

The following are suggested solutions to the problem questions on pages 275–276. They represent answers of an above average standard. The ILAC approach to problem-solving as set out in the ‘How to Answer Questions’ section of the preliminary pages of the *Criminal Law Guidebook Second Edition* has been used in devising these solutions.

## **SCENARIO 1**

- (1) In relation to the offences of cultivating and supplying cannabis, it is arguable that Tom (T), Rick (R) and Harry (H) are all principal offenders. It is not clear from the facts which specific roles each man takes, but their responsibility can be analysed in terms of each being a joint principal in the first degree, or as acting together in concert (a joint criminal enterprise) for the following reasons.

### **Cultivation of cannabis**

Depending on the physical conduct of each man in growing the cannabis, they may jointly commit all the acts necessary to complete the actus reus of a cultivation offence<sup>1</sup>. This offence includes actions such as preparing soil, sowing, fertilising, tending and caring for the plants, and harvesting the crop<sup>2</sup>. Then, if they individually carry out any of these acts with the intention to cultivate prohibited, controlled or narcotic plants, namely cannabis, then T, R and H are each joint principals in the cultivation of cannabis. This is a form of primary liability that applies in all jurisdictions.

In South Australia, if T, R and H are prosecuted under s 33B *Controlled Substances Act 1984* (SA) rather than s 33K, then the cannabis plants must be cultivated with the intention to sell them or their products, or at least in the belief that another person intends to do so. It is apparent that T, R and H also deal in cannabis, so this intention to sell can be established and the liability of each for a s 33B offence can be proved beyond reasonable doubt.<sup>3</sup>

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<sup>1</sup> *Drug Misuse and Trafficking Act 1985* (NSW) ss 23(1) – (2) depending on the quantity of the prohibited plants cultivated; *Controlled Substances Act 1984* (SA) ss 33B(1) - (3), 33K depending on the quantity of the controlled plants cultivated; *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 72-72B depending on the quantity of narcotic plants cultivated. Cannabis is: a prohibited plant under *Drug Misuse and Trafficking Act 1985* (NSW) Schedule 1; a controlled plant under *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* (SA) Schedule 3, Part 2; a narcotic plant under *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70 and Schedule 11.

<sup>2</sup> *R v Giorgi and Romeo* (1981) 7 A Crim R 305. Also see definitions of ‘cultivate’ in *Drug Misuse and Trafficking Act 1985* (NSW) s 3; *Controlled Substances Act 1984* (SA) s 4; and *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(1).

<sup>3</sup> The particular sub-section of s 33B *Controlled Substances Act 1984* (SA) under which T, R and H are charged will depend on the particular quantity of cannabis plants that they have cultivated.

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Alternatively, if there is an agreement between T, R and H to cultivate the cannabis plants without each of them being physically involved in an act of cultivation, then the prosecution will rely on the agreement as establishing a joint criminal enterprise, or that T, R and H were acting in concert or with a common purpose to cultivate cannabis. This is a form of primary liability at common law and applies in New South Wales and South Australia.<sup>4</sup> It can be inferred from the given facts that the three men know each other well, have been involved in a 'business' of growing and selling cannabis for some time, and have an agreement in relation to this 'business'. Accordingly, the acts of one in relation to cultivation of cannabis become the acts of the others, so that 'they each incur primary liability for acts of all offenders, whether they have carried out some, all or none of the physical acts'<sup>5</sup>.

There is a requirement that the offenders be present at the scene of the offence to be acting in concert, however, this has been liberally applied and 'continuing presence is not essential'<sup>6</sup>, particularly in a crime of this nature, which naturally extends over a lengthy period of time. The individual intention of each of T, R and H can also be inferred from their agreement to grow cannabis. It is clear that this is the intended crime by each man, and it is not necessary to consider extended joint criminal enterprise or extended common purpose.

In Victoria, by entering into agreement, arrangement or understanding with one another<sup>7</sup> to commit the offence of cultivation of cannabis, T, R and H can be each charged with being 'involved in the commission' of this offence under s 324(1) *Crimes Act 1958* (Vic). Each derives liability from the agreement for the commission of the acts of cultivation with the relevant intention and their particular roles do not have to be determined for a finding of guilt to be made.<sup>8</sup>

### **Supply of or trafficking in cannabis**

This reasoning can also be extended to the supplying of or trafficking<sup>9</sup> in cannabis by T, R and H. Again, the individual physical involvement of each man in the actual selling and distributing of the cannabis, after it has been harvested and prepared for sale, is not clear from the facts. It is clear, however, that they are 'dealers' and are in the business of supplying most of the cannabis to their small regional town. Accordingly, depending on the jurisdiction, T, R and H will

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<sup>4</sup> The common law doctrines of acting in concert, joint criminal enterprise and common purpose (including extended common purpose) have been abolished in Victoria – see *Crimes Act 1958* (Vic) s 324C(2).

<sup>5</sup> *Osland v The Queen* (1998) 197 CLR 316 per McHugh J at 344.

<sup>6</sup> *R v Franklin* (2001) 119 A Crim R 223, 270-271.

<sup>7</sup> *Crimes Act 1958* (Vic) s 323(1)(c).

<sup>8</sup> *Crimes Act 1958* (Vic) s 324B.

<sup>9</sup> The term 'trafficking' is used to apply to dealing in controlled drugs in South Australia and a drug of dependence in Victoria where the dealing takes place within a commercial setting – see *R v Holman* (1981) 4 A Crim R 446. As T, R and H grow their cannabis to sell as part of a business, then 'trafficking' as opposed to 'supplying' is the relevant offence in South Australia and Victoria.

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be jointly responsible for supplying prohibited drugs<sup>10</sup>, or trafficking in controlled drugs or a drug of dependence<sup>11</sup>.

As analysed above in relation to the cultivation of cannabis, T, R and H may each be joint principals, depending on who commits the actus reus of supply or trafficking the cannabis, that is, the acts involved in the commercial transactions such as selling or delivery of the drugs<sup>12</sup>. Each has the intention to supply or traffic in the drug, which can be established through individual knowledge that the substance they are selling is cannabis<sup>13</sup>.

The alternative scenario is again based on the existence of an agreement that extends to acts amounting to supplying or trafficking in cannabis. As long as T, R and H have each agreed to the selling and distributing of the cannabis as part of their business, then they are acting in concert or involved in a joint criminal enterprise or common purpose at common law. The acts of each of them become the acts of the others, and the mens rea of each man can be inferred from their agreement. The business arrangement extending to dealing in cannabis is presented in the facts in a straightforward way so that supply or trafficking are agreed offences, and extended joint criminal enterprise liability does not need to be analysed.

In Victoria, the alternative scenario is again charging T, R and H for each being involved in the commission of trafficking in a drug of dependence through their agreement, arrangement or understanding to commit this offence.<sup>14</sup>

(2) As to the death of Vincent (V), it is first necessary to analyse the liability of Max (M) as he must be considered the principal offender. The liability of T, R and H may derive from M and each will be separately analysed.

### **Liability of Max for the death of Vincent**

Max (M) has been charged with murder on the basis that he committed the act that caused Vincent (V)'s death with reckless indifference to human life, that is, being aware that it is probable that death or grievous bodily harm would result

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<sup>10</sup> *Drug Misuse and Trafficking Act 1985* (NSW) ss 25(1) - (2) depending on the quantity of cannabis involved.

<sup>11</sup> *Controlled Substances Act 1984* (SA) ss 32(1) – (3) depending on the quantity of cannabis involved; *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 71 – 71AC depending on the quantity of cannabis involved.

<sup>12</sup> *Drug Misuse and Trafficking Act 1985* (NSW) s 3; *Controlled Substances Act 1984* (SA) s 4; *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 4, 70(1) and (2). Also, see *R v Trudgeon* (Unreported, CCA (NSW), 16 December 1988).

<sup>13</sup> *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Saad v The Queen* (1987) 70 ALR 667.

<sup>14</sup> *Crimes Act 1958* (Vic) ss 323(1)(c) and 324(1)

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from his conduct<sup>15</sup>. It is clear that V died as a result of one of the several shots that M fired through the rear door of the restaurant; it is the 'substantial and operating' cause<sup>16</sup> of V's death. There may, however, be difficulty in proving the mens rea of M for murder, as he had decided to leave and abandon the plan to kill V when he was seen in the alley outside the restaurant with the handgun. The shots he then fired through the rear door of the restaurant were fired in the hope that he would scare V, and not to kill him. In these circumstances, the defence could argue that M may have realised there was a possibility that V would be killed or seriously injured, however, that is insufficient for proof of recklessness for murder. To counter this, the prosecution may contend that M's firing of several shots with the knowledge that V was working inside the restaurant is evidence of M's recklessness, as it can be inferred from doing this that M was aware of the probability of causing V's death or serious injury to him. Overall on the known facts, particularly if M gives credible evidence of his reason for firing the shots, it will be difficult for the prosecution to prove the mens rea for murder beyond reasonable doubt. Thus, the alternative charge of manslaughter must be considered<sup>17</sup>.

The prosecution would argue in the alternative that M was liable for the manslaughter of V on the basis of the commission of an unlawful and dangerous act<sup>18</sup>. The firing of a handgun in a public place towards a building is an unlawful act, in that it amounts to a breach of the criminal law<sup>19</sup>. The fact the gun was fired several times in close proximity to the door of a restaurant with people inside is evidence that the conduct was dangerous in carrying with it an 'appreciable risk of serious injury'<sup>20</sup>. Manslaughter involves an objective test of dangerousness, so M's stated intention only to scare V is not determinative in the circumstances and it is likely M would be found liable for manslaughter.

### **Liability of T for the death of V**

It is strongly arguable that T is also responsible for the death of V as a principal offender at common law; in that he formed the agreement with M for the contract killing of V. T met M at the scene of the killing and supplied M with a shotgun and the money. It seems that T did not stay at the scene with M until

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<sup>15</sup> *Crimes Act 1900* (NSW) s 18 (death only in New South Wales – see Chapter 7 p 161); *La Fontaine v The Queen* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464.

<sup>16</sup> *R v Smith* [1959] 2 QB 35; *R v Hallett* [1969] SASR 141; *R v Moffatt* (2000) 112 A Crim R 201.

<sup>17</sup> Manslaughter is always a common law alternative to a charge of murder and does not need to be expressly charged – see *R v Downs* (1985) 3 NSWLR 312.

<sup>18</sup> *R v Coomer* (1989) 40 A Crim R 417; *Wilson v The Queen* (1992) 174 CLR 313; *R v Presley* (2015) 122 SASR 476, 489.

<sup>19</sup> *Pemble v The Queen* (1971) 124 CLR 107; *R v Pullman* (1991) 58 A Crim R 222. Examples of relevant criminal offences are 'Firing a firearm in or near a public place' (*Crimes Act 1900* (NSW) s 93G(1)(b)) and 'Firing a firearm at a building with reckless disregard for the safety of any person' (*Crimes Act 1900* (NSW) s 93GA(1)).

<sup>20</sup> *Wilson v The Queen* (1992) 174 CLR 313, 332.

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the precise time that M shot V, however, T was the organiser and was initially present to show M the restaurant where V worked. It may be argued that the continuing presence of T is not essential<sup>21</sup> to incur primary liability as a joint principal or to be acting in concert or a common purpose with M<sup>22</sup>; however the offence is not of a continuing nature. T's liability would then need to be analysed in terms of being derivative as an accessory before the fact, due to his earlier acts in procuring M and providing information and equipment. There is, however, an alternative argument that T was constructively present when M killed V, and thus still incurred primary liability.

T may be constructively present<sup>23</sup>, as it can be rationally inferred from known facts that T was waiting for M in a vehicle nearby to escape from the scene. M fired several shots hoping to at least scare V and to convince T to let him keep the money, so it is strongly arguable that this strategy was used by M knowing that T was nearby and would have heard the shots fired. Since T had the intention to kill V, as well as being constructively present when M fired the gun, he would be liable for the acts of M as a principal offender<sup>24</sup>. As T had the mens rea for murder, it is likely that he would be found liable for this crime even though it is likely that M's ultimate liability would be for manslaughter<sup>25</sup>. The crime agreed between M and T, that is the killing of V, was committed, so accessorial or extended joint criminal enterprise liability does not arise for consideration on this analysis. Also, the fact that M did not ultimately use the gun supplied by T, but rather used his own handgun, is only a matter of detail. Even though T told M to follow his instructions to the letter, M's use of the handgun does not affect T's liability for the death of V. The fundamental agreement between T and M was to kill V and the change of weapon does not alter this agreement in any material way.

### **Liability of R for the death of V**

Turning to R's liability for the death of V, it is apparent that approximately one month before the killing of V, R agreed with T to find someone to kill V if the situation in relation to their drug business did not improve. R agreed with T that they would offer 'fifteen grand' and T's sawn-off shotgun could be used. Over the ensuing month the cannabis business did continue to decline and T's agreement with R to find someone to kill V for 'fifteen grand' was still in

<sup>21</sup> *R v Franklin* (2001) 119 A Crim R 223.

<sup>22</sup> If relying on the agreement rather than being a joint principal, then in Victoria this means that T would be charged with being involved in the murder of V under s 324(1) *Crimes Act 1958* (Vic).

<sup>23</sup> *R v Russell* [1933] VLR 59, 64-67; *R v McCarthy and Ryan* (1993) 71 A Crim R 395; *R v Choi (Pong Su) (Ruling No 21)*, *Re: R v Ta Song Wong* [2005] VSC 96. In Victoria, T may be involved in the commission of an offence even if he is not physically present when the offence is committed - *Crimes Act 1958* (Vic) s 323(3)(a).

<sup>24</sup> *Osland v The Queen* (1998) 197 CLR 316.

<sup>25</sup> *Matusевич v The Queen* (1977) 137 CLR 633; *Markby v The Queen* (1978) 140 CLR 108; *Osland v The Queen* (1998) 197 CLR 316 per McHugh J at 343-347.

## **Criminal Law Guidebook Second Edition – Chapter 10: Extending Criminal Responsibility**

existence. Arguably, from this arrangement, R has the intention to kill V, however, the facts do not raise a strong basis for a joint criminal enterprise between R, T and M at common law. R was not specifically part of the later agreement with M to kill V for \$20,000, and he was not present in any way when the killing of V took place. Although the increase in the contract price by \$5,000 is not material, it is clear that there were two days between when T and M made the agreement and the killing of V took place, giving T time to consult R about this specific arrangement with M. R was not consulted on known facts and did not take part in any of the acts that resulted in V's death, so it would be difficult to establish primary liability in R.

On the other hand, it is arguable that R has derivative liability for the death of V on the basis of being an accessory before the fact, or through the application of the doctrine of extended joint criminal enterprise at common law.

First, considering general principles of responsibility as an accessory, R must have (i) known all of the essential matters that made the killing of V a crime, that is, knowledge that the principal committed or planned to commit the *actus reus* together with the *mens rea* required for murder; and (ii) intentionally aided, abetted, counselled or procured the acts of the principal offender.<sup>26</sup> R knew that T was planning to find and pay someone to kill V, that is, commit the act causing death with the intention required for murder. Although R has no specific knowledge of M, he was part of the initial agreement with T, the other principal offender in the death of V, and the *mens rea* of R's accessorial liability can be established beyond reasonable doubt.

The *actus reus* of R's accessorial liability lies in counselling or procuring the commission of the offence, as he was not present when the murder of V took place. Counselling involves advice or encouragement prior to the commission of the offence, and has been interpreted as meaning 'urged' or 'advised'<sup>27</sup>. Procuring goes beyond mere encouragement and involves acts designed to bring about the commission of the offence<sup>28</sup>. The relevant conduct of R is his agreement with T to offer 'fifteen grand' from their business to someone to kill V. These acts of instigation are a form of encouragement by R for T to set up a contract killing of V, and a causal connection between this conduct and the commission of the offence can be established, as it continues until countermanded or the offence is perpetrated<sup>29</sup>. There is no evidence of R countermanding the agreement with T, so it is strongly arguable that R is liable for the death of V as an accessory before the fact, even though he was not part of the specific arrangement with M to kill V.

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<sup>26</sup> *Giorgianni v The Queen* (1985) 156 CLR 473; *R v Stokes and Difford* (1990) 51 A Crim R 25.

<sup>27</sup> *R v Taylor* (1875) LR 2 CCR 147; *R v Webbe* [1926] SASR 108; *R v Calhaem* [1985] QB 808.

<sup>28</sup> *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773.

<sup>29</sup> *R v Banks* (1873) 12 Cox CC 393.

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Alternatively, if R argues that he did not know that T would arrange with M to commit murder and therefore did not intend to aid and abet that type of offence<sup>30</sup>, then consideration must be given to R's liability by application of the common law doctrine of extended joint criminal enterprise or extended common purpose. R may argue that the offence of murder was outside the scope of the agreement that he had made with T, which was simply to seek out someone to kill V, but not to actually go through with it. The prosecution would likely argue that there was an agreement to kill V as long as someone could be found who would do it. The actual murder of V, which was ultimately arranged by T, was within the scope of this original agreement between T and R, even though more money was paid to M than the offer initially stated by T during his discussions with R. The resolution of this issue would turn on how the fact-finder characterises the scope of the agreement between T and R based on evidence of that agreement and its details. On the given facts, it is strongly arguable that the actual killing of V was contemplated as a possible outcome of the carrying out of the agreement between T and R, making R liable as part of an extended common purpose to kill V<sup>31</sup>. This is not a case where the offence committed was outside the scope of the common purpose, and R continued to participate with individual foresight of the possibility of the murder of V<sup>32</sup>.

In Victoria, R's derivative liability will be charged as him being involved in the commission of V's murder under s 324(1) *Crimes Act 1958* (Vic). In this instance the meaning of 'being involved in the commission of an offence' extends to intentionally assisting or encouraging the commission of the offence<sup>33</sup>, entering into an agreement to commit the offence<sup>34</sup>, or entering into an agreement to commit another offence where R is aware that it was probable that the offence charged would be committed in the course of carrying out the other offence.<sup>35</sup> R does not have to be physically present when the offence is committed to be involved in its commission.<sup>36</sup> Accordingly, similar to the analysis of R's complicit liability at common law above, by applying any one of these alternative meanings to R's involvement in V's murder his liability for this offence could be established in Victoria.

### **Liability of H for the death of V**

Finally, as to H's liability for the death of V, it is strongly arguable that although H was part of the joint criminal enterprise with T and R to grow and sell

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<sup>30</sup> *R v Bainbridge* [1960] 1 QB 129.

<sup>31</sup> *Johns v The Queen* (1980) 143 CLR 108.

<sup>32</sup> *McAuliffe and McAuliffe v The Queen* (1995) 183 CLR 108.

<sup>33</sup> *Crimes Act 1958* (Vic) s 323(1)(a).

<sup>34</sup> *Crimes Act 1958* (Vic) s 323(1)(c).

<sup>35</sup> *Crimes Act 1958* (Vic) s 323(1)(d).

<sup>36</sup> *Crimes Act 1958* (Vic) s 323(3)(a).

## **Criminal Law Guidebook Second Edition – Chapter 10: Extending Criminal Responsibility**

cannabis, he was never part of any agreement to kill V. When T raised the possibility of having V killed, H replied angrily, 'Don't be ridiculous, we grow weed, we're not murderers; if that's what you two want to do I don't want any part of it.' At this point, H stormed out of their strategy meeting and was not aware of the agreement between T and R. Accordingly there is no basis to argue primary liability or extended common purpose liability of H for the death of V.

H may have been aware of the possibility of an agreement to kill V, particularly when funds to pay for the killing were seemingly drawn by T from business funds, but this is not sufficient for accessorial liability, as H has not done anything to facilitate the commission of the crime with knowledge of the essential matters<sup>37</sup>. Rather, it is clear from the facts that H communicated unequivocally to T and R that he did not want to proceed with any plan to kill V<sup>38</sup>, so he can be taken as either never having been an accessory or as having effectively withdrawn from T and R's plan to find someone to kill V.

If it is a case of withdrawal rather than H never having been an accessory, then the prosecution may argue that because H was aware of the possibility of V being killed, this is a situation where H needed to take further steps to prevent the offence because he believed the offence would proceed without his assistance<sup>39</sup>. The law as to terminating secondary liability is not entirely settled, however, it is clear that so long as the acts of the accessory still have the effect of assisting or encouraging the principal offence, he should not escape liability merely by stating that he no longer wished the principal offence to be committed. He must expressly and effectively undo or counterbalance the acts of assistance or encouragement previously given, that is a voluntary act involving timely and unequivocal communication of notice of withdrawal<sup>40</sup>. Such action should involve clearly making the others aware that he was not going ahead with the crime; trying to dissuade the others from committing the offence themselves; and taking reasonable steps to prevent the crime from being committed, for example, by informing the police<sup>41</sup> prior to warning V (if possible), or more generally, such action as he can reasonably take to undo the effect of his previous encouragement or participation<sup>42</sup>. These actions do not have to be taken in circumstances where there is a reasonable possibility that the accused holds an honest belief that the others are not going to proceed with the crime at that time<sup>43</sup>.

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<sup>37</sup> *Giorgianni v The Queen* (1985) 156 CLR 473.

<sup>38</sup> *R v Rook* [1993] 2 All ER 955.

<sup>39</sup> *R v Sua Van Truong* (unreported, CCA (NSW), 22 June 1998).

<sup>40</sup> *R v Rook* [1993] 2 All ER 955.

<sup>41</sup> *R v Sua Van Truong* (unreported, CCA (NSW), 22 June 1998).

<sup>42</sup> *White v Ridley* (1978) 140 CLR 342; *R v Wilton* (1993) 64 A Crim R 359; *R v Tietie, Tietie and Bolamatu* (1988) 34 A Crim R 438; *Croxford v R* (2011) 34 VR 277; *McEwan v R*; *Robb v R*; *Dambitis v R* (2013) 41 VR 330.

<sup>43</sup> *R v Sua Van Truong* (unreported, CCA (NSW), 22 June 1998).



## ***Criminal Law Guidebook Second Edition – Chapter 10: Extending Criminal Responsibility***

It is arguable that if there is a possibility of secondary liability in H, his clear words before he left the meeting with R and T, particularly 'I don't want any part of it', show that he unequivocally gave notice to them that he would not participate in any plan to kill V. As the stage at which H left the meeting was early, T only just having raised the possibility of arranging for V to be killed, it may be contended that H did not have to take any further steps for effective withdrawal, such as informing the authorities. Also, as a month passed before T took action to have V killed, H may have honestly believed that if R and T had agreed to kill V then they were now not going to proceed with it, so that no further action was necessary on his part. Accordingly, even if H could be characterised as an accessory to V's murder, it is strongly arguable that in the circumstances known to H, he effectively withdrew from the enterprise and does not incur primary or derivative liability for the death of V. In Victoria, these arguments would extend to H not being involved in the commission of V's murder, as he is not taken to have committed the offence if he 'withdraws from the offence'.<sup>44</sup>

### ***SCENARIO 2***

#### *Criminal liability of Ronnie and Mick for the robbery of Charlie*

From the available evidence, including the CCTV footage obtained from the train stations, it appears that Mick and Ronnie have together committed the acts amounting to robbery<sup>45</sup> of Charlie, which in New South Wales and South Australia would be aggravated by Ronnie and Mick being 'in company'.<sup>46</sup> By Mick grabbing Charlie's two shopping bags containing electrical goods after Ronnie demanded that he hand over the bags and threatened him with a raised clenched fist and said, 'Hands up or you'll be sorry' when Charlie motioned to grab his shopping bags, the two men have taken and carried away property owned by Charlie without his consent and by threatening the use of violence at the time of the taking. While Ronnie and Mick may have separately completed assault and stealing offences, together their conduct amounts to the actus reus of robbery, aggravated by the fact that the acts were carried out 'in company'. It is apparent that Charlie was confronted by the combined force of two persons and there is a coercive effect of this group even though it was only Ronnie who walked around in front of Charlie and demanded that he hand over the shopping bags soon after the train started moving; Mick had been sitting with Ronnie immediately behind Charlie and even if Charlie was not aware of this, the close proximity of Mick was sufficient to 'reassure the offender in committing the

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<sup>44</sup> *Crimes Act 1958* (Vic) s 324(2).

<sup>45</sup> *Smith v Desmond* [1965] AC 960, *Crimes Act 1900* (NSW) s 94; *Crimes Act 1958* (Vic) s 75; *Criminal Law Consolidation Act 1935* (SA) s 137.

<sup>46</sup> *Crimes Act 1900* (NSW) s 97(1); *Criminal Law Consolidation Act 1935* (SA) ss 137/5AA(1)(h).

## ***Criminal Law Guidebook Second Edition – Chapter 10: Extending Criminal Responsibility***

crime, or to intimidate the victim into submission'.<sup>47</sup> The key question then is whether both men might be regarded as principals in the first degree attracting primary liability for the robbery of Charlie. This can be argued on alternative bases, namely that they were joint principals; or they were part of a joint criminal enterprise.

First, as to being joint principals this will be argued on the basis that Ronnie and Mick were both present at the scene of the robbery of Charlie and each committed some of the actus reus of the offence of robbery with the requisite intent. Each individual has the mens rea for the offence, that is to dishonestly and permanently deprive Charlie of the property in his shopping bags without a genuine claim of right. This can be readily inferred by their actions in identifying Charlie carrying two shopping bags and following him onto the train after Ronnie said, 'There is probably some valuable gear in there; we should get hold it', taking the property by force soon after the train started moving and then immediately alighting from the train at the next station with the shopping bags. In addition, Ronnie and Mick jointly committed all acts necessary to complete the actus reus so primary liability for each man can be readily established on this basis.<sup>48</sup>

Second, the alternative basis of liability, joint criminal enterprise or common purpose, can be used on the basis that Ronnie and Mick agreed to commit the robbery of Charlie and primary liability can be attributed to each of them through this agreement.<sup>49</sup> The prosecution is required to prove (1) that Ronnie and Mick had reached an agreement to commit a crime, and (2) that Ronnie and Mick participated in the execution of that joint criminal enterprise. There is no evidence of any express agreement between Ronnie and Mick to rob Charlie. However, no formal agreement is legally required,<sup>50</sup> and it may be that an agreement to rob Charlie can nevertheless be inferred from the surrounding circumstances.<sup>51</sup> The prosecution would likely argue that an agreement to rob Charlie can be inferred from the fact that both men were together late in the evening at the train station, saw Charlie walk from the shopping centre carrying two bags from an electrical goods store, Ronnie said, 'There is probably some valuable gear in there; we should get hold it' and they boarded the train and immediately sat behind Charlie. Although Mick did not expressly respond to Ronnie's statement that they should get hold of the goods in Charlie's shopping bags, it is clear that he agreed to this course of action by his subsequent actions

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<sup>47</sup> *R v Crozier* (Unreported, NSWCCA, Cole JA, Grove and Ireland JJ, 8 March 1996); *R v Button and Griffen* (2002) 54 NSWLR 455; *FP v The Queen* (2012) 224 A Crim R 82.

<sup>48</sup> *Kanaan v R* [2006] NSWCCA 109; *R v B, FG*; *R v S, BD* (2012) 114 SASR 170, 173.

<sup>49</sup> *R v Tangye* (1997) 92 A Crim R 545, 556-557; *McEwen v R*; *Robb v R*; *Dambitis v R* (2013) 41 VR 330, 336-337.

<sup>50</sup> *Kanaan v R* [2006] NSWCCA 109.

<sup>51</sup> *R v Chishimba, Chishimba v R* [2010] NSWCCA 228; *Guthridge v R* (2010) 27 VR 452; *R v Wellgreen* [2014] SADC 10.

## ***Criminal Law Guidebook Second Edition – Chapter 10: Extending Criminal Responsibility***

in boarding the train and sitting with Ronnie in the seat immediately behind Charlie. This would likely be strong evidence supporting an inference that an agreement to commit the robbery of Charlie existed just prior to boarding the train.

It also seems likely that participation in a joint criminal enterprise could be made out on known facts. First, both Ronnie and Mick have completed some of the actus reus of the offence of robbery, which would likely be enough to prove participation in this instance. Secondly, both men are present, and by their presence assisting and encouraging one another during the completion of the various acts from a point soon after the train started moving out of the station.<sup>52</sup> Thus it is likely that the participation aspect of joint criminal enterprise can be proven beyond reasonable doubt.

Overall, it is likely that both Ronnie and Mick would be criminally liable as principals in the first degree for the robbery of Charlie.

If these events occurred in Victoria, by entering into an agreement, arrangement or understanding with one another<sup>53</sup> to commit the offence of robbery, Ronnie and Mick can be each charged with being 'involved in the commission' of this offence under s 324(1) *Crimes Act 1958* (Vic). Each derives liability from the agreement for the commission of the separate acts making up the offence of robbery with the relevant intention.

### *Criminal liability of Keith for the robbery of Charlie*

The difference in relation to Keith is that he did not commit any part of the actus reus of the robbery offence. When Keith boarded the train he moved to the other end of the carriage so that he could observe events from a distance. Therefore, he could not be characterised as being liable as a joint principal but could still attract primary liability on the basis of joint criminal enterprise or common purpose.

As Keith had met up with Mick and Ronnie at the inner city train station before they saw Charlie, it is apparent that Keith was present when Ronnie said, 'There is probably some valuable gear in there; we should get hold of it' after observing Charlie carrying the two bags from an electrical goods store. Again there is no evidence of Keith expressly responding to Ronnie's suggestion that they rob Charlie of his property, however his boarding the train with them and sitting in the same carriage close enough to observe the events can be used as evidence to infer that he formed an agreement with Mick and Ronnie to rob Charlie of his

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<sup>52</sup> *Osland v R* (1998) 197 CLR 316; *Huynh v R* (2013) 87 ALJR 434, 442.

<sup>53</sup> *Crimes Act 1958* (Vic) s 323(1)(c).

## **Criminal Law Guidebook Second Edition – Chapter 10: Extending Criminal Responsibility**

property.<sup>54</sup> Although Keith was not actively involved in robbing Charlie, he was at least constructively present as a result of the agreement, in that he was close enough to offer assistance to Ronnie and Mick if needed<sup>55</sup> and seemingly his deliberate presence offered some degree of assistance and encouragement.<sup>56</sup> In all the circumstances, it is strongly arguable that Keith's presence is sufficient participation in the joint criminal enterprise.

Therefore, with the agreement and participation in the joint criminal enterprise, the acts of Ronnie and Mick can be attributed to Keith for primary liability.<sup>57</sup> Further, the same inferences as to intention to dishonestly and permanently deprive Charlie of his property without a genuine claim of right can be drawn in the case of Keith. Keith was clearly aware that Ronnie and Mick intended to steal the shopping bags from Charlie when they followed him onto the train and he observed the taking of the bags by force soon after the train started moving. Also, Keith alighted from the train with Ronnie and Mick at the next station when they had possession of the shopping. Overall, there is a strong case against Keith for criminal liability for the robbery of Charlie on the basis of joint criminal enterprise with Ronnie and Mick even though he did not commit any of the physical acts. In New South Wales and South Australia, this would include the aggravating feature of Keith being 'in company' with Ronnie and Mick as he was proximate to them in the carriage, at least encouraged their acts and formed part of the coercive effect of the group.<sup>58</sup>

If these events occurred in Victoria, then Keith would also be charged with being 'involved in the commission' of this offence under s 324(1) *Crimes Act 1958* (Vic) as a result of entering into an agreement or understanding with Ronnie and Mick to commit the robbery of Charlie.<sup>59</sup>

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<sup>54</sup> *R v Chishimba, Chishimba v R* [2010] NSWCCA 228; *Guthridge v R* (2010) 27 VR 452; *R v Wellgreen* [2014] SADC 10.

<sup>55</sup> *R v McCarthy and Ryan* (1993) 71 A Crim R 395; *R v Choi (Pong Su) (Ruling No 21, Re: R v Ta Song Wong* [2005] VSC 96

<sup>56</sup> *R v Lam* (2008) 185 A Crim R 453; *Al-Qassim v R* [2009] VSCA 192; *LAL v R* [2011] VSCA 111, [43].

<sup>57</sup> *Osland v R* (1998) 197 CLR 316

<sup>58</sup> *R v Button and Griffen* (2002) 54 NSWLR 455, 466.

<sup>59</sup> *Crimes Act 1958* (Vic) s 323(1)(c).