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Is Knowledge Required? Analysing the High Court of Australia's Decision in *R v Rohan*

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Abstract

The High Court of Australia's decision in R v Rohan addresses critical aspects of complicity in criminal offences under the Crimes Act 1958 (Vic). The case involved Rohan and two co-accused charged with supplying drugs and committing sexual offences against minors. The primary legal issue was whether the prosecution needed to prove that the accused knew the victims' ages to establish guilt under sections 323 and 324 of the Crimes Act 1958 (Vic). The High Court ruled that such knowledge was unnecessary, focusing instead on the agreement to commit the acts constituting the offence. This decision broadens the scope of criminal liability to include those involved in joint criminal enterprises, regardless of their awareness of specific details. The ruling has significant implications for prosecutorial strategies and the interpretation of complicity laws, reinforcing the attitude that involvement in a criminal agreement suffices for liability.

I Introduction

The High Court case of *R v Rohan* ('*Rohan*'),¹ adjudicated on 14 February 2024, deals with significant legal questions surrounding complicity in criminal offences, particularly under the *Crimes Act 1958* (Vic).² This case involved serious charges against Rohan and two co-accused related to the supply of drugs and sexual offences against minors. The High Court's decision provides crucial insights into interpreting ss 323 and 324 of the *Crimes Act 1958* (Vic), the requisite

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¹ [2024] HCA 3 ('*Rohan*'). It is noted that due to the sensitive case facts all names in the *Rohan* decision are under pseudonyms: see, eg, *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A).

² See generally *McAuliffe v The Queen* (1995) 183 CLR 108, 115–18 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Gillard v The Queen* (2003) 219 CLR 1, 11 [19] (Gleeson CJ and Callinan J).

mens rea for these offences, and the application of the legislation to joint criminal enterprises.

II Context

A *Facts of the Case*

The accused, Rohan, was jointly charged and tried with two other men, MK and WF, in the County Court of Victoria for offences involving two young girls, aged 11 and 12.³ The prosecution presented evidence that the three men had entered into an agreement to “pick up” the girls, supply them with alcohol and cannabis, and subsequently engage in sexual activity with them.⁴ This plan was executed, leading to the supply of cannabis and alcohol to the girls, followed by sexual assault and penetration.⁵

B *Legal Issues*

The central legal issue on appeal was whether a substantial miscarriage of justice had occurred due to the trial judge’s failure to direct the jury that they needed to be satisfied beyond reasonable doubt that the accused parties knew the ages of the complainants.⁶ This contention centred on a proper interpretation of ss 323 and 324 of the *Crimes Act 1958* (Vic), particularly in relation to the requisite mens rea for complicity in criminal offences.⁷

Section 324(1) stipulates that a person involved in the commission of an offence is deemed to have committed that offence and is liable to the maximum penalty. Section 323(1) defines involvement in the commission of an offence as intentionally assisting, encouraging, or directing the commission of the offence or entering into an agreement or understanding with another person to commit the offence.⁸ The prosecution argued that under s 324(1), it was unnecessary to prove which accused committed which specific offence as long as they were involved in the commission of the offence as defined in s 323(1).⁹

For a conviction under s 71B of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and under ss 49A and 49D of the *Crimes Act 1958* (Vic), the prosecution must establish that the victim was under

³ Ibid [4] (Gageler CJ, Gordon and Edelman JJ).

⁴ Ibid [2].

⁵ Ibid [3].

⁶ *Rohan* (n 1) [7] (Gageler CJ, Gordon and Edelman JJ).

⁷ See Mark Weinberg, ‘The Criminal Law: A “Mildly Vituperative” Critique’ (Peter Brett Memorial Lecture, Melbourne Law School, 10 August 2011) 19–20.

⁸ To consider the context for such provisions see generally Penny Crofts et al, *Waller & Williams, Criminal Law Text and Cases* (LexisNexis Butterworths, 14th ed, 2020) 962–77 [12.61]–[12.74].

⁹ See, eg, Beatrice Krebs, ‘Accessory Liability: Persisting in Error’ (2017) 76(1) *The Cambridge Law Journal* 7, 9.

the specified age.¹⁰ The accused can, however, raise a defence of reasonable belief that the child was above the relevant age. Here, the trial judge at the County Court instructed the jury accordingly but did not require proof that Rohan knew the victims' ages.

III Legal Proceedings

A County Court Proceedings

The County Court jury found each of the accused guilty of multiple charges, including supplying a drug of dependence to a child,¹¹ seven charges of sexual penetration of a child under 12,¹² and two charges of sexual assault of a child under 16.¹³ Rohan received a sentence of 11 years and 4 months' imprisonment with a non-parole period of 6 years and 9 months. The prosecution argued that under s 324(1) of the *Crimes Act 1958* (Vic), it was unnecessary to prove which accused committed each specific offence, contending that Rohan's involvement in the agreement to commit the offences sufficed for his conviction.¹⁴

As alluded to, the trial judge instructed the jury that the prosecution needed to prove Rohan's intention regarding the supply of cannabis and the sexual penetration charges but did not need to establish that Rohan knew the victims' ages. On this point, Rohan argued that a miscarriage of justice occurred because the jury was not directed to determine whether the accused knew the complainants' ages.

B Court of Appeal Decision

Rohan appealed his conviction,¹⁵ asserting that the jury should have been directed to find that the accused knew the ages of the complainants. The Court of Appeal posited two possible interpretations of "agreement to commit the offence" in s 323(1)(c) of the *Crimes Act 1958* (Vic):

1. The agreement required was to carry out the offending acts.
2. The agreement required was to commit the offending acts with knowledge of the facts that made the conduct an offence.¹⁶

The Court of Appeal adopted the latter interpretation, concluding that the prosecution needed to prove that Rohan and his co-accused

¹⁰ *Rohan* (n 1) [21] (Gageler CJ, Gordon and Edelman JJ).

¹¹ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71B.

¹² *Crimes Act 1958* (Vic) s 49A.

¹³ *Ibid* s 49D. See also *DPP (Vic) v Rahamutullah* [2021] VCC 1318.

¹⁴ See also John C Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 (July) *Law Quarterly Review* 453, 455.

¹⁵ *Rohan v The Queen* [2022] VSCA 215 ('*Rohan VSCA*'). See especially Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 443 [7.135].

¹⁶ *Rohan* (n 1) [8]–[9] (Gageler CJ, Gordon and Edelman JJ).

knew the complainants were under the specified ages.¹⁷ Consequently, the convictions based on s 324(1) were overturned, and Rohan was resentenced on the remaining charges.

IV High Court Decision

A *Gageler CJ, Gordon and Edelman JJ*

The Crown's appeal to the High Court, in which Rohan was the respondent, focused on whether the prosecution must prove Rohan's knowledge of the complainants' ages when entering the agreement. The High Court, through the joint judgment of Gageler CJ, Gordon and Edelman JJ, clarified that under ss 323 and 324 of the *Crimes Act 1958* (Vic), the term "offence" encompasses the combination of factual elements (physical, mental, and circumstantial) that give rise to criminal liability.¹⁸

Chief Justice Gageler and Gordon and Edelman JJ held that it was not necessary for the prosecution to prove that an accused charged under s 324 intended, knew, or believed in the existence of those elements.¹⁹ The critical consideration was whether the accused agreed to commit acts that constituted a criminal offence under the circumstances, irrespective of their knowledge of specific facts such as the victims' ages.

B *Reasoning of Gleeson and Jagot JJ*

Justices Gleeson and Jagot concurred with the majority but provided additional reasoning to support the conclusion that the prosecution did not need to prove that Rohan knew the victims were under the specified age at the time of the offence. Their Honours emphasised that under s 323(1)(c) of the *Crimes Act 1958* (Vic), liability for an offence arises from the agreement to commit the offence, not from the individual's knowledge of all specific circumstances that make the conduct criminal.²⁰ Justices Gleeson and Jagot underscored that s 324(1) imposes liability on those involved in the commission of an offence as primary offenders, meaning that the mental state required for conviction under this section is aligned with that of the principal offence but does not necessitate awareness of all factual elements.²¹ Their Honours demonstrated that this interpretation is consistent with the legislative intent to cover various forms of participation in criminal activities under

¹⁷ *Rohan* VSCA (n 20) [51] (Emerton P, Kyrou and Forrest JJA). See also John Anderson, *Criminal Law Guidebook: New South Wales, Victoria and South Australia* (Oxford University Press, 2nd ed, 2016) 260–1, 269–72.

¹⁸ *Rohan* (n 1) [27]–[29], [42] (Gageler CJ, Gordon and Edelman JJ).

¹⁹ *Ibid* [33].

²⁰ *Ibid* [75]–[76] (Gleeson and Jagot JJ).

²¹ *Ibid* [69].

a joint criminal enterprise, thereby broadening the scope of criminal liability to include those who enter into agreements to commit offences, regardless of their knowledge of specific details such as the victims' ages.²²

C *State of Mind Required*

The High Court ultimately outlined a three-question test to determine liability under s 324:²³

1. Did the accused and others enter into an agreement?
2. Did they act (or fail to act) in a manner fulfilling all necessary acts or omissions for the offence?
3. Did the accused have the requisite state of mind for the offence at the time of the agreement?

In this case, affirmative answers to these questions established the accused's guilt. The ruling equates the mental element required for secondary liability under s 324 with that needed for the substantive offence, illustrating the coherence of secondary and principal liability.²⁴

The High Court emphasised that this construction is consistent with s 324 of the *Crimes Act 1958* (Vic), which allows for the conviction of an individual where it is unclear whether they were the principal offender or an accomplice, provided the trier of fact is satisfied that the accused falls into one of these categories.²⁵

D *Implications of the Decision*

The High Court's decision clarifies the application of secondary liability under Victorian law, particularly in terms of the scope of s 324. The ruling underscores that involvement in a criminal agreement, irrespective of knowledge of specific elements of an offence, such as the victims' ages, suffices for liability. This interpretation strengthens prosecutorial efforts in cases involving complex criminal enterprises, ensuring that all participants in a joint criminal venture can be held accountable.²⁶

The decision will spark debate about the fairness of convicting individuals without proving knowledge of all offence elements. In so doing, an argument may arise that this approach could result in harsh

²² Ibid [63], [67].

²³ Ibid [31] (Gageler CJ, Gordon and Edelman JJ).

²⁴ Andrew Perry Simester, 'Accessory Liability and Common Unlawful Purposes' (2017) 133 (January) *Law Quarterly Review* 73, 83–7.

²⁵ Stephen Gray, "'I Didn't Know, I Wasn't There': Common Purpose and the Liability of Accessories to Crime' (1999) 23(4) *Criminal Law Journal* 201, 203; Stephen Odgers, 'The High Court, the Common Law and Conceptions of Justice' (2016) 40(5) *Criminal Law Journal* 243, 243–4.

²⁶ Gerard Nash, 'Parties to an Offence' (2024) 24(1) *Criminal Law News Victoria* 1, 1–3.

penalties for individuals with peripheral involvement.²⁷ However, the High Court's ruling aims to balance deterrence and public protection, aligning with the foundational principles underpinning criminal liability.²⁸

V Conclusion

The High Court's decision in *Rohan* underscores that an accused can be found guilty of complicity in an offence without proof of their knowledge of specific facts, such as the victim's age, provided they agreed to commit the acts constituting the offence. This interpretation aligns with the statutory framework of the *Crimes Act 1958* (Vic) and reinforces the broader concept of joint criminal enterprise and primary liability.

The case highlights the importance of clear jury directions regarding the mens rea for complicity offences and the necessity for legal practitioners to understand the nuances of statutory interpretation in the context of criminal law. This decision reaffirms the liability of individuals involved in criminal agreements and their responsibility for the offences committed within the scope of those agreements, even in the absence of specific knowledge about certain elements of the offence.²⁹

²⁷ Andrew Dyer, 'The Australian Position Concerning Criminal Complicity: Principle, Policy or Politics' (2018) 40(2) *Sydney Law Review* 289, 311, 318. See also Timothy Smartt, 'The Doctrine of Extended Joint Criminal Enterprise: A "Wrong Turn" in Australian Common Law' (2018) 41(3) *Melbourne University Law Review* 1324, 1358–9.

²⁸ Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 5th ed, 2015) 8.

²⁹ Robert Hayes and Francine L Feld, 'Is the Test for Extended Common Purpose Over-Extended?' (2009) 4(2) *University of New England Law Journal* 17, 32. See generally Lorraine Finlay and Tyrone Kirchengast, *Criminal Law in Australia* (LexisNexis Butterworths, 2nd ed, 2020) 319 [11.2], 335 [11.63], 338–9 [11.69]–[11.73].