Sentencing in complicity cases — Abettors, accessories and other secondary participants (Part 2)

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Introduction

This Sentencing Trends and Issues paper discusses sentencing offenders whose criminal liability is framed on the basis of either being a secondary participant who aided, abetted, counselled or procured the commission of an offence or as an accessory after the fact to an offence. Part 1, “Joint criminal enterprise” discussed joint enterprise and extended common purpose. The liability of a person convicted of a crime on the basis of joint enterprise or extended common purpose is, in the words of Hayne J, “separate from the liability of an accessory before the fact, who counsels or procures the commission of the crime; it is separate from the liability of a principal in the second degree, who aids or abets in the commission of the crime”.

It is perhaps not helpful at sentence to use or mix expressions found in these two discrete areas of the law. The liability that attaches, although closely related, is not interchangeable. It is discrete. The High Court emphasised in GAS v The Queen that the formulation of the liability of secondary participants set out in Giorgianni v The Queen of “intentional participation in a crime by lending assistance or encouragement” is central to the sentencing exercise both in terms of assigning culpability and finding facts.

As with other areas of sentencing, there is no “golden rule”, or to use the more modern phrase, “bright line rule”, for assessing the culpability of secondary participants. Sentencing principles, necessarily framed in general terms, are applied to the individual case. It has been said that “it will often be appropriate that a principal in the first degree should be more severely punished” than a secondary participant. However, there “is not a universal principle that the culpability of an aider and abettor is less than that of a principal offender”. A “manipulative or dominant aider and abettor” may be more culpable.

1 The term “secondary participant” was used by Wilson, Deane and Dawson JJ in Giorgianni v The Queen (1985) 156 CLR 473 at 500 and by Mason J at 492.
2 At the time of publication, a Bill which will insert joint commission provisions into the Criminal Code Act 1995 (Commonwealth) is before the Commonwealth Parliament: Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009.
4 For example R v Wright [2009] NSWCCA 3 at [29], although the respondent had been convicted on the basis of the doctrine of joint enterprise, in assessing culpability, the court quoted GAS v The Queen (2004) 217 CLR 198, a case concerning the liability of principals in the second degree. Likewise, in Goundar v R (2001) 127 A Crim R 331 and R v Breedon (unrep, 3/12/92, NSWCCA), where the offender had been convicted as an aider and abettor, the court at [27] used language consistent with liability on the basis of joint enterprise.
6 (1985) 156 CLR 473.
7 Ibid Wilson, Deane and Dawson JJ at 506 [emphasis added].
8 R v Geddes (1936) SR (NSW) 554 Jordan CJ at 555 (Bavin J concurring).
9 Ebner v The Official Trustee in Bankruptcy (2000) 205 CLR 337 at [32].
10 R v Lattouf (unrep, 12/12/1996, NSWCCA).
11 R v Makhouli [2004] NSWCCA 275 at [17].
12 GAS v The Queen (2004) 217 CLR 198 at [23].
13 Ibid.
Deane and Dawson JJ said: “the master mind and guiding spirit of a crime ring will probably receive a heavier sentence than his tools”. There may be “minimal” differences in culpability. But if an aider and abettor is to be considered less culpable than the principal, “the degree of difference will depend upon the circumstances of the particular case”. Ultimately, the culpability of the secondary participant is “judged by the facts of the case at hand” and the court must make findings of fact about “what [the secondary participant] actually did in assisting or encouraging the principal offender”. The judicial task is always to impose a sentence that is appropriate in all the circumstances of the case.

Accessories before the fact and principals in the second degree

Given the sentencing focus of the paper, it is unnecessary to give a legal dissertation of the liability of secondary participants other than to set out some of the basic principles. A clear statement of the mens rea for secondary participants required to be proven by the Crown is found in Giorgianni v The Queen, where Wilson, Deane and Dawson JJ said:

“Aiding, abetting counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence. The necessary intent is absent if the person alleged to be a secondary participant lacks knowledge that the principal offender is doing something or is about to do something which amounts to an offence.”

The terms “secondary participant” and “secondary liability” are used to describe these offenders because their liability is derivative, or dependent on the prosecution proving in the proceedings against the secondary participant the commission of the crime by the principal in the first degree. It is unnecessary for the Crown to establish that the secondary participant had knowledge of or any intention in relation to the consequences of the principal offender’s act.

In the case of felonies at common law, generally speaking, the words “aid and abet” described the action(s) of a person who was present at the commission of the offence and took some part. Such an offender was called “a principal in the second degree”. The words “counsel and procure” described an accessory before the fact who was not present at the commission of the offence. But as Mason J remarked in Giorgianni:

“In substance, however, there appears to be no distinction between a principal in the second degree and an accessory before the fact beyond the question of presence [at the

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14 Johns v The Queen (1980) 143 CLR 108 at 117.  
15 R v Swan [2006] NSWCCA 47 at [72].  
16 GAS v The Queen (2004) 217 CLR 198 at [23].  
18 R v Swan [2006] NSWCCA 47 at [72].  
19 Ryan v The Queen (2001) 206 CLR 267 McHugh J at [59].  
21 Giorgianni v The Queen (1985) 156 CLR 473 at 506.  
22 ibid.  
23 Osland v The Queen (1998) 197 CLR 316 Gaudron and Gummow JJ at [14]; McHugh J at [71]; Giorgianni v The Queen (1985) 156 CLR 473 Mason J at 491; see also R Howie and P Johnson, Criminal Practice and Procedure New South Wales Looseleaf Service, Butterworths, Sydney, 1998– [6–005] and [6–100]. An exception to this is where an accessory before the fact is charged as a principal, pursuant to s 546 of the Crimes Act 1900 (NSW): King v The Queen (1986) 161 CLR 423 Dawson J (Gibbs CJ, Wilson and Brennan JJ agreeing; Murphy, Mason and Deane JJ dissenting on other grounds).  
25 Giorgianni v The Queen (1985) 156 CLR 473 Wilson, Deane and Dawson JJ at 500; Gibbs CJ at 480; Mason J at 493; Gillard v The Queen (2003) 219 CLR 1 Hayne J at [109]; Gleeson CJ and Callinan J agreeing at [10]; Gummow J agreeing at [31].  
27 Giorgianni v The Queen (1985) 156 CLR 473 at 493.
The terms are descriptive of a “single concept” or “instances of one general idea” that the secondary participant is “linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about [its] commission”. Mason J also noted that, while in a particular case one of the four terms aid, abet, counsel and procure may be “more closely descriptive of the conduct of a secondary party than another, it is important that this not be allowed to obscure the substantial overlap of the terms at common law and the general concept that they embody”.

Accessories after the fact

The liability of an accessory after the fact is derivative, or dependent on the prosecution proving in the proceedings against the secondary participant the commission of the crime by the principal. As Scouler and Button note, strictly speaking, these offenders are not true accessories at all in that they commit a separate, less serious, offence after the commission of the principal offence by another offender. A person may be held liable as an accessory after the fact to a crime if he or she, knowing of the facts, and assists the principal. The assistance must have a tendency to assist the principal to avoid justice. In rendering the assistance, one of the accessory’s aims must have been to assist the offender to escape detection or punishment. Section 347 of the Crimes Act provides for the offence of an accessory after the fact to a “serious indictable offence” and s 6 of the Crimes Act (Cth) provides an equivalent for Commonwealth offences.

Punishment of accessories

Part 9 of the Crimes Act is headed “Abettors and accessories” and sets out penalty provisions for principals in the second degree, accessories before the fact and accessories after the fact. Section 345 provides that principals in the second degree are liable to the same penalty as the principal offender. Sections 351B(2) and 346 provide, respectively, that accessories before the fact are liable to the same punishment as the principal and that they may be charged as a principal. Section 346 applies the rule to serious indictable offences (defined in s 4 to be an indictable offence with a maximum penalty of at least five years’ imprisonment) and s 351B(2) to offences “punishable on summary conviction”. If an accessory before the fact is charged as a principal, there will be no need for the principal to actually be convicted of an offence before the accessory can be convicted of it.

The statutory scheme, so far as it relates to accessories after the fact, produces some anomalies. Section 350 provides that an accessory after the fact “to any other serious indictable offence is liable to imprisonment for 5 years, except where otherwise specifically enacted”. Four examples of “specifically enacted” accessory after

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28 ibid.
31 Giorgianni v The Queen (1985) 156 CLR 473 at 493.
32 This follows from the fact that, to be liable, an accessory after the fact must know of the precise offence committed by the principal: R v Tevendale [1955] VR 95; R v White (1977) 16 SASR 571 at 580; R v Stone [1981] VR 737 at 740. In Chanthaboury v R (2007) 176 A Crim R 438, Barr J at [59] suggests that the proper way of framing the charge against an accessory after the fact is “first to aver that the principal offender committed the principal offence, saying concisely what the offence was, and that, in knowledge of the fact, the accused afterwards received, etcetera, the principal offender”.
36 R v White (1977) 16 SASR 571 at 580.
38 R v Young and Phipps (unrep, 31/10/1995, NSWCCA) Gleeson CJ; Badgery-Parker and Abadee JJ agreeing.
39 A “serious indictable offence” is defined in s 4 of the Crimes Act as an offence with a maximum penalty of at least five years’ imprisonment.
40 King v The Queen (1986) 161 CLR 423 Dawson J at 434 (Gibbs CJ, Wilson and Brennan JJ agreeing; Murphy, Mason and Deane JJ dissenting on other grounds).
the fact offence provisions can be found in Part 9. Section 349 provides that an accessory after the fact to murder is liable to a maximum penalty of 25 years. Section 349(2) provides that “[e]very accessory after the fact to the crime of robbery with arms or in company with one or more person or persons, or to the crime of kidnapping referred to in section 86, shall be liable to imprisonment for fourteen years”.

The effect of these provisions is that for the crime of accessory after the fact to manslaughter or, for example, accessory after the fact to wound with intent to murder, the maximum penalty is five years’ imprisonment. This is just over a third of the penalty prescribed for an offence of accessory after the fact to armed robbery or an offence of accessory after the fact to kidnapping. The wide gap between the penalty for accessory after the fact to murder and that for accessory after the fact manslaughter (25 and five years respectively) has been the subject of judicial criticism in *R v Walsh*.

It is also anomalous that accessories after the fact to treason are only liable to imprisonment for two years.

### Standard non-parole periods

Standard non-parole periods apply to various offences listed in a Table in s 54D of the *Crimes (Sentencing Procedure) Act* 1999. The Table makes no specific reference to the provisions in Part 9 *Crimes Act* relating to “Abettors and accessories”. The former NSW Attorney-General, the Hon Bob Debus, requested the NSW Sentencing Council to consider whether accessorial offences should be included in the standard non-parole period scheme — the assumption being that they were excluded. The Council subsequently advised that “the area of accessorial liability is presently inappropriate for this scheme.” However, the Court of Criminal Appeal has since held that the standard non-parole period scheme does apply to secondary participants convicted for the offences listed in the Table. In *DJB v R* and *R v Merrin* the court proceeded on the basis that the standard non-parole period provisions apply to aiders and abettors. In *SAT v R*, where the applicant had pleaded guilty to, among other offences, three counts of aiding and abetting sexual intercourse with a child under 10 years, Buddin J said:

“in my view, the issue … remains to be authoritatively determined. That said, I see no reason for present purposes at least to depart from the approach taken in *DJB* (supra) and *Merrin* (supra).”

### Sentencing accessories before the fact and principals in the second degree

For conceptual clarity, the following discussion will use the common law factual delineations of accessory before the fact, principal in the second degree and accessory after the fact. In a given case it is “the interaction of the law creating the primary offence and the law giving rise to secondary liability” that determines the ingredients of the crime. The first instance decisions are cited as examples of the application of the general principles.

### Homicide

The role that each offender plays in an offence of murder or manslaughter is crucial to assessing their respective culpability. Where the court cannot determine what role each offender played, each offender will be held to have the same level of culpability. In *GAS* for instance, the absence of evidence concerning each of the two offenders’ participation in a manslaughter offence led to them being assessed as being equally culpable for that offence.
Instigator/dominant figure

If an accessory is the instigator of the offence or the dominant figure in its commission, this will increase his or her culpability.

A manipulative or dominant accessory may be held to be more culpable than the principal offender. In R v Norman, a determination that the accessory before the fact was more culpable than the principal was made in circumstances where the principal shot the victim dead on the accessory’s instructions. The accessory had instigated and planned the offence and benefited more than did the principal from the offence’s commission. The evidence suggested that the principal’s relationship with the accessory was “generally one of dependence”. Similar determinations have been made by the Victorian Supreme Court against the notorious offender, Carl Williams. When sentencing Williams as an accessory before the fact to three contract killings, King J held that Williams was more culpable than the offenders who actually performed the acts causing death as he was the “puppet master deciding and controlling whether people lived or died”. Her Honour stated that:

“The position of a counsellor and procurer in offences of this nature is considered by the courts as more heinous than even the role of the killer. The killing is being done at the counsellor and procurer’s instigation, usually for monetary reward, whilst they distance themselves from the crime. The courts have made it clear on many occasions and I agree that it is appropriate that in relation to these crimes [the counsellor and procurer bears] the highest level of criminality of all those involved.” [Emphasis added.]

On the other hand, if the principal is the dominant offender, ordinarily he or she will be held to be more culpable than the accessory. This was the case in Aoun v R, where the trial judge’s finding that an accessory before the fact to murder was less culpable than he would have been had he been the organiser of what had occurred was not disturbed. In that case, the accessory, knowing or believing that the principal intended to kill or inflict grievous bodily harm on the deceased’s son or one of his family, aided or assisted him to do so by advising him to shoot at the deceased’s house during daylight and preparing the vehicle that was to be used in the drive-by shooting.

A similar finding was made in R v Jeffrey, where two offenders were found guilty of manslaughter, one as the principal and the other as an aider and abettor. The principal was held to be more culpable than her co-offender, partly on the basis that she played the “dominant role … as the instigator and the primary perpetrator of the robbery” that led to the victim’s death.

Easily led — vulnerable to the influence of others

If an offender is less intelligent than his or her co-offender(s) and, because of this, is manipulated into committing the offence by the co-offender(s), this may be a factor that mitigates his or her culpability. Thus, in R v Bassett, the Court of Criminal Appeal affirmed the sentencing judge’s finding that an offender who was convicted of offences including one count of aiding and abetting murder was entitled to “substantial mitigation” on the basis of his intellectual deficit and vulnerability to the influence of his co-offenders. The court noted that the sentencing judge received evidence that fell short of establishing the defence of duress. The evidence proved that the co-offenders “had a very substantial influence over the prisoner in these events”.

Planning

The degree of planning will be a relevant circumstance in assessing a co-offender’s respective culpability. In R v Norman, the fact that Hidden J had no difficulty inferring in respect of Norman that

54 [2007] NSWSC 142 Hidden J at [30].
55 ibid.
56 R v Norman [2007] NSWSC 142 Hidden J at [31].
57 R v Williams [2007] VSC 131 at [87].
58 ibid at [124].
59 R v Makhoul [2004] NSWCCA 275 at [17].
60 [2007] NSWCCA 292 at [13].
61 ibid at [1].
64 (unrep, 2/11/1994, NSWCCA).
65 ibid.
the “planning of the murder was his,” was crucial to his Honour’s conclusion that Norman was more culpable for the murder than was the principal. In *R v Jeffrey*, the fact that the principal’s actions were “the result of premeditation and planning however unsophisticated”, whereas the accessory’s participation in the robbery that led to the victim’s death was “impulsive”, was a major reason why the principal was held to be more culpable than her co-offender.

In *R v Jeffrey*, the fact that the principal’s actions were “the result of premeditation and planning however unsophisticated”, whereas the accessory’s participation in the robbery that led to the victim’s death was “impulsive”, was a major reason why the principal was held to be more culpable than her co-offender. In *R v AB*, Grove J held that an offender who had recruited two men to carry out an acid attack on the deceased, arranged for the assailants to be transported to and from the deceased’s house, held the money to be paid for the commission of the crime and, when the crime was committed, acted “as a sort of paymaster”, was more culpable than an offender who had not participated in the planning of the offence and whose involvement in its commission was limited to driving the assailants to and from the deceased’s house.

**Physical participation in the offence**

The extent to which each offender participated in the physical acts that caused death will be a factor that will often bear heavily on the assessment of their culpability. In *R v Glasby*, the Court of Criminal Appeal accepted that an aider and abettor, whose role was to “pretend that she was available for sexual activity, to drive to the scene of the murder, be present there while it occurred and drive the appellant away from it” was less culpable than the appellant, who had actually killed the deceased. In *R v Satore*, Studdert J found that an accessory before the fact of a fatal acid attack was less culpable than the actual assailants (and the offenders who planned the attack and engaged the assailants). In that case, the offender’s participation was limited to providing and driving the car that took the deceased’s attackers to and from his home. Finally, in *R v Lulham*, Greg James J held that the fact that the role played by the aider and abettor was “not that of the assassin” was a factor that diminished his culpability in comparison with that of the offender who performed the physical acts causing death. His Honour rejected a Crown submission that each offender be treated alike.

Nevertheless, it will depend on the circumstances of the case whether an offender who has actually carried out the killing will be held to be more culpable than his or her co-offenders. As was noted above, if an accessory before the fact is the instigator or dominant figure in the commission of the offence, he or she will usually be held to be more culpable than the person(s) who implemented his or her instructions.

**Benefit from crime committed**

If an offender has directly benefited from the crime, this will be a factor that increases his or her culpability. In *R v Norman*, one of the circumstances leading to the accessory before the fact being held to be more culpable than the principal was that “[i]t was for his benefit that Mr Williams was killed”, whereas there was “no evidence of any significant payment to [the principal] for carrying out the killing.”

The benefit received need not be financial. In *R v AB*, the assistance that the offender provided was motivated by a desire to ingratiate himself with a person who was a significant supplier of drugs to him. In these circumstances, the fact that he “did not seek or receive any money for [his]
participation” was held not to be a “matter of great weight for reduction of [his] culpability.”

Sexual assault
Similar principles to those which apply when parties are sentenced as accessories before the fact, or as aiders and abettors of homicide are also applicable when sentencing sexual assault matters.

Instigator/ dominant figure
The instigator of, or dominant figure in, a sexual assault offence will have his or her culpability increased on this account.

In DJB v R, the respondent initiated a sexual assault perpetrated by his fourteen-year-old son on a girl of the same age. The court held that the respondent’s active encouragement of his son included removing the victim’s pants and those of his heavily intoxicated son. Accordingly, although “he was to be sentenced as an aider and abettor, the respondent was dominant in the commission of the offence and his culpability was substantially more than that of his 14-year-old son. He then removed his son and commenced having sexual intercourse with the victim himself”. In the later case of SAT v R, the court stated that, in coming to this conclusion, the court in DJB “[n]o doubt ... had in mind” the passage from GAS quoted above, namely, that “it is not a universal principle that the culpability of an aider and abettor is less than that of a principal offender.”

Nevertheless, where there is no evidence that an accessory was the instigator or dominant offender, he or she will generally be held to be less culpable than the principal. In R v Hajeid, the applicant had been convicted of one count of aggravated sexual assault as a principal and five counts of aggravated sexual assault as an aider and abettor, in circumstances where he had been a participant in a group that had engaged in various sexual and other offences against two complainants in a park in Greenacre. The sentencing judge had imposed the same sentence on him for each of the offences regardless of whether his role was as the principal or as an accessory. The Crown supported his Honour’s approach on the basis that this was consistent with the statement of the High Court in GAS, cited above. However, the Court of Criminal Appeal noted that: “it was not suggested that the applicant was the dominant member of the group nor that he had instigated the activities that night” and concluded that “we would favour discriminating between the offences on the basis of whether they were committed as a principal or an accessory”. Accordingly, in resentencing the applicant, the court imposed a lesser sentence for each of the accessorial counts than it did for the offence in which the applicant was the principal.

The same approach was taken in R v Sanoussi. In that case, the court acknowledged that “there may be circumstances where a dominant aider and abettor is as culpable as the principal.” However, it then noted that “there was no evidence before his Honour on counts 4 and 5 which was capable of casting the applicant in that role.” Accordingly, the applicant was found to be less culpable in respect of the accessorial offences of which he was convicted than he was in respect of the offence for which he was convicted as a principal.

Of course, where the principal plays a more dominant role in the commission of a sexual assault offence than does his or her accessory, he or she generally will be held to be more culpable than the accessory. In Skaf v R, Mohammed Skaf had been convicted as an accessory before the fact to aggravatd sexual assault perpetrated on the complainant by Bilal Skaf in circumstances where Mohammed Skaf had lured the complainant

82 ibid Grove J at [26].
83 [2007] NSWCCA 209 at [100].
84 ibid.
85 [2009] NSWCCA 172 at [53].
89 ibid at [38].
90 ibid at [39].
91 ibid at [51].
92 [2005] NSWCCA 323.
93 ibid at [31].
94 ibid at [31].
95 ibid at [41].
96 [2008] NSWCCA 303.
to a park in Greenacre where she was sexually assaulted by Bilal Skaf and another unknown offender. The Court of Criminal Appeal did not disturb the sentencing judge's findings that (a) Bilal Skaf was the leader of the group of men who had participated in the sexual assaults on the complainant and was “the orchestrator and organiser of the events of that night”\(^\text{97}\); and (b) Mohammed Skaf's role, “although pivotal, was less than that of his brother”.\(^\text{98}\) Accordingly, it held that Bilal Skaf was the more culpable of the two.\(^\text{99}\)

### Physical participation in the offences

The extent of an offender’s physical participation in a sexual assault in company offence, and any violence attending that offence, will be relevant to the assessment of culpability. This follows from the fact that whilst an accessory may, in appropriate circumstances, be held to be as culpable as the principal, it will generally be the case that the principal, as the party who actually performed the acts constituting the offence, will be held to be more culpable than his or her accessory/accessories.

In *Ghanem v R*,\(^\text{100}\) a case involving another participant in the sexual assaults with which the court dealt in *Hajeid*, a differently constituted Court of Criminal Appeal upheld the view expressed in *Hajeid* that it was “appropriate to distinguish between the s 61J(1) offences in which the applicant had been an accessory from the offence committed on Ms B to which he was a principal”.\(^\text{101}\) As in *Hajeid*, the court imposed slightly less severe sentences on the applicant in respect of the accessorial offences of which he was convicted than it imposed on him for the offence for which he was convicted as a principal.\(^\text{102}\)

The same approach was adopted in *Skaf v R*,\(^\text{103}\) *R v Skaf*,\(^\text{104}\) *R v H*,\(^\text{105}\) and *R v Sanoussi*.\(^\text{106}\) In the first mentioned of these cases, the court approved the sentencing judge's finding that, “as he [Mohammed Skaf] had left the scene before Bilal Skaf arrived, aggravating features of the principal offence, such as ‘the actual and threatened violence to the complainant’ could not be attributed to him”\(^\text{107}\) and that, as a result, his role in the offence was less than that of Bilal Skaf.\(^\text{108}\) In each of these four cases, more severe sentences were imposed where the offenders were convicted as principals than for offences for which they were convicted as accessories.

### Robbery

Where the robbery goes “according to plan, without violence beyond that contemplated and threatened by the presence of the weapon”,\(^\text{109}\) each offender should be held to have the same degree of culpability. Where this is not the case, the culpability of those who aid and abet, or are accessories before the fact of robbery, will be assessed using similar criteria to that which applies to the sentencing of aiders and abettors or accessories before the fact of homicide or sexual assault.\(^\text{110}\)

In *R v Breedon*,\(^\text{111}\) an offender had been convicted of two counts of aiding and abetting armed robbery. He had waited in a car outside the premises during each robbery while his co-offender, wearing a balaclava and armed with a knife, had entered the premises, threatened the proprietor with the knife and made away with money from the till. The accessory had received the same sentence for each count as did the principal offender. This result was affirmed on appeal. Carruthers J said:

> While the charges the two prisoners face in these proceedings differ, both in number and as to their nature, I am satisfied that they were the result of both persons involving themselves in a course of criminal conduct which could be described as a
joint enterprise. I regard their objective criminality as being of the same quality.”

In *R v Goundar*, the respondent had been convicted of one count of aiding and abetting armed robbery, the court cited with apparent approval the above statement from *Breedon*, whilst noting that:

“This does not automatically mean that every participant in such an enterprise shares the same degree of objective criminality … On some occasions cause will arise for differentiation between them, for example, if one offender stands out as an obvious ringleader, or abuses some inside knowledge or connection with the premises to carry the crime into effect, or is the person who actually elects to carry out the threat of violence.”

**Instigator/dominant figure**

As noted above, it was acknowledged in *Goundar* that if one offender stands out as an obvious ringleader, his or her culpability will be increased on this account.

In *R v Cox*, *R v Barre*, and *R v Chamma*, it was held that a secondary participant was less culpable than co-offenders who had been the ringleaders of the respective offences. The Court of Criminal Appeal has acknowledged in robbery cases that dominant aiders and abettors or accessories before the fact may be held to be more culpable than principal offenders.

**Physical participation in the offence/threat of violence**

If an offender elects to carry out the violence or threat of violence attending the offence, this may be a factor that increases his or her culpability. Nevertheless, it will depend on the facts of the case whether accessories who did not participate in any violence or threat of violence attending a robbery will be held to be less culpable than co-offenders who did.

As noted above, in an offence where the robbery goes “according to plan, without violence beyond that contemplated and threatened by the presence of the weapon”, the fact that the offender is the driver and does not participate in any violence will not serve to reduce his or her culpability to a level below that of the principal(s). In *Goundar*, the fact that nothing that any of the offenders did during the commission of the offence deviated from the plan that had been devised by all of the offenders meant that it was inappropriate to differentiate between them when assessing their respective culpability.

Similarly, in *R v Syed*, the court overturned the sentencing judge’s finding that an accessory before the fact was less culpable than his co-offenders. It stated that:

“There was nothing proved to be done by [co-offenders] Syed or Mahmood which went beyond that to which [the accessory before the fact] Islam agreed and sought to assist. There was accordingly … no basis upon which he should have been sentenced more leniently than the others.”

In *Breedon*, too, the applicant, whose role was that of the driver, was held to be as culpable as the principals who entered the premises (see above).

On the other hand, in *R v Anderson*, the court held that notwithstanding the fact that the driver was “ready and able to assist if required during the commission of the offence”, it was “well open” to the primary judge to assess the respondent’s culpability as being at a level below that of the

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114 ibid at [32]–[33].
115 ibid at [33].
116 [2004] NSWCCA 413 at [23].
117 [2002] NSWCCA 432 at [3], [8].
118 [2009] NSWCCA 92 at [17].
121 ibid at [34].
122 (2001) 127 A Crim R 331 at [32]–[34].
123 [2008] NSWCCA 37.
124 ibid at [70].
125 (unrep, 3/12/1992, NSWCCA).
126 [2002] NSWCCA 485 at [27]–[28].
principals. The court found that her culpability was “[c]ertainly … very much less than that of her co-offenders”. Given that the court also found that it was “not easy to determine from the evidence just what her [the accessory’s] involvement was”, it is unclear what exactly led to this conclusion.

Knowledge of presence of weapon/provision to principal of receptacle for weapon
Where the offence is robbery in company, the court may take into account the circumstance that a weapon was used by the principal(s). Where the secondary participant is unaware of the principal’s actual or potential use of the weapon, his or her culpability will be lessened.

In *R v Barre*, the accessory before the fact to an armed robbery provided the principal with a backpack “in which a large machete style knife which the Respondent knew would be used could be concealed.” These circumstances aggravated the accessory’s culpability.

Benefit from crime committed
The fact that one party stands to benefit from the offence to a greater extent than do his or her co-offenders will increase his or her culpability. In *R v Barre*, one of the reasons why the court held that the accessory before the fact was considerably less culpable than the principal was that the motive for the offence was to obtain funds for the principal.

Abuse of inside knowledge
If an offender “abuses some inside knowledge or connection with the premises to carry the crime into effect”, this may lead to his or her culpability being assessed as being greater than that of his or her co-offenders.

Assault and wounding, break and enter and detain for advantage and kidnapping
There have been relatively few cases in which there has been a discussion of the principles relevant to sentencing offenders convicted as accessories before the fact to, or as aiders and abettors of: (a) assault and wounding offences; (b) break and enter offences and (c) detain for advantage or kidnapping offences.

Nevertheless, the principles that emerge from the cases that have been decided are similar to those which apply to other offences. Due to the small number of relevant cases, these principles can be discussed together.

Instigator/dominant figure
In *R v Hamze*, the court upheld a Crown appeal against a sentence imposed on an accessory before the fact to an offence of malicious wounding in company. The court held that the fact that the respondent was the instigator of the assault, organising a “group of men to carry [it] out,” aggravated his culpability. Similarly, the fact that in *Charlesworth v R*, the respondent, who had been convicted of one count of aiding and abetting an offence of aggravated detain for advantage, had a “supporting role in the offence” and was not even aware of the victim’s detention until near its end led the Court to conclude that he was less culpable than the dominant principal offender, who had “led at every stage”.

In *R v Blackman*, the fact that the respondents were “very much the junior partners in the enterprise, being have unduly influenced by Taylor” (who was described elsewhere in the judgment as the “ringleader”), was crucial to the court’s determination that the sentencing judge did not err in imposing good behaviour bonds on them.

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127 ibid at [28].
128 ibid at [27].
130 ibid.
131 [2002] NSWCCA 432 at [3].
135 ibid at [14].
136 ibid at [42].
138 ibid at [80].
139 [2001] NSWCCA 121.
140 ibid at [40].
141 ibid at [20].
Blackman had been charged, along with one count of accessory after the fact of break, enter and steal, with a count of accessory before the fact of break, enter and steal. The second respondent, Walters, appears to have been proceeded against as a principal.\footnote{[2001] NSWCCA 121 at [4].}

**Physical participation in the offence/threat of violence**

Where an offender has actually participated in any violence, this will be a factor that increases his or her culpability. In *R v Mitchell*,\footnote{(2007) 177 A Crim R 94.} the court held that the culpability of Mitchell’s co-offender, Gallagher, was increased as a result of the fact that “he was a party to the infliction of injury upon the victim in a real sense and not merely by way of derivative culpability as might be the case had he simply aided and abetted his co-offender”.\footnote{ibid at [41].} Accordingly, in *R v Magrin*\footnote{[2000] NSWCCA 346.} the court dismissed a Crown argument that, as Magrin’s co-offender, Watson, had “carried out a role, which involved active participation such as to be analogous to that of a driver in a getaway car in an armed robbery [there could only be] limited mitigation, in his not having actually participated in the attack”.\footnote{ibid at [29].} It also dismissed the Crown’s contention that the sentence imposed on Magrin was manifestly inadequate, as he was a “willing and active participant in the plot to bash”, despite not participating in any actual violence.\footnote{ibid at [30].} In other words, the fact that neither respondent had participated in any violence was held to be one factor that reduced their culpability below that of the principal.

**Planning**

The extent to which an offender participates in the planning of an offence will be relevant to the assessment of his or her culpability, although, as stated above, unplanned violence will not increase the culpability of offenders who did not participate in it or contemplate it.\footnote{ibid at [30].}

**Sentencing accessories after the fact**

**Murder**

In *R v Farroukh*,\footnote{(unrep, 29/3/1996, NSWCCA) Levine and Dowd JJ agreeing.} Gleeson CJ stated that: “The maximum penalty is penal servitude for twenty-five years. There is, however, a wide variation in the possible degrees of moral culpability of persons convicted of this offence.”

The courts have identified several factors relevant to the assessment of an offender’s culpability.

**Nature of assistance to principal**

In *R v Quach*, Simpson J found that because the assistance that the offender gave included disposing of the body, the seriousness of the crime was in the “upper echelons of the offence against s 349”.\footnote{[2002] NSWSC 1205 at [11]. See also *R v Paterson* (unrep, 10/8/1987, NSWSC). In that case, Maxwell J stated: “Perhaps at the top of the range would be the offender, who, after the murder, assists in disposing of the body as well as secreting the principal offender in some hideaway.”} Her Honour said that by this she did not mean that the offence was “the most serious of its kind but I do regard it as of considerably more seriousness than, for example, assisting an offender to clean himself or herself after the murder”.\footnote{[2002] NSWSC 1205 at [11]. See *R v Quach* [2002] NSWSC 1205 at [11].} Simpson J cited *R v Farroukh* as an example of the latter type of case.\footnote{(unrep, 7/5/1997, NSWCCA) Grove J (Gleeson CJ and Sperling J agreeing).} However, while assistance in destroying incriminating evidence is viewed less seriously than disposal of the body, in *R v Do*\footnote{[2002] NSWSC 1205 at [11].} the court made it clear, in the context of a discussion of *Farroukh*, that this type of assistance will nevertheless increase the objective seriousness of an accessory after the fact of murder offence.
Duration of assistance

In *Farroukh*, the fact that the respondents’ conduct “went beyond a mere spur-of-the-moment reaction to a critical situation”\(^{155}\) aggravated their culpability. Similarly, in *R v Waters*,\(^ {156}\) Simpson J noted that the “most serious aspect” of the assistance that the offender gave to the principal was the “long period of non-disclosure [two years and nine months] during which it must have seemed likely that [the principal] … would escape the consequences of his conduct”. On the other hand, that the offender in *R v Gersterling*\(^ {157}\) “desisted in the continuation of his offence at a very early stage” was one of the reasons why the court deemed it appropriate to impose a non-custodial sentence.

Nevertheless, the extent to which a short period of assistance will ameliorate the seriousness of the offence will depend on all the circumstances of the case. In both *R v AB*\(^ {158}\) and *R v Mirad*,\(^ {159}\) the assistance given (driving the principals from the scene of the crime) lasted for less than 10 minutes. In *R v AB*, Berman AJ found that the offender’s criminality:

“although serious, was towards the lower end of the range. It involved a period of criminality of only five minutes and came about when circumstances were thrust upon him and must have been at least partially influenced by the fact that one of the men whom he was assisting had, to his knowledge just shot a person and was still armed with the murder weapon.”\(^ {160}\)

But in *Mirad*,\(^ {161}\) Barr J held that neither the short time involved nor the short distance travelled lowered the seriousness of the offence. His Honour stated that: “[h]owever short the journey, it was timely and sufficient to do everything that the offender and the murderers desired. The latter got clean away.”\(^ {162}\)

Emotional dependence/misguided loyalty

The common law rule that a wife could not be guilty as an accessory after the fact to an offence committed by her husband has been abolished.\(^ {163}\) Emotional attachment or a misguided sense of loyalty was cited by a two-judge bench in *R v Dileski*\(^ {164}\) as a common factor in “most, if not all of the cases … disposed of otherwise than by full-time custodial sentences”. An example of a case where a misguided sense of loyalty motivated the commission of the offence is *Gersterling*,\(^ {165}\) where the offender briefly concealed a gun used by his closest friend to commit a murder. The fact that the offender was “not motivated by personal gain or hope for reward” and that his attempt to conceal the weapon “arose from an instinctive and impulsive desire to help his closest friend”\(^ {166}\) was a major reason for Adams J’s decision to impose a non-custodial sentence on him.\(^ {167}\)

Duress/fear of principal

Where the assistance rendered by an accessory after the fact to murder to the principal is motivated partly or wholly by fear of the principal offender, this may be viewed as mitigating his or her culpability.\(^ {168}\) In *R v Bassett*,\(^ {169}\) the Court of Criminal Appeal considered that the culpability of an offender was lowered as a result of the fact that he was dominated by, and fearful of, his co-offenders. Similar findings were made in *R v Almirol* (No 2),\(^ {170}\) *R v Faulkner*\(^ {171}\) and *R v AB*.\(^ {172}\)

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158 [2004] NSWSC 1517 at [28].
159 [2004] NSWSC 701 at [10].
160 ibid at [10].
161 Crimes Act 1900 (NSW), s 347A.
163 [2000] NSWSC 989 at [28].
165 [2000] NSWSC 989 at [28].
166 ibid at [9].
167 See also *R v RAF* [1999] NSWSC 615 at [11], where a very young offender had assisted her older boyfriend by obtaining “some material assistance from her uncle” and giving him the “support and encouragement of a continuing ‘relationship’.”
170 [2007] NSWSC 323; [2007] NSWSC 1517 at [18].
171 [2007] NSWSC 323 Kirby J at [18].
172 [2007] NSWSC 1517 at [18].
Direct benefit from crime committed
If the offence results in a murderer or murderers escaping punishment, this will be a factor that increases the offender’s culpability. In *Faulkner*, Wood CJ at CL approved the remarks of McPherson and Pincus JJA in *R v Winston* to the effect that “the extent to which it [the assistance provided] helped the primary offender to escape or to delay detection, apprehension and punishment” was a matter to be taken into account in weighing the offender’s objective criminality.

In *R v Do*, Grove J noted that the offence committed by an accessory after the fact was less grave than that which had been committed in *Farroukh*, partly because, unlike in that case, the offender did not enable the murderer to escape justice. In a short concurring judgment, Gleeson CJ agreed with this analysis, stating that “[i]n view of the reference that has been made to *Farroukh* [by the Crown], it should also be added that the present is not a case where the conduct of the offender resulted in the escape from punishment of the murderer”. The fact that in *R v Mirad* the principals evaded justice as a result of the assistance rendered to them by an accessory after the fact was held to have increased the objective seriousness of the accessory after the fact’s offence.

Personal involvement in the murder/involvement in murder arises from regular association with criminal elements
In *R v Do*, Gleeson CJ stated that where the accessory after the fact “has been personally involved in the criminal activity, although the involvement falls short of participation as a principal” or “where the accessorial involvement … arises from the regular association with criminal elements”, his or her culpability will be enhanced on this account.

The fact that in *R v Almiro* the accessory after the fact was present when the murder was committed and was “therefore apprised of the enormity of what ha[d] … occurred, which he then help[ed] … to conceal” led Kirby J to find that his crime was more serious than that in *R v Quach*, where the accessory was not present. Moreover, in *R v Mirad*, an accessory after the fact’s culpability was found to have been increased on account of the circumstance that, whereas he was “in no way responsible for promoting or facilitating the murder”, he realised before the fatal shooting that it was likely that the murderers would “use their pistols and have a consequent desire to flee”.

*R v Faulkner*, *R v Winston*, *Hawken v R* and *R v Crowley* were all cases where the fact that, as Wood CJ at CL put it in *Faulkner*, “the accessory became involved in the offence by reason of his connection with criminal elements” served to increase the accessory’s culpability. On the other hand, in *AB*, the fact that there was no evidence that the accessory after the fact: (a) realised that the principals were criminal elements; or (b) had any knowledge before the offence of what they were likely to do, meant that he could not be held to be as culpable as he would have been had he had such knowledge.

Manslaughter
The maximum penalty for the offence of accessory after the fact to manslaughter is five years’ imprisonment. In *R v Walsh*, Howie J stated that, in his view, this maximum penalty is: “completely inadequate to deal with the criminality that such an offence may involve ....

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175 (2000) NSWSC 944 at [39].
177 ibid.
178 (2004) NSWSC 701 at [10].
180 (2007) NSWSC 323 at [16].
182 (2004) NSWSC 701 at [12].
184 (1994) 74 A Crim R 312.
185 (1986) 27 A Crim R 32.
188 (2007) NSWSC 1517 at [22].
189 Crimes Act 1900 (NSW), s 350.
In many cases, the criminality of an accessory after the fact to manslaughter will be the same as that of a person convicted of being an accessory after the fact to murder. In both cases the accessory knows that an unlawful killing has occurred. The determination of the offence for which the offender is guilty will depend upon the offence for which the principal offender is convicted. That is the case here. In all probability had Mr Walsh been convicted of murder, Ms Sharp would have been convicted of accessory after the fact to murder. If that had been the result she would have been liable to a maximum penalty of not 5 years imprisonment but 25 years imprisonment”.  

The facts in proceedings against an accessory after the fact to a manslaughter can often be very similar to those where the charge is accessory after the fact to murder. Accordingly, the factors relevant to an assessment of an offender’s culpability are also very similar.

As with the offence of accessory after the fact to murder, if the accessory assists with the disposal of the body, this will generally lead to his or her offence being held to be more objectively serious than an offence in which the assistance rendered consists of the destruction or cleaning of incriminating evidence. The duration of the assistance rendered by the accessory to the principal will also be a relevant consideration. Where an offender has been motivated by strong emotional ties to the principal, this may reduce his or her culpability. A non-custodial sentence may even be appropriate in such a case, although this will depend upon all of the circumstances, including the nature and extent of the assistance rendered by the accessory to the principal and the amount of enthusiasm with which such assistance was provided. If the accessory’s assistance was rendered partly or wholly because he or she was fearful of the principal, this may reduce his or her culpability. Finally, the extent to which the assistance given frustrated the detection, apprehension or conviction of the principal will also be a relevant consideration.

Concealing a serious indictable offence

It must also be noted that, pursuant to s 316 of the Crimes Act 1900 (NSW) there exists the offence of concealment of a “serious indictable offence”. This offence was introduced by the Crimes (Public Justice) Amendment Act 1990 (NSW), the purpose of which was to create a “comprehensive statement of the law relating to public justice offences [which until then had been] fragmented and confusing, consisting of various common law and statutory provisions, with many gaps, anomalies and uncertainties.

Importantly for present purposes, it bears some similarity to the offence of accessory after the fact, in that it applies to offenders who, knowing that an offence has been committed, frustrate the investigation of that offence. It has a broader reach than the offence of accessory after the fact in so far as it is constituted by “mere knowledge [of an offence] accompanied by inaction” as opposed to the rendering of active assistance to an offender after the commission by him or her of an offence. Only if active assistance is given by a person to the principal will they be able to be convicted as an accessory after the fact to the principal’s offence.

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192 R v Jones [2007] NSWSC 1333 at [141].
194 R v Jones [2007] NSWSC 1333 at [139].
195 See for example the statement in R v Kari [2008] NSWSC 993 at [41]. A full time custodial sentence was imposed. R v Jones [2007] NSWSC 1333 at [139] and [154].
197 R v Huntington [1999] NSWSC 1314 at [3]; [7]; see also R v Walsh (2004) 142 A Crim R 140 at [53].
199 As noted above, “serious indictable offence” is defined in s 4 of the Crimes Act 1900 as an indictable offence with a maximum penalty of at least five years’ imprisonment.
201 New South Wales Law Reform Commission, Review of Section 316 of the Crimes Act 1900 (NSW), NSWLRC Report 93, 1999 at [3.20].
Section 316 replaced the common law offence of misprision of felony, which was constituted by an accused, knowing that a felony had been committed by persons known or unknown, unlawfully concealing the commission of that felony. An offence against s 316(1) occurs where a person knows that a serious indictable offence has been committed by another; has information that “might be of material assistance in securing the apprehension of the offender or the prosecution of the offender,” but fails “without reasonable excuse” to bring that information to the attention of a member of the police force “or other appropriate authority”. In R v Crafts Gleeson CJ and Meagher JA both noted the difficulty in determining the meaning of the words “without reasonable excuse”. Notwithstanding their Honour’s criticisms, and the NSW Law Reform Commission’s recommendation that the s 316(1) offence be abolished, the offence remains.

A maximum penalty of two years’ imprisonment applies to an offence against s 316(1). In R v Chant Howie J noted that:

“one should not lose sight of the fact that it is a relatively minor offence so far as offences

within the Crimes Act are concerned. The offence carries a maximum penalty of two years imprisonment and is generally dealt with in the Local Court.”

Conclusion

Secondary participants are held criminally liable because of their role in assisting or encouraging the principal offender. The factual findings at sentence about a secondary participant’s role or “what [the secondary participant] actually did in assisting or encouraging the principal offender” determine the issue of culpability. By the courts’ emphasis on the role played by the secondary offender, the approach taken to assess culpability is similar to that taken in joint criminal enterprise and extended common purpose cases. This is so even though for the latter form of liability, the Crown must prove an agreement between offenders or an agreement and acts in contemplation of the agreement. Other considerations, such as parity of sentence, prior criminal history, and the secondary participants’ subjective factors also have an important bearing on the sentence ultimately imposed.

203 The common law offence was abolished by s 341, Crimes Act 1900 (NSW).
205 [unrep, 10/3/1995, NSWCCA].
207 [2009] NSWSC 290 at [25].
208 R v Swan [2006] NSWCCA 47 at [72].
209 In R v Houvardas [2000] NSWCCA 203, Heydon JA at [17] (Mason P and Smart AJ agreeing) stated that: “Sentencing an accessory more severely than a principal does not necessarily create a justifiable sense of grievance.”
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1. The Children’s Court, March 1991
4. Sentencing in the Court of Criminal Appeal, February 1993
5. Common Offences in the Local Court, March 1994
9. Common Offences in the Children’s Court, May 1995
10. Sentencing Drink Driver Offenders, June 1995
11. “Sentenced to the Rising of the Court”, January 1996
12. The Use of Recognizances, May 1996
13. Sentencing Deception Offenders Part 1 — Local Court, June 1996
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