



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S148/2024
File Title: The King v. Batak
Registry: Sydney
Document filed: Form 27F - Appellant's Outline of oral argument
Filing party: Appellant
Date filed: 08 Apr 2025

Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

S148/2024

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

The King
Appellant

and

Cem Batak
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication

1. This outline is in a form suitable for publication on the internet.

Part II: Outline of oral argument

The appeal is competent; special leave should not be revoked

2. The sole basis upon which the respondent's appeal to the Court of Criminal Appeal (CCA) was upheld is that it was an error of law to permit constructive murder to be left to the jury on the basis of accessorial liability. That determination is embodied in Order 3 which is definitive of the parties' rights and liabilities on that issue. The appellant is aggrieved by that order, which precludes prosecution of the respondent, in any re-trial, for murder on the basis of accessorial liability. Unelaborated, Order 5 directs a retrial in which the appellant may not prosecute the respondent as an accessory before the fact to constructive murder or is insufficiently clear that the appellant may so proceed. Whether or not the respondent's proposed Notice of Contention is upheld, Orders 3 and 5 must at least be varied.
3. An appeal which seeks to set aside or vary orders below so as to make explicit the scope of a remitter or any subsequent action (including a retrial) is competent (*North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 474-475; *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 63-65). The appeal relates to the decision of the CCA as to the law to be applied in an actual case. It is not merely academic or advisory.
4. The appeal raises important questions of principle beyond this case. The decision of the CCA excluded the liability of accessories before the fact and at the scene of the commission of constructive murder. As the appellant is precluded from prosecuting the respondent and any future accused on this basis of liability for constructive murder, there is no other avenue by which the appellant could seek to correct this erroneous exclusion.

5. Remittal of the matter to the CCA is appropriate so that the question of the adequacy of the directions in the respondent's trial can be assessed with the benefit of this Court's reasons for judgment as to the proper formulation of the mental element (ASuppS [7]).

Errors of the CCA

6. Two overarching errors emerge from the CCA judgment.
7. First, accessorial liability for constructive murder does not require proof of knowledge of the consequence of death. The CCA wrongly elided knowledge of the act that causes death with knowledge of the consequence of that act (J[183]; CAB 229; AS[26], [57], [59]-[60]).
8. Second, the CCA recognised that there may be cases where the act causing death coincides with the physical elements of the foundational offence (J[165]; CAB 221-222). However, the CCA analysed the applicability of accessorial liability for constructive murder on the wrong approach, namely that because in *some* cases the act causing death may be distinct from the foundational offence, the doctrine was not compatible *at all* with constructive murder (J [183]; CAB 229; AS [51], [52], [60]).

Accessory before the fact

9. A person who intentionally encourages or assists the principal in the commission of a crime, with knowledge or belief of the essential matters that made was done a crime, may be prosecuted as a principal offender (*Giorgianni v The Queen* (1985) 156 CLR 473 at 506; JBA 336; AS [21], [43]).
10. The liability of the accessory is based on the link in purpose between the accessory and the principal, but is not dependent on consensus or agreement (*Giorgianni* at 493; JBA 323; AS [23]). The moral culpability of the accessory may be greater than that of the principal (*GAS v The Queen* (2004) 217 CLR 198 at 209; AS [21]).
11. Knowledge of the consequence of the commission of the physical elements of the principal's offence is not required for liability of an accessory (*Giorgianni* at 479, 495, 502-503; JBA 309, 325, 332-333; *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021 at [351]; JBA 924; AS [45], [55], [59])
12. The liability of the accessory is grounded in his or her contribution to the principal's crime (*Clayton v The Queen* (2006) 81 ALJR 439 at [20]; JBA 752; *Miller v The Queen* (2016) 259 CLR 380 at [34]; JBA 474). Liability is derivative, dependent upon the guilt of the principal: (*Osland v The Queen* (1998) 197 CLR 316 at [71]; JBA 569-570, AS [23]).

Constructive Murder

13. "Constructive murder" describes the method of proving murder under s 18(1)(a) of the *Crimes Act 1900* (NSW), where death is caused by an act done in an attempt to commit, or during or immediately after the commission, of a foundational offence. This method is the statutory expression, in a modified form, of the common law felony murder rule (*IL v The Queen* (2017) 262 CLR 268 at [7]; JBA 346;

Ryan v The Queen (1967) 121 CLR 205 at 220; JBA 686; AS [30]). The rationale is that a person who uses violent measures in the commission of a felony does so at their own risk and is guilty of murder if those violent measures result even inadvertently in the death of the victim (*R v Jarmain* [1946] 1 KB 74, 80-81; JBA 1017-1018; AS [31]).

14. The state of mind of a principal offender necessary to establish constructive murder under s 18(1)(a) is that which is necessary to prove the foundational offence (*Ryan; Sio v The Queen* (2016) 259 CLR 47, AS [33]).
15. Section 18(1)(a) imports the common law rules of complicity (*IL* at [60]; JBA 365-366; AS [34]).

Application of principles

16. Under the common law in the late 1800s, the progenitor of s 18(1)(a) having been enacted in 1883, an accessory before the fact could be liable for the unintended death of a person during the course of the commission of a felony (*R v Gaylor* (1857) 169 ER 1011; *R v Radahyski* (1899) 24 VLR 687; JBA 1077; AS [35]-[42]).
17. Prior to *Woolmington v Director of Public Prosecutions* [1935] AC 462, the test was expressed as liability for the “probable consequences” of what was assisted or encouraged (*R v Johns* [1978] 1 NSWLR 282 at 288D; JBA 1062; AS [36]). Following *Johns v The Queen* (1980) 143 CLR 108, accessorial liability based on common purpose was increasingly applied in practice. Joint criminal enterprise was ultimately confirmed as a distinct doctrine of liability, albeit that it and accessorial liability overlap in practice (*Clayton* at [20]; JBA 752; *Miller* at [34]; JBA 474; AS [22]-[23]).
18. Accessorial liability requires knowledge that the principal offender is about to do something which amounts to an offence (*Giorgianni* at 505; JBA 335). The knowledge of the accessory may include knowledge the principal would do something should the occasion arise, or conditional intention (AS [28]; [48]). The discussion by Gageler J (as his Honour then was) in *Miller* at [89] is apt in this respect (JBA 489).
19. This case is a paradigm example of accessory before the fact, in which the accessory provided a loaded gun to the principal to use to commit a robbery. He may have hoped that the principal would get away with the robbery without anyone getting hurt, but knew or believed that the principal would discharge the firearm as a means of effecting the robbery, if the occasion arose. The mental element for an accessory before the fact is coherent with constructive murder. Section 18(1)(a) of the *Crimes Act* does not exclude accessorial liability from application to constructive murder.

Dated: 8 April 2025



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