Commentary

Section 7

Fraser JA explained the operation of section 7(1) in *R v Taylor* [2021] QCA 15. His Honour said –

> "[68] Section 7(1) provides:
>
> > "When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
> >
> > (a) every person who actually does the act or makes the omission which constitutes the offence;
> >
> > (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
> >
> > (c) every person who aids another person in committing the offence;
> >
> > (d) any person who counsels or procures any other person to commit the offence."
>
> [69] The word "offence" denotes "the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment". Sections 7(1)(b) and 7(1)(c) apply only if – when the person did or omitted to do the act described in (b) or aided as described in (c) – the person knew the essential matters which constitute the offence committed by another person. Thus, for a person to be responsible for the offence of murder under s 7(1)(b) or s 7(1)(c) that person must have known that whoever did an act that killed the victim did so intending to cause death or grievous bodily harm. Section 7(1)(b) in terms requires the prosecution also to prove that the person did or omitted to do the relevant act for the purpose of enabling or aiding the principal offender to commit the offence. Although s 7(1)(c) does not express any similar requirement, it has been held that it requires the prosecution to prove that the person intended to aid the other person in committing the offence.
>
> [70] Mere presence at the scene of a crime ordinarily does not amount to aiding under s 7(1)(c), but in a particular case "[v]oluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding" and "a calculated presence or a presence from which opportunity is taken can project positive encouragement and support to a principal offender"."

Knowledge for s 7(1)(b) or (c)

To establish criminal responsibility under s 7(1)(b) or s 7(1)(c), the prosecution must prove that the defendant knows "the essential facts constituting or making up the offence that is being or about to be committed by the person he is aiding or assisting".[1] It is not necessary for the prosecution to prove that the defendant had a specific intention to commit the offence. It is necessary for the prosecution to prove that he knew of the intention of the principal offender

[1] *R v Jeffrey* [1997] QCA 460; [2003] 2 Qd R 306; *Giorgianni vThe Queen* (1985) 156 CLR 473 at 482; *R v Brown* (2007) 171 A Crim R 345; [2007] QCA 161 at [48].

to do so.[2] Knowledge of no more than a possibility that the offence might be intended will not suffice.[3]

Thus, where the charge is murder under s 302(1)(a), it must be shown that the defendant assisted or aided the principal offender in carrying out the killing knowing, at the time of doing so, that the other was intending to kill the victim or do him grievous bodily harm. If that state of knowledge is not established, the defendant may be guilty of manslaughter, subject to defences under s 23(1) of the *Criminal Code*.

Aiding

A person "aids" another to commit an offence if he assists or helps him to do so. It is not necessary for the aider to be present at the crime but he must be "aware at least of what is being done…by the other actor."[4]

Procuring

"Procuring" in s 7(1)(d) has been defined as "effort, care, management or contrivance towards the obtaining of a desired end".[5] It has been said that it involves more than mere encouragement; it entails successful persuasion.[6] A person may be charged under s 7(1)(d) with procuring another to commit an offence with a circumstance of aggravation where the circumstance of aggravation merely attracts additional punishment rather than constituting a specific offence.[7]

Section 9

Section 9 expands criminal responsibility for "counselling" by making the counsellor liable for an offence committed by the principal, other than what was counselled, where the facts constituting the committed offence are a probable consequence of carrying out the counsel.[8]

Section 10A(1)

Section 10A(1) *Code*, which was inserted shortly after the decision in *Barlow*[9] (although the amending bill was introduced before the High Court's decision), provides that the criminal responsibility of a secondary party under s 7 extends to any offence that, on the evidence admissible against him is either the offence proved against the principal offender "or any statutory or other alternative to that offence."

While the meaning of the sub-section is far from clear, it does seem that its effect includes enabling a jury to convict of a lesser offence when the secondary offender's intent as an aider, counsellor or procurer extends no further than that offence. It does not allow a person charged under s 7(b) (c) or (d) to be convicted of an offence which, though technically a statutory

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2 Jeffrey; Lowrie at 535.
3 *Lowrie* at 525, 541.
4 *Sherrington & Kuchler* [2001] QCA 105 at 7.
5 *R v Castiglione* [1963] NSWR 1at 6, a meaning adopted in *R v Chan* [2001] 2 Qd R 662; [2000] QCA 347at [52].
6 *R v Adams* [1998] QCA 64 at 6.
7 *R v Webb* [1995] 1 Qd R 680at 685.
8 For an examination of the relationship between s 7(1)(d) and s 9 see *R Oberbillig* [1989] 1 Qd R 342 at 345; *Hutton* (1991) 56 A Crim R 211. See also *Darkan v The Queen* (2006) 227 CLR 373; 80 ALJR 1250.
9 *Barlow* (1997) 188 CLR 1 at 9.

alternative, is independent in its factual basis of the offence committed by the principal offender.[10]

"Offence" should be given the same meaning in both ss 7 and 8 *Code*, that is "the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment".[11]

Section 10A(2)

Section 10A(2) *Code* provides that a defendant's criminal responsibility under s 8 "extends to any offence that, on the evidence admissible against him or her, is a probable consequence of the prosecution of a common intention to prosecute an unlawful purpose, regardless of what offence is proved against any other party to the common intention".

Consistently with the analysis in *Barlow,* it follows that a defendant may be found guilty of the principal offence to the extent that its elements were the probable consequence of a common intention to prosecute an unlawful purpose. So, in the case of murder under s 302(1)(a), the "nature" of the offence for the purposes of s 8 is to be regarded as consisting of the *elements* of murder (unlawful killing plus intent), rather than murder itself.[12]

A defendant charged under s 302(1)(a) may be convicted of manslaughter, notwithstanding that the principal offender is convicted of murder, if intentional killing was not a probable consequence of their mutual plan but an unlawful killing, objectively speaking, was.[13]

Where acts of violence escalate beyond the level of force initially contemplated, it is necessary, before a secondary party can be held criminally responsible under s 8, that the jury be satisfied he shared in the expanded intention to inflict such greater violence.[14]

Where the prosecution relies on s 8 responsibility in relation to a murder charge brought under s 302(1)(b) ("death … caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life"), the question as to what extent the elements of the offence were a probable consequence of the unlawful purpose, will entail a consideration of whether it was a probable consequence that an act of such a nature as to be likely to endanger human life as the act which caused death would occur. If that element were missing, a secondary offender could not be convicted of murder but might be convicted of manslaughter.[15]

Probable consequence

The expression "a probable consequence" used in s 8 and s 9 *Code* was considered in *Darkan v The Queen* (2006) 227 CLR 373.

The High Court said that the expression "a probable consequence" –

- does not mean a consequence likely to happen on the balance of probabilities (which would be unduly generous to a defendant); and

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10 *R v Sullivan & Marshall* [2002] 1 Qd R 95; [2000] QCA 393.
11 Barlow; Sullivan & Marshall.
12 *R v Brien & Paterson* [1999] 1 Qd R 634 at 645.
13 It is, conversely, conceivable that the secondary party may be guilty of a more serious offence than the principal offender: See *Barlow* at 14, eg. diminished responsibility. See *R v Hallin* [2004] QCA 18.
14 *R v Ritchie* [1998] QCA 188.
15 Brien & Paterson.

- means more than a real or substantial possibility (a test which would be unduly harsh to a defendant).

The expression "a probable consequence" means the occurrence of the consequence is probable in the sense that it could well happen: at [81] –

> *"It is not necessary in every case to explain the meaning of the expression 'a probable consequence' to the jury. But where it is necessary or desirable to do so, a correct jury direction under s 8 would stress that for the offence committed to be 'a probable consequence' of the prosecution of the unlawful purpose, the commission of the offence* ***had to be not merely possible, but probable in the sense that it could well have happened*** *in the prosecution of the unlawful purpose. And where it is desirable to give the jury a direction as to the meaning of the expression 'a probable consequence' in s 9, a correct jury direction would stress that for the facts constituting the offence actually committed to be 'a probable consequence' of carrying out the counselling, they had to be not merely possible, but* ***probable in the sense that they could well have happened*** *as a result of carrying out the counselling."*

Withdrawal as a Party to the Offence

Whether the defendant has withdrawn from a common purpose, or from a role enabling, aiding, counselling or procuring an offence, may arise as a question of fact relevant to whether the offence has been committed, rather than as constituting a defence. The question of what amounts to effective withdrawal has met with different answers in relation to s 7 and s 8 liability, although it is clear that a mere change of mind is not sufficient.

In *White v Ridley* (1978) 140 CLR 342, Gibbs J's view was that an accused would not be liable if he had given a timely countermand to the innocent agent whom he had procured to commit a crime and had done whatever was reasonably possible to counteract the effect of his earlier actions. But Stephen and Aickin JJ considered it necessary that he take steps which were actually effective to prevent his conduct resulting in the crime, so that if it occurred it was attributable to some new cause. The Gibbs approach was taken by Thomas J in *R v Menniti* [1985] 1 Qd R 520, while the Stephens/Aickin formulation was followed by Derrington J in the same case. The less stringent approach adopted by Gibbs J seems, generally, to have been preferred by State courts dealing with liability of the s 7 kind: *Croxford v The Queen* (2011) 34 VR 277; [2011] VSCA 433; *R v Heaney & Ors* [1992] 2 VR 531; *R v Wilton* (1993) 64 A Crim R 359.

It is questionable whether either approach should be applied to withdrawal for the purposes of s 8. In *R v Saylor* [1963] QWN 14, the Court of Criminal Appeal held that a defendant relying on dissociation from a common purpose must be able to point to evidence showing "that he made to the other party an unequivocal 'timely communication' of his intention to abandon the common purpose". There was no suggestion that steps to counteract the common purpose were also required. In *R v Menniti*, Thomas J pointed out that withdrawal was more readily effected in common purpose cases "because the destruction (by countermand or otherwise) of the common purpose may mean that the eventual crime was not committed in the prosecution of that common purpose". Consistently with that view, in *R v Emelio* (2012) 222 A Crim R 566; [2012] QCA 111, Dalton J, with the agreement of McMurdo P and Muir JA, observed that there was a distinction between what was necessary to show withdrawal under s 7 and that under s 8, because the relevance of withdrawal to a case under s 8 was to show that the common purpose had come to an end before the commission of an offence.

On the other hand, in *R v Tietie* (1988) 34 A Crim R 438, the New South Wales Court of Criminal Appeal held that a jury was properly directed that an accused had not withdrawn from the common purpose unless he had made a timely communication of his withdrawal and done

what he could reasonably do to dissuade the others from continuing with the unlawful purpose. The court relied on Gibbs J's judgment in *White v Ridley*, and did not draw any distinction between common purpose and accessorial offending of the kind with which s 7 deals. In a dissenting judgment in *Miller v Miller* (2011) 242 CLR 446 (the case did not turn on this point) Heydon J described s 8(2) of the Criminal Code WA as reflecting the equivalent common law rule; it absolves a defendant of liability only if, having withdrawn from a common unlawful purpose, he takes all reasonable steps to prevent the commission of the offence.

Logically, however, if the defendant withdraws before the offence is committed and communicates that withdrawal, it would seem to follow that, whether or not he takes any steps to prevent its occurrence, the offence was not committed in the prosecution of any common purpose to which he was a party.

Direction - Section 7

(Read the section or relevant parts to the jury).

General:

This section extends criminal responsibility to any person who is a party to an offence. The section makes each of the following persons guilty of an offence:

- **Each person who actually does the act (or makes the omission), or one or more of the acts in the series, which constitute/s the offence.**[16]
- **Each person who does an act (or makes the omission) for the purpose of enabling or aiding another to commit the offence.**
- **Each person who intentionally aids another to commit the offence.**
- **Each person who counsels or procures another to commit the offence.**

So, it is not only the person who actually does a criminal act (or makes a criminal omission) who may be found guilty of an offence. Anyone who aids – that is, assists or helps or encourages – that person to do it <u>may</u> also be guilty of the (same or a less serious) offence if they did it for the purpose of, or with an intention to, aid. Anyone who counselled or procured the commission of the offence <u>may</u> also be guilty of it.[17]

Aiding (general):

That is the basis on which the defendant is charged with [offence] in the case before you. The prosecution argues that, although it was not the defendant who actually committed the [offence], the defendant is also guilty of [that offence] because he aided (the alleged principal offender) to commit it.

Proof of aiding involves proof of acts and omissions intentionally directed towards the commission of the principal offence by the perpetrator, and proof that the defendant was aware of at least the essential matters constituting the crime in contemplation.[18] **To aid means to assist or help.**[19]

The prosecution do not need to prove that the person who actually committed the offence has also been convicted.[20] **It is enough if the prosecution proves, not**

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16 *R v Wyles*; *ex parte A-G* [1977] Qd R 169, approved in *R v Webb; ex parte A-G* [1990] 2 Qd R 275.
17 See *Barlow v The Queen* (1997) 188 CLR 1 (now apparently confirmed by s 10A of the Code).
18 *R v Tabe* (2003) 139 A Crim R 417 at [12].
19 *R v Sherrington* (2003) 139 A Crim R 417, [2001] QCA 105.
20 *R v Lopuszynski* (1971) 26 LGRA 237.

necessarily the identity of the perpetrator, but that there was a principal offender or perpetrator, and proof of the commission of an offence by that someone, and that the defendant aided that person to commit it. The prosecution must prove that that other perpetrator was guilty of committing the offence by evidence which is admissible against the defendant.[21]

The prosecution must prove that the defendant knew that the type of offence which was in fact committed was intended; but not necessarily that that particular offence would be committed on that particular day at that particular place.[22] **It is not enough if the prosecution prove the defendant knew only of the possibility that the offence might be committed.**

S 7(1)(b) and (c) direction (shorter version)

You may find the defendant guilty of the (offence) only if you are satisfied beyond reasonable doubt of four things. The first is that (an identified or unidentified perpetrator) committed the offence; that is, that (the perpetrator) [outline elements of offence]. The second is that the defendant either in some way assisted (the perpetrator) to [commit offence] or did an act with the purpose of assisting or enabling him to [commit offence] even if that act did not in fact assist.[23] **The third is that he assisted or did the act with the intention of helping (the perpetrator) to [commit the offence].**[24] **The fourth is that, when he assisted (the perpetrator) or did the act with that purpose, the defendant *knew*[25] that (the perpetrator) intended to [**identify acts of which offence is comprised**].**

As to the first two, there is evidence [outline elements of offence as to which there is evidence of assistance].

However, the defendant can be found guilty of the [offence] only if you are satisfied beyond reasonable doubt that, when he [identify respects in which the defendant is said to have given assistance] did so intending to help (the perpetrator), knowing (the perpetrator) was going to [identify acts, and intent if relevant, constituting offence]. If you are not satisfied that the defendant knew that (the

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21 *R v Buckett* (1995) 132 ALR 669 at 676.
22 *R v Ancuta* [1991] 2 Qd R 413.
23 Generally, mere presence during the commission of a crime by another is not of itself sufficient to involve criminal responsibility as an aid under s 7; but is nevertheless capable of affording some evidence to that effect; *Jefferies v Sturcke* [1992] 2 Qd R 392 at 395.
24 *R v Roberts & Pearce* [2012] QCA 82 at [170]-[171].
25 See *Lowrie* [2000] 2 Qd R 529.

perpetrator) meant to do those things, or if you have a reasonable doubt about it, then you must find him not guilty of [the offence charged].[26]

S 7(1)(b) direction (expanded version)

The prosecution must prove to your satisfaction beyond reasonable doubt each of the following things:

1. **that (the identified perpetrator or an unidentified perpetrator) committed the offence.**

2. **that the defendant did acts or made omissions for the purpose of enabling or aiding that person to commit the offence, even if those acts or omissions did not in fact assist.**

3. **that the defendant did so with the intention to aid (the alleged perpetrator or unidentified perpetrator) to commit the offence.**

4. **that the defendant had actual knowledge or expectation of the essential facts of that offence, that is, all the essential matters which make the acts done a crime,**[27] **(including [where relevant] the state of mind of the (alleged perpetrator or unidentified perpetrator)**[28] **when that person committed the offence.**

S 7(1)(c) direction (expanded version)

The crown must prove to your satisfaction beyond reasonable doubt that:

1. **(the identified or alleged perpetrator, or an unidentified perpetrator) [committed the offence].**

2. **the defendant assisted (the perpetrator) to [commit offence]**

3. **that when the defendant assisted (the perpetrator), he did so intending to help him to [commit the offence]**[29]

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[26] *R v Jeffrey* [2003] 2 Qd R 306; [1997] QCA 466; *Lowrie* [2000] 2 Qd R 529.
[27] *R v Giorgianni* (1984-5) 156 CLR 473 at 482.
[28] *R v Stokes and Difford* (1990) 51 A Crim R 25; *R v Pascoe* [1997] QCA 452.
[29] *R v Roberts & Pearce* [2012] QCA 82 at [170]-[171].

4. **that the defendant had actual knowledge or expectation of the essential facts of the principal offence, (including, [where relevant] the state of mind of the principal offender).** [30]

Counselling s 7(1)(d)

For the prosecution to prove beyond reasonable doubt that the defendant is guilty because he counselled[31] (the perpetrator) to commit the offence of (identify offence), the prosecution must prove beyond reasonable doubt:

1. **(the perpetrator) committed the offence of …… (acts which constitute the offence, with intent if relevant).**

2. **that the defendant counselled, in the sense of urging or advising (the perpetrator) to commit that offence.**

3. **that (the perpetrator) committed that offence after being urged or advised by the defendant to commit (that offence or an offence of – describe offence).**

4. **that (the perpetrator) committed the offence when carrying out that counsel.**

[Section 7(1)(d) direction combined with s 9]

5. **that the facts constituting the offence actually committed (by the perpetrator) were a probable consequence of carrying out the counsel given by the defendant. A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, the facts constituting the offence actually committed (by the perpetrator) must be shown to be "a probable consequence" of carrying out the counselling, in the sense that they could well have happened as a result of carrying out the counselling.** [32]

In considering whether the defendant urged or advised the perpetrator to commit (the offence) you must consider with care what it was that the defendant urged or advised (the perpetrator) to do, if anything.

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30 *R v Beck* [1990] 1 Qd R 30 at 38 and *R v Tabe* (2003) 139 A Crim R 417,[2003] QCA 356 at [36], judgment of Mackenzie J.

31 In *R v Georgiou* (2002) 131 A Crim R 150; [2002] QCA 206 the Court of Appeal suggested that explanation for the meaning of "counselled" was not essential; while noting that Gibbs J used the terms "urged" or "advised" in *Stuart v The Queen* (1976) 134 CLR 426 at 445. "Counsel" involves intentional participation: see *R v Hawke* [2016] QCA 144 at [37] – [39], [58].

32 See *Darkan v The Queen* (2006) 227 CLR 373; (2006) 80 ALJR 1250 at [72]-[81], [130] - [132].

S 7(1)(d) counselling with s 9 – example

In the present case, the defendant did not tell (the perpetrator) to kill (the victim) or to injure him seriously; but the question for you is whether the killing of (the deceased) by (the perpetrator) with an intention to kill or do grievous bodily harm to him was a probable consequence of his carrying out the defendant's plan to assault (the deceased) with a baseball bat. In law each of them has taken to have murdered (the deceased) if (but only if) murdering (the deceased) was a probable consequence of (the perpetrators) carrying out the defendant advising or urging to give (the deceased) a beating.

A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, the facts constituting the offence actually committed must be shown to be "a probable consequence" of carrying out the counselling, in the sense that they could well have happened as a result of carrying out the counselling.

If you are left in doubt whether murder was a kind of offence that was a probable consequence of (the perpetrators) carrying out the defendant's advice, then you may find the defendant guilty of the lesser offence of manslaughter. For that you need to be satisfied beyond reasonable doubt that (the perpetrator's) killing of (the deceased), without any intention to cause death or grievous bodily harm, was the probable consequence of carrying out the advice to give (the deceased) a beating. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter.

S 7(1)(d): procure

To procure means to bring about, cause to be done, prevail on or persuade, try to induce. To procure means to procure by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.[33]

Procuring involves more than mere encouragement, and means successful persuasion[34] **to do something. You may find the defendant guilty of the [offence**

[33] *R v F*; *Ex Parte A-G* [2004] 1 Qd R 162.

[34] *R v Adams* [1998] QCA 64 at [6]. See also *R v Oberbillig* [1989] 1 Qd R 342 at 345; *R v F; ex parte Attorney-General (Qld)* [2004] 1 Qd R 162 at [58], *R v Hawke* [2016] QCA 144.

charged] on the basis of procuring only if you are satisfied beyond reasonable doubt of these things:

- **That [the perpetrator, identified or unidentified] committed the offence;**
- **That the defendant procured (that perpetrator) to commit that offence by successfully persuading (the perpetrator) to do it and thereby bringing about the commission of the offence;**
- **The defendant knew that (the perpetrator) intended to (commit the acts constituting the offence).**

Presence at scene - aiding by encouraging

A defendant may assist or aid another by giving actual physical assistance in the commission of an offence, but it is not necessary for the crown to show actual physical assistance. Wilful encouragement can be enough, certainly if the defendant intended that (the perpetrator) should have an expectation of aid from the defendant in the commission of (the offence).

Where the prosecution alleges aiding by encouragement, such as from the presence of the person charged at the commission of the offence, the prosecution must prove both that the person charged as an aider did actually encourage the perpetrator in the commission of the offence, such as by presence at the scene; and also that the person charged intended to encourage the commission of that offence (by his or her presence).[35] **Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding.**[36]

Assault by a number of persons resulting in the victim's death

For the prosecution to establish criminal responsibility for murder under either s 7(1)1(b) or (c) it is necessary for it to prove that the defendant committed his act to enable or aid one or more of the others to kill or do grievous bodily harm to the victim, knowing that that other or others intended to kill or inflict grievous bodily harm upon the victim. It is not necessary to prove that the defendant himself had such an intention; it is sufficient (and necessary) that the defendant knew that one

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35 *R v Clarkson, Carroll, and Dodd* (1971) 55 Cr App R 445; *R v Beck* [1990] 1 Qd R 30.
36 *R v Beck* at [37].

or more of the others had it and that, knowing this, did an act to aid or enable that or those others to kill or do grievous bodily harm.[37]

[37] This direction follows the decision in *R v Pascoe* [1997] QCA 452.

Direction - Section 8

Read the section to the jury:

> **So, if two or more people plan to do something unlawful together and, in carrying out the plan, an offence is committed, the law is that each of those people is taken to have committed that offence if (but only if) it is the kind of offence likely to be committed as the result of carrying out that plan.**
>
> **For the prosecution to prove the defendant guilty relying on this section, it is necessary for you the jury to be satisfied beyond reasonable doubt:**
>
> 1. **that there was a common intention to prosecute an unlawful purpose. You must consider fully and in detail what was the alleged unlawful purpose, and what its prosecution was intended to involve;**
>
> 2. **that (the offence charged) was committed in the prosecution or carrying out of that purpose. You must consider carefully what was the nature of that actual crime committed;**
>
> 3. **that the offence was of such a nature that its commission was a probable consequence of the prosecution of that purpose.**[38]

Common unlawful purpose

> **Obviously, a great deal depends on the precise nature of any common unlawful purpose, proved by the evidence in the light of the circumstances of the case, particularly the state of knowledge of the defendant.**[39] **It is the defendant's own subjective state of mind as established by the evidence, which decides what was the content of the *common* intention to prosecute an unlawful purpose.**[40] **That common intention is critical because it defines the restrictions on the nature of the acts done or omissions made which the defendant is deemed by the section to have done or made.**
>
> **When considering what any common intention was, and what was any common unlawful purpose, you should consider whether you are satisfied beyond reasonable doubt that the defendant agreed to a common purpose:**
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> (by way of example only)

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38 This direction combines what Gibbs J (and Mason J) wrote in *Stuart v The Queen* (1974) 134 CLR 426 with the words of s 8.

39 Jacobs J in Stuart v The Queen.

40 So held in the joint judgment of Brennan CJ, Dawson and Toohey JJ in *R v Barlow* (1997) 188 CLR 1 at 13.

- **that involved the possible use of violence or force; or**
- **to carry out a specific act;**[41] **or**
- **that involved inflicting some serious physical harm on the victim.**[42]

Commission of the offence in the prosecution of the common unlawful purpose

If you are satisfied beyond reasonable doubt there was a common intention to prosecute an unlawful purpose and what that was, you must ask if you are satisfied beyond reasonable doubt that an offence of (describe offence)[43] was committed in the prosecution or furtherance or carrying out that purpose. If you are so satisfied, then in considering whether you are satisfied beyond doubt that the nature of the offence committed was such that its commission was a probable consequence of the prosecution or furtherance or carrying out of the common unlawful purpose,[44] **the probable consequence is a consequence which would be apparent to an ordinary reasonable person with (the defendant's) state of knowledge at the time when the common purpose was formed. That test is an objective one and is not whether (the defendant) himself recognised the probable consequence or himself realised or foresaw it at the time the common purpose was formed.**[45]

Probable Consequence

A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, for the offence actually committed to be "a probable consequence" of carrying out the unlawful common purpose, the

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41 See *R v Keenan* (2009) 236 CLR 397 at [118].

42 See *R v Keenan*. Care must be taken in identifying the common intention by focusing only on the means used to effect the common unlawful purpose (per Hayne J at [85]). Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible. In some cases the means intended to be used may permit an inference as to the level of harm intended (per Kiefel J at [121]). An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors (per Kiefel J at [120]).

43 Refer to the act or omission and its nature, the harm it causes and the intention with which it is inflicted. Where, for example, the act is one of shooting, the question for the jury may be whether the shooting which caused grievous bodily harm was an offence of such a nature that its commission was a probable consequence of the common purpose, such as it is found to be (per Kiefel at [132, 133]).

44 See R v Keenan.

45 See the caution in *R v AAP* [2013] 1 Qd R 244; [2012] QCA 104 at [27] against leading the jury to consider the defendant's view of probable consequence; and see also *Stuart v The Queen at* 453-5, (Jacobs J); *R v Pascoe* [1997] QCA 452 (McPherson JA at 9; Davies JA at 12).

commission of the offence must be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose.[46]

Section 8 – Direction on alternative verdict open – s 10(A)

If you are satisfied that acts constituting an offence were committed, and that the commission of those acts was the probable consequence of the prosecution of the unlawful common purpose, it does not matter that the actual perpetrator who committed those acts did so with a specific intent, where the fact the perpetrator had that intent was not itself either subjectively agreed or an objectively probable consequence of the prosecution of that unlawful common purpose. The defendant can still be convicted of the offence constituted by those acts, but not the offence of committing those acts with that extra specific intent, where that specific intent was not an agreed or probable consequence of carrying out that purpose.

For example, if you are satisfied beyond reasonable doubt that in fact a murder occurred, which is an unlawful killing of another person committed by a perpetrator who intended to cause the victim death or grievous bodily harm, you must obviously ask yourselves whether you are satisfied beyond reasonable doubt that that offence of unlawful killing with that specific intent was objectively a probable consequence of the prosecution of the subjectively agreed unlawful purpose held in common, if any, which you have found to exist. If you were so satisfied, (and satisfied of other relevant matters) you could find the defendant guilty of murder.

However, if you are not so satisfied, you would then consider whether the commission of an offence of manslaughter was a probable consequence of carrying out the agreed unlawful purpose. Manslaughter is an offence of unlawful killing when one person kills another in circumstances not authorised, justified, or excused by law. There is no element of intention to kill or do grievous bodily harm in manslaughter.

If you were satisfied beyond reasonable doubt that an unlawful killing of another person in circumstances which would amount to manslaughter, and the acts constituting such an offence, were committed, and that the commission of those acts and that offence of manslaughter was objectively a probable consequence of prosecuting the subjectively agreed unlawful purpose, then you could find the defendant guilty of manslaughter; even though satisfied that the actual perpetrator

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[46] See *Darkan v The Queen* (2006) 227 CLR 373; 80 ALJR 1250 at [72]-[81], [130]- [132].

went *beyond* the agreed or probable consequences and committed the more serious offence of murder.

Section 8 - direction on group assault resulting in death

For the Crown to prove beyond reasonable doubt that the defendant is guilty of murder on the basis of s 8, it must prove to your satisfaction beyond reasonable doubt that a probable consequence of the prosecution of the common purpose of assaulting (the deceased) must have been that one or more of the people attacking (the deceased) would have the intention of doing (the deceased) at least grievous bodily harm. The relevant common intention which must be proven beyond reasonable doubt, contemplated by s 8 and necessary to support a verdict of guilty of murder, is one to commit an assault of sufficient seriousness that an intention to cause death or grievous bodily harm on the part of at least one or more of those attacking (the deceased) was a probable consequence of the prosecution of that purpose. If that probable consequence is absent, but the assault the subject of the common intention was nevertheless of sufficient seriousness that a death was the probable consequence and it occurred, the proper verdict is manslaughter. It is not necessary in either case that those consequences were intended or even foreseen by the defendant.[47]

[Example] **Here the evidence is that the defendant and (B) planned to rob a bank together, and, in carrying out that plan together, (B) murdered Mr Smith the bank teller. In those circumstances, the defendant is in law taken to have murdered Mr Smith if (but only if) murdering someone was the kind of offence that was a probable consequence of carrying out the plan to rob the bank.**

If you are satisfied of those matters, then the offence committed by the defendant [or by each of the defendants] is murder. I have already told you that murder is killing someone with the intention of causing death or doing grievous bodily harm. If you are not satisfied that murder, in the sense of killing with such an intention, was the kind of offence that was a probable consequence of carrying out such a plan, then you may find the defendant guilty (if at all) only of the lesser offence of manslaughter. For that, you would have to be satisfied that death was something that was likely to result from carrying out the plan.[48]

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[47] This direction is taken from *R v Pascoe* [1997] QCA 452.

[48] Where there is an "escalating" plan or intention, it is essential that the defendant be proved to have been a party to that expanded intention: *R v Ritchie* [1998] QCA 188.

Here the defendant may be found guilty of murdering Mr Smith the bank teller if (but only if) you are satisfied beyond reasonable doubt that killing him with that intention was something that was a probable consequence of carrying out the plan to rob a bank. If you are not satisfied of that, then you may find the defendant guilty at most only of manslaughter.

If you are left in doubt whether murder was the kind of offence likely to result from carrying out their plan, then you may find the defendant guilty of the lesser offence of manslaughter. For that you need to be satisfied beyond reasonable doubt that killing Smith, without any intention to cause death or grievous bodily harm, was something that was a probable consequence of carrying out the plan to rob. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter.