Ahsin did not wish McCallum to murder the deceased. It is, however, perfectly clear that, despite such apparent reservations, she remained and continued to play her part in the implementation of the underlying common purpose by waiting until McCallum had finished and then driving him away. To me, the evidence supports not withdrawal from the common purpose but rather a continuing participation in its implementation.

Withdrawal – Ms Rameka

[292] At trial, Ms Rameka did not suggest that the shouts had originated with her and was content to allow them to be attributed to Ms Ahsin. The proposition that they may have originated with her was advanced for the first time in this Court. If the outcome of her appeal turned on this point, I would have required some convincing – and perhaps sworn evidence – before being prepared to entertain this proposition and particularly any criticism of the summing up based on complaints that the Judge did not adequately deal with a line of argument which, as a result of what must have been a tactical decision made by Ms Rameka and her counsel, was not raised at trial. For the purposes of the present discussion, however, I will put this point to one side.

[293] Unless the jury was sure that Ms Rameka encouraged McCallum's murderous assault on the deceased, it could not convict her under s 66(1)(c). If the jury thought it is possible that she had made the remarks in question, it may have been left in doubt whether any encouragement she had earlier given was current at the time of the fatal assault. If so, the jury would have found her not guilty on the basis that the elements of the offence had not been made out. As is apparent from what I have already said, on my approach to what the Crown had to show to establish liability under s 66(1)(c), the defence of withdrawal which the majority regards as tenable in respect of this aspect of the case serves no useful purpose. This

is because a jury which accepted the defence (in the sense of seeing it as reasonably possible) would have already concluded that encouragement had not been established.

[294] In respect of s 66(2), Ms Rameka faces problems which are similar to, but not as acute as, those already discussed in respect of Ms Ahsin. In her favour is the fact that her role in the implementation of that purpose was less tangible than that of Ms Ahsin. Since that role came down to encouragement, a clear cessation of such encouragement and disapprobation of McCallum's actions could represent a withdrawal by her from the common purpose. Arguably the shouted words were sufficient. But, as with Ms Ahsin, the expression of a wish that McCallum not kill the deceased does not necessarily represent a withdrawal from the common purpose. So I think it would be legitimate for a jury to conclude that, despite the shouted words, she remained a party to the common purpose in that she stayed at or by the car and at the conclusion of the assault left the scene with McCallum.

Why I would allow Ms Rameka's appeal

[295] The Court of Appeal was satisfied that it was open to the jury to convict Ms Rameka under s 66(2).[224] I agree. This is because:

(a) It was open to inference that there was a common purpose to which Ms Rameka was a party, which encompassed looking out for and attacking, with likely fatal consequences, anyone thought to be associated with the Mongrel Mob and that she (along with the others) had agreed to assist each other in facilitating this common purpose.

(b) Such assistance was to be provided by her in the form of presence, support and encouragement.

(c) The murder was committed in the prosecution of this common purpose.

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[224] *Rameka v R*, above n 175, at [134].

[296] The Court of Appeal, following a very careful review of the evidence, reached the view that there was insufficient evidence against Ms Rameka to support a conviction based on s 66(1). In doing so, the Court of Appeal focussed almost exclusively on the evidence of what happened at the time of the fatal assault. It concluded that it was not open to the jury to conclude that Ms Rameka had pushed the deceased out of the car and that the evidence was too equivocal to enable the jury to conclude that she had been yelling encouragement at the critical time.[225] I agree with the conclusion of the Court of Appeal on this point.[226]

[297] This is not to say that the Crown was not entitled to rely on s 66(1). If the jury concluded that Ms Rameka was a party to the common purpose of the kind referred to in [295](a) and that the assistance she had agreed to provide was by way of presence, support and encouragement, the jury would have been entitled to infer that her presence at the time of the final assault was itself by way of encouragement and would thus have been entitled to find her guilty under s 66(1), irrespective of the difficulty of attributing to her anything actually said or done at the time of that assault. Unsurprisingly (given that such an approach to liability would have simply duplicated the Crown's s 66(2) argument) the case was not put to the jury on this basis.

[298] What troubles me is the risk that despite the absence of an adequate evidential foundation, the jury (or some of its members) may have concluded that Ms Rameka was guilty on the basis that she provided assistance or encouragement to McCallum at the time of the murder. I see this risk as being more than theoretical given that the case against Ms Rameka under s 66(2) was not overwhelming. This is not to say that what happened at the scene had to be put to one side. In assessing the case against Ms Rameka under s 66(2) – including the nature and scope of the underlying common purpose, her role, if any, in it, and the foreseen probable consequences of its implementation – the jury was entitled to take into account the evidence as to her behaviour at that time. But what the Judge should have told the jury is that this behaviour did not in itself warrant a finding of guilty. All of this is a

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225 At [118].

226 Compare the reasons given by the majority above at [168].

slightly long-winded way of saying that the case against Ms Rameka should most logically have been put to the jury solely on the basis of s 66(2).

[299] This is not a retreat from my views on unanimity. On the approach taken by the Court of Appeal, which I adopt, the evidence in support of the case as presented against Ms Rameka under s 66(1)(b) and (c) (which focussed on what happened after the car stopped) was insufficient to support a conviction. It was therefore not open to the jury to conclude that she was guilty under s 66(1)(b) or (c). On the particular facts, and allowing for the way the Crown presented it case, it was therefore also not open to the jury to conclude that if Ms Rameka was not liable under s 66(2), she was necessarily guilty under s 66(1)(b) or (c).

[300] For those reasons I would allow Ms Rameka's appeal, quash her conviction for murder and direct a retrial.

Why I would dismiss Ms Ahsin's appeal

[301] If the Judge was going to sum up on both s 66(1) and s 66(2) in respect of Ms Ahsin, he should have told the jury that they could find Ms Ahsin guilty:

(a) under s 66(1)(b) and (c) if sure that she knew that McCallum would assault the deceased with murderous intent and intentionally assisted and encouraged him to do so by stopping the car beside the deceased, moving the car during the attack, shouting encouragement and generally acting as a get-away driver; or

(b) under s 66(2) if sure that she was a party to a common purpose to attack people thought to be associated with the Mongrel Mob and to assist each other in carrying it out, that McCallum murdered the deceased in the implementation of that common purpose and that she knew that murder was a probable consequence of the carrying out of the common purpose.

[302] I consider that there were the following errors in the summing up and question trail:

(a) In the summing up, the Judge did not make it clear that Ms Ahsin's liability under s 66(1)(b) depended on her assistance being intentional. This was, however, correctly addressed in the question trail.

(b) The question trail did not direct the jury's attention to the need for the murder to have been carried out in the furtherance of the common purpose. This was addressed in the summing up.

(c) In the question trail the direction as to the required foresight was that a "killing could well happen" rather than murder. Again this was correctly dealt with in the summing up.

(d) In the summing up the Judge did not refer to the necessity for the jury to be aware of McCallum's murderous intent albeit that this was referred to in the question trail.

[303] It seems to me to be sensible to focus primarily on the question trail which jurors had with them during their deliberations and which they must have used as an agenda for their deliberations. Accordingly, I do not regard correct statements of the law in the summing up as negating errors in the question trail but, on the other hand, am not troubled by the error in the summing up referred to in [302](d) which was not repeated in the question trail. This leaves in contention the first three errors mentioned in [302].

[304] I do not think it significant that the question trail did not expressly address whether Ms Ahsin's assistance was intentional. The question trail relevantly asked whether the defendants incited, aided or encouraged McCallum in his assault on the deceased. The next question came down to whether the defendants did so with an awareness that McCallum would attack the deceased with murderous intent. The stopping of the car beside the deceased must have been deliberate. And if Ms Ahsin

did so knowing that this would result in a murderous attack by McCallum on the deceased, as the jury must have concluded, she was plainly guilty of murder.

[305] The second error seems to me to be equally inconsequential. It is true that the question trail should have directed the attention of the jury to whether the murder occurred in the prosecution of the common purpose but did not do so. On the other hand given the scope of the common purpose alleged by the Crown (to intimidate and assault those thought to be associated with the Mongrel Mob) and the complete absence of any reason other than the implementation of this common purpose for the attack on the deceased, the conclusion that the attack occurred in the implementation of the common purpose was inescapable provided that the common purpose was still current at the time. And as to this, the question trail did address withdrawal.

[306] I was initially more troubled by the third of these errors (foresight of a "killing" but not murder) but, on reflection, see it as also being of no substantial moment. An intention to inflict violence (in a context where weapons are to hand) and a recognition that death is a probable consequence are practically indistinguishable from an intention to inflict bodily injury with an awareness that death is likely to result. In other words, a party to the common purpose alleged who knew that a killing was probable would necessarily also have recognised that murder was probable (or to be more particular, that death would result from an assault with intent to cause injury with foresight of, and recklessness as to, the likelihood of death).

[307] More generally, the jury must have concluded that Ms Ahsin had the necessary mens rea – broadly, an awareness that a murderous attack was probable and a willingness to assist (principally in the form of driving) despite this awareness. Given the significance of Ms Ahsin's physical involvement in the events that led to the murder, the finding that she had the necessary mens rea led inexorably to the conclusion that she was guilty of murder.

[308] Although I am critical of the structure of the summing up, the question trail the Judge provided would have enabled the jury to follow a logical path to the verdict they reached and I cannot see how the imperfections which I have identified could have resulted in this process miscarrying.

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